



Deutsches Institut
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Keynote

National Implementation of the UNGPs

Where we are, where we could go

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National Implementation of the UNGPs: Where we are, where we could go

By now, we have reached a threshold in mainstreaming human rights in the world of business. On the initiative of John Ruggie, the then UN Secretary General's Special Representative for Business and Human Rights, the United Nations Human Rights Council unanimously endorsed the UNGPsⁱ in 2011, following a long consultation process with different stakeholders. Involving all stakeholders and finding an agreed language made it possible to open up a work field, where groups with conflicting interests could not only negotiate but also cooperate on human rights issues on a practical and political level. Indeed, our conflicts may not have been completely eliminated - as is apparent from different national implementation processes. Yet the paralysis that emerged from the refusal to adopt the „UN Norms on the Responsibilities of Transnational corporations and other Businesses with regards to human rights“ seems to have been lifted to a considerable extent.

However, even if the UNGPs have enabled multiple stakeholders to take joint actions by giving them a common language and marking judicial boundaries and possibilities, they cannot – and, in fact, are not supposed to – replace stakeholder actions. Without the practical engagement of governments, businesses, NGOs, Unions and international organizations, the UNGPs would remain a mere technical prose with no use other than inspiration for academic research – if at all. In the years following its endorsement, it has become evident that there is a strong need for capacity building and resources to translate the UNGPs into a political, judicial and corporate context in order to change current practices in such a way as to reduce human rights violations and improve access to justice, especially for vulnerable groups. Thus, starting in 2011 and continuing to this day, businesses have started to check their management, sustainability and risk analysis systems with regards to the UNGPs and have organized sectoral and cross-sectoral initiatives. Governments, in turn, have begun to develop NAPs and to check their legislative compliance with the UNGPs and international law, while civil society organizations have developed a considerable set of recommendations for governments based on the UNGPs.

To provide a plausible route for future decisions, however, it is essential to first detail the status quo of current efforts to implement the UNGPs. To that end, I'll draw on examples from France, UK and Germany to formulate two concise lessons learned and to conclude with a plea originating from a human rights perspective.

France: Mandatory Human Rights Due Diligence (HRDD)

France is the first country to pass a law to make HRDD mandatory for businesses – „Loi relative au devoir de vigilance de sociétés mères et des entreprises donneuse d'ordre“. ⁱⁱ According to this Law, any French business with at least 5.000 employees in France or 10.000 worldwide is obliged to:

- assess potential impacts (risks) throughout its operations and subsidiaries, as well as the operations of its subcontractors and suppliers insofar as an established commercial relationship is maintained with these business partners

- take adequate measures to mitigate human rights risks and to prevent violations of rights;
- establish a grievance mechanism in cooperation with unions;
- set up a monitoring system to assess the effectiveness of its due diligence plan.

The original draft bill introduced a provision that allowed for a monetary fine of up to 10 million Euros in case of non-compliance. However, this provision was ruled unconstitutional.ⁱⁱⁱ Unfortunately, the Law does not define how businesses should be monitored. Furthermore, it risks the phenomenon of adverse selection since companies may avoid sanctions without minimizing human rights impacts, if they can show an eloquent HRDD plan. Notwithstanding, the French law is a corner stone in the implementation of the UNGPs.

UK: Mandatory Transparency

The UK's Modern Slavery Act 2015^{iv} is a critical first step forward in responding to the expectations of the UN Guiding Principles. It seeks to prevent all forms of "slavery, servitude and forced or compulsory labour" as well as "human trafficking". The government has decided to tackle this problem in part by addressing the role of businesses in preventing modern slavery from occurring in their own business and in their supply chains. What does it mean in practice?

The Modern Slavery Act introduces an important provision on transparency in supply chains. Under Section 54 of the Act, all businesses that operate in the UK market with a turnover of above £36 million are required to engage in a meaningful human rights due diligence process by providing a "slavery and human trafficking statement" for each financial year. The statement is supposed to either disclose the steps the company has taken during that year to ensure that slavery and human trafficking is not taking place in any of its supply chains or in any part of its own business (Section 54(4)) or, alternatively, to declare that no such steps have been taken. The statement needs to be approved by the board or its equivalent (Section 54(6)) and be publicly available on the company's website with a prominent link to it on the homepage (Section 54(7)).

The content of the company's statement is not prescribed, yet Section 54(5) of the Act recommends six areas that might be included:

- the company's structure and a summary of its operations and supply chains;
- any policies that are relevant to slavery and human trafficking;
- Due diligence processes in relation to slavery and human trafficking in the company's business and supply chains;
- the parts of the company's business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
- the effectiveness of the company's approach in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
- the training about slavery and human trafficking available to its staff.

If a business fails to comply, that is, fails to produce a slavery and human trafficking statement for a particular financial year, the Secretary of State may seek an injunction through the High Court requiring the organization to comply. If the company still fails to comply with the injunction, it will be in contempt of a court order, which is punishable by an unlimited fine. Practically, a failure to comply with the provision will mean that the organization has not produced a statement that is published on its website. While the Modern Slavery Act demonstrates a good practice example in mandatory transparency with extra-territorial reach, it fails to introduce key elements for monitoring its implementation, e.g. by including a central registry or a clearer benchmark for the transparency statements.^v

Germany: The German NAP

At least 50 Percent of German businesses with more than 500 employees are supposed to integrate human rights due diligence into their operations until 2020. The NAP does not include sanctions. However, it is stated that the German government will take further political or legal measures into consideration, if the 2020-500-50 goal cannot be reached. The NAP does not deliver any methodology for measurement, but identifies support for businesses and sector dialogues as important actions for the implementation of HRDD.^{vi}

United Nations: The Treaty Process

In 2014 the United Nations Human Rights Council passed a resolution to form an Intergovernmental Working Group, which has the task to develop such an international binding instrument to hold businesses to account. Ecuador's government had submitted a proposition to the Human Rights Council in favor of a binding framework. It is striking that Ecuador was mainly supported by countries which have host-state economies (although the resolution was drafted by South Africa as well), whereas governments of countries with home-state economies, including Germany and all the EU countries, voted against the resolution. This shows that the UNGPs can't fully overcome the discrepancy of interest between countries, where transnational companies are based and those where they operate.

What are the lessons learned?

Firstly, the examples show that a NAP is not the only possible strand of implementation of the UNGPs. The UK, for instance, was the first country to agree and publish NAP after the endorsement of the UNGPs. Having the merit of being the pioneer, the content of the NAP was still rather weak and provided only voluntary measures. It was the Modern Slavery Act that advanced the implementation of the UNGPs. Interestingly, the modern slavery debate did not at all emerge in the business and human rights field, but in migration policy. Still it can be seen as an important step towards a coherent human rights due diligence regime. Sometimes, it can be meaningful to refer to political areas other than business and human rights, in order to advance the process of implementation of the UNGPs. In the case of France the HRDD law was passed almost parallel to the publication of the governments NAP.

Secondly, looking at the stage of implementation of the UNGPs and the creation of the Intergovernmental Working Group for the creation of an internationally binding

instrument, one could critically say that we have arrived where we started: the discussion of mandatory versus voluntary measures must seem like Deja-vu to those involved in the UN Norms. The strongest critique concerning the German NAP – before it was even published – was the government’s decision to adopt a voluntary approach rather than a mandatory one. However, the critique may be valid or not, it shouldn’t be the primary question we ask ourselves. Governments and businesses should not implement the UNGPs, because they are obliged to – be it for the legal or the social license. But because they don’t want to cause or contribute to human rights violations, not even potentially. The responsibility to respect human rights is not only a social responsibility. It also means that businesses have to take responsibilities for their own actions and omissions to act with regard to human rights. Not because there is a business case – since negative human rights impacts can have high costs: reputation damages, law expenses, reparation payments, etc. –, but as a matter of course.

The UNGPs and the processes it kicked off created a community of those for whom human rights are an end in itself, no matter if its members work for the government, business or NGOs.

The Roundtable Human Rights in Tourism has done pioneer work in establishing a sector dialogue on human rights, long before the government has asked businesses to do so. Having in mind that sector dialogues are integral to the implementation of Germany’s NAP, the Roundtable might play a crucial role in the implementation of the UNGPs. For example, by delivering precious good practice examples and sharing its experiences in developing a sector dialogue.

Sector dialogues, therefore, and this is a polite plea, should boost ambition, where political will seems to be lacking.^{vii} They can already improve techniques of measurement, exchange ideas and establish standards of human rights due diligence. Not because they have to comply with a law or – in the case of the German NAP – with a governmental demand (2020-500-50), but with another and very clear goal: to reduce detrimental impacts on human rights.

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ⁱ UN Human Rights Council (2011): Guiding Principle 7 of the UN Guiding Principles on Business and Human Rights. Resolution 17/4. 16. Juni 2011, UN Doc A/HRC/17/31.

ⁱⁱ Assemblée Nationale (2017): Loi relative au devoir de vigilance de sociétés mères et des entreprises donneuse d'ordre. <http://www.assemblee-nationale.fr/14/pdf/ta/ta0924.pdf> (retrieved on 27.06.2017).

ⁱⁱⁱ Conseil Constitutionnel (2017): Décision n° 2017-750 DC du 23 mars 2017 - Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-750-dc/communiquede-presses-148858.html> (retrieved on 27.06.2017).

^{iv} Parliament of the United Kingdom (2015): Modern Slavery Act. http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf ((retrieved on 27.06.2017).

^v Shift (2015): Mapping of the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights. https://www.shiftproject.org/media/resources/docs/Shift_ModernSlaveryAct_UNGPs_July2015.pdf (retrieved on 27.06.2017).

^{vi} Bundesregierung (2016): Nationaler Aktionsplan „Wirtschaft und Menschenrechte“. <http://www.auswaertiges-amt.de/cae/servlet/contentblob/754690/publicationFile/228334/161221-NAP-DL.pdf> (retrieved on 27.06.2017).

^{vii} Deutsches Institut für Menschenrechte (2016): Zögerliche Umsetzung. Der politische Wille reichte nicht weiter: Deutschland setzt die UN-Leitprinzipien - um mit kleinen Schritten. http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme_Verabschiedung_NAP_Wirtschaft_und_Menschenrechte.pdf (retrieved on 27.06.2017).