

Discussion paper on EU priorities for the further implementation of the United Nations Guiding Principles on Business and Human Rights¹

1. Context

1.1 The United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGPs) are the culmination of 6 years of work led by Professor John Ruggie, who served as the UN Secretary-General's Special Representative for Business and Human Rights from 2005-2011. The UNGPs were unanimously endorsed by the UN Human Rights Council in June 2011. A five person UN Working Group has since been established to promote the effective and comprehensive dissemination and implementation of the UNGPs. The EU has recognised the UNGPs as “the authoritative policy framework” in the field of business and human rights.²

The UNGPs are structured according to three distinct but interrelated pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; the corporate responsibility to respect human rights, in essence meaning to act with due diligence to avoid infringing on the rights of others; and the need for greater access by victims to effective access to remedy, judicial and non-judicial.

The activities and products of most enterprises contribute to the fulfilment of human rights. Some enterprises have nevertheless been implicated in human rights harm. The focus of the UNGPs is on ensuring that enterprises do not contribute to infringement of human rights.

1.2 European Commission policy on corporate social responsibility

The European Commission published a communication on corporate social responsibility (CSR) in October 2011.³ It defines CSR as the responsibility of enterprises for their impacts on society, and identifies human rights as one issue to be addressed by enterprises in order to meet that responsibility.

The Commission undertook to publish a report by the end of 2012 on EU priorities for the further implementation of the Guiding Principles. This discussion paper should be considered in the context of the development of that report.

Additionally, the Commission invited EU Member States to develop their own national plans for the implementation of the UN Guiding Principles.

In 2010 and 2011 respectively the Commission published studies on the legal framework for human rights and the environment applicable to EU enterprises when they operate outside the

¹ This discussion paper has been prepared by the services of the European Commission to help orientate discussions in the conference “Principles to Practice”, organised by the Danish Presidency of the EU on 7-8 May 2012. The paper does not necessarily represent the official view of the European Commission.

² EU statement to UNWG on Business and Human Rights, January 2012

<http://www.ohchr.org/Documents/Issues/TransCorporations/Submissions/UNAndIGOs/EuropeanUnion.pdf>

³ COM(2011)681 http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf

EU, and on responsible supply chain management.⁴ These studies will be taken into account in the report on EU priorities for the implementation of the UNGPs.

2. General considerations

2.1 Pillar 1 and 3 as the focus of the report

The report on EU priorities for the implementation of the UNGPs should be written primarily from the perspective of the state duty to protect (pillar 1) and access to remedy (pillar 3). The close interrelationships between all three pillars should be emphasised, however. For example, part of the state duty to protect (pillar 1) is to ensure that enterprises have adequate guidance to meet the corporate responsibility to respect (pillar 2). Close cooperation between all concerned parties – EU, EU Member States, the UN Working Group, enterprises and other stakeholders – will be critically important.

Some of the challenges for enterprises in meeting the corporate responsibility to respect human rights can be tackled more efficiently with a better implementation of the principles relating to the state duty to protect. Provided it is done proportionately, better fulfilment of the state duty to protect should therefore also be in the interests of enterprises.

2.2 Internal and external dimensions

Many of the most well-known cases of business involvement in human rights harm have taken place outside the European Union. However concerns also exist regarding operations within the EU. The report on EU priorities for the implementation of the UNGPs will have both intra-EU and extra-EU dimensions.

3. Mapping the UN Guiding Principles against EU policy

This section presents an initial mapping of the UN Guiding Principles against EU policy. The mapping is neither comprehensive nor definitive, but rather serves as a starting point for further analysis and discussion.

For each principle or set of principles, we have provided a short commentary that addresses the question of EU competence and identifies some of the policies or regulations already in place at EU level.

3.1 The state duty to protect

Foundational principles (principles 1-2)

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

⁴ See http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf and <http://ec.europa.eu/social/main.jsp?langId=en&catId=331&newsId=1014&furtherNews=yes>

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

The duty to protect human rights is a duty of states. Within the EU, this duty also concerns the Union itself, within its competences. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU, which is addressed to the institutions, offices, agencies of the Union and to the Member States when they are implementing EU law. Some state functions relevant to the UNGPs may therefore fall within the competences of the EU or within the competences of its Member States when they apply EU law.

Fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and as they result from the constitutional traditions common to the Member States also constitute general principles of the Union's law. The Union is founded on the value of respect of human rights which it shall promote in its relations with the wider world; it shall define and pursue common policies and actions in order to consolidate and support human rights.

In some areas there may be a role for the EU in facilitating the sharing of experience and good practice between EU Member States. Any EU role in this regard should not duplicate the role of the UN Working Group or other existing mechanisms that provide for the sharing of experience and good practice.

The EU Agency for Fundamental Rights provides the Member States when implementing Union law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.

The European Commission's 2011 communication on CSR states an expectation that all enterprises should meet the corporate responsibility to respect human rights in accordance with the UNGPs. The modern understanding of CSR presented in that communication explicitly refers to the integration of human rights into business operations and strategy. The Commission plans to collect and publish information on the references made by large companies in their policy statements to internationally recognised CSR guidelines and principles. This exercise could have a dimension related to human rights and the UNGPs.

General State regulatory and policy functions (principle 3)

3. In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

A large body of EU policy and legislation is relevant to principle 3, including but not limited to areas such as: health and safety, labour law, child labour and protection of young people at work, rights of the child, gender equality, anti-discrimination, combating human trafficking, consumer protection, privacy and data protection, and protection of the environment. The EU has passed a number of important pieces of legislation in the field of corporate law. Some EU development assistance has the effect of helping non-EU states to better fulfil the duty to protect.

The Commission is sponsoring a process to develop guidance for enterprises on the corporate responsibility to respect human rights in 3 sectors: employment and recruitment agencies, ICT, and oil and gas. In parallel the Commission is also supporting the development of a guide and other material on human rights specifically adapted to small and medium-sized enterprises. The Commission has also undertaken to facilitate a process involving enterprises, EU Delegations in partner countries and civil society actors, to raise understanding of the challenges enterprises face in countries where the state fails to fulfil its duty to protect.

The Commission intends to put forward a new legislative proposal on company disclosure of non-financial information. That proposal is expected to be published in the autumn of 2012.

The EU Agency for Fundamental Rights is developing a future project on the topic of labour exploitation. The project will map legal and policy responses to extreme labour exploitation, collect information on the nature of and responses to labour exploitation in the EU through fieldwork interviews, as well as information about existing good practices that can serve as possible models for prevention and identification of labour exploitation.

The state-business nexus (principles 4-6)

4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

If there is a role for the EU regarding these principles, in most cases it is likely to be limited to facilitating the sharing of experience and good practice between EU Member States. The case of the European Investment Bank may constitute a partial exception regarding point 4, since the European Commission is a 30% shareholder in the European Investment Bank Group.

EU policy on public procurement is relevant to principle 6. In December 2011 the European Commission put forward a proposal for the revision of the EU public procurement directives which would, amongst other things, facilitate the use of social and environmental criteria in public procurement processes and make accessibility for persons with disabilities compulsory.

The Commission has also published guides for public authorities on the use of social and environmental criteria in public procurement.

Supporting business respect for human rights in conflict-affected areas (principle 7)

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

In some circumstances the EU could contribute to engaging with and providing assistance to enterprises (principles 7 (a) and 7 (b)). Principle 7 (d) may relate to areas of EU competence in the same way as principle 1.

The EU has financed a research project on the privatisation of war (PRIV-WAR), which made recommendations for EU regulatory action in the field of private military and security companies.

Ensuring policy coherence (principles 8-10)

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

10. States, when acting as members of multilateral institutions that deal with business related issues, should:

(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet

their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Policy coherence on business and human rights is a necessity at different levels: within different EU institutions; between those institutions; and between the EU and its Member States.

The European Commission aims to ensure that all EU actions, including legislative proposals, comply with the Charter of Fundamental Rights of the European Union. It presented in 2010 a “Strategy for the effective implementation of the Charter of Fundamental Rights by the EU”⁵, and publishes annually a report to monitor progress on the enforcement of the Charter in areas where the Union has powers to act. The second annual report was published on 16 April 2012. European Commission policy on smart regulation also emphasises the assessment of the impact of legislation and policies on fundamental rights.⁶

The Commission adopted in 2011 *Operational Guidance on taking account of fundamental rights in Commission Impact Assessments*⁷. The Guidelines make explicit reference, among others, to the UN Convention on the Rights of the Child and to the UN Convention on Rights of Persons with Disabilities which the Union signed and ratified. This Convention, which binds the Union to the extent of its competences, has to be taken into account in the Commission’s actions. Depending on the policy context, the Commission may also need to take into account international customary law, when interpreting the rights set out in the Charter.

As required by article 33 of the UN Disability Convention, the Commission is preparing the setting up of the EU Framework to promote, protect and monitor implementation of the Convention. The EU framework's mandate will cover areas of EU competence under the Convention, and complement the national frameworks and national mechanisms which bear the main responsibility for the promotion, protection and monitoring of the Convention in the Member States.

Principle 9 cites the example of investment treaties, which have been a competence of the EU since 2010. The European Commission’s 2010 communication on European investment policy states that “a common investment policy should also be guided by the principles and objectives of the Union's external action more generally, including [...] human rights [...]”⁸ Trade policy, an exclusive competence of the EU, is also relevant to principle 9.

Principle 10 is applies to EU Member States also in the context of their membership of the EU. It is also relevant to the EU itself insofar as the EU is a member of or interacts with different international organisations.

⁵ COM(2010)573

⁶ COM(2010)543

⁷ SEC(2011) 567 final

⁸ COM(2010)343

The EU has begun to “advance international cooperation in the management of business and human rights challenges” (principle 10 (c)) by addressing business and human rights in dialogues with other countries and regions.

3.2 Access to remedy

Foundational principle (principle 25)

25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

As part of the efforts to improve access to effective remedy within the EU, the European e-Justice Portal provides information on justice systems throughout the EU in 22 languages, including information on the institutions to contact in cases of violation of fundamental rights, and training is provided to EU legal practitioners on fundamental rights.⁹

State-based judicial mechanisms (principle 26)

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

The functioning of national legal systems is the competence of EU Member States. The liability of enterprises for violations of human rights is a question of the substantive national law of EU Member States, including in the case of foreign companies and their subsidiaries.

The Brussels I Regulation covers various types of civil and commercial disputes and ensures access to court in the EU in such disputes insofar as they show a close link with the Union. The regulation covers, in particular, civil liability disputes concerning the violation of human rights and compensation for damages caused by a failure to comply with environmental standards. In its proposal for a recast of the regulation, the Commission has proposed to extend the scope of the existing jurisdiction rules to defendants domiciled outside the Union, in particular in order to improve access to justice in the Union. This includes a proposal to create a *forum necessitatis* ground of jurisdiction.

As part of the efforts to improve access to effective remedy and the treatment of victims in criminal proceedings, the European Commission has proposed an EU Directive establishing minimum standards on the rights, support and protection of victims of crime, which would replace an existing Framework Decision on victims' rights.¹⁰

Some EU development assistance aims to help non-EU states to improve the effectiveness of their domestic judicial mechanisms.

⁹ https://ejustice.europa.eu/content_fundamental_rights-176-en.do

¹⁰ Council Framework Decision [2001/220/JHA](#) of 15 March 2001 on the standing of victims in criminal proceedings.

State-based non-judicial grievance mechanisms (principle 27)

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive state-based system for the remedy of business-related human rights abuse.

The EU supported the successful update of the OECD Guidelines for Multinational Enterprises in 2011, including support for the inclusion of a new human rights chapter consistent with the UNGPs. EU Member States that are members of the OECD have established National Contact Points to provide mediation and conciliation in specific instances when there are allegations of non-respect of the guidelines. The European Commission has a contact point for the OECD Guidelines, but does not deal with specific instances.

Non-state-based grievance mechanisms (principle 28-30)

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

The EU system of social dialogue between employers' and employees' representatives functions in part as a non-State-based grievance mechanism, in particular with regard to workers' rights and labour standards.

Some EU support to human rights defenders outside the EU, in particular the European instrument for Democracy and Human Rights, facilitates access to effective non-State-based grievance mechanisms.

4. Issues for discussion

4.1 How to prioritise?

The services of the European Commission would welcome all ideas and suggestions as to how the EU could contribute to the further implementation the UNGPs, bearing in mind the limits of EU competence. The challenge is how to prioritise different initiatives knowing that time and resources will not allow us to do everything.

- How, and according to what criteria, could the EU best decide what its priorities should be?
- Do any obvious gaps emerge from the initial mapping exercise presented in this paper? Is any further analysis necessary in order to identify gaps? What lessons can be drawn from the knowledge we have of the existing situation in the EU on business and human rights?

4.2 Policy coherence

Policy coherence accounts for 3 of the 10 principles under the state duty to protect, and is especially important in the complex, multi-layered policy-making context of the EU.

- Which policy areas should we focus on in terms of promoting policy coherence?
- What practical steps can be taken to promote policy coherence? Is there a need to improve existing coordination mechanisms, and if so how? Are all actors and stakeholders adequately included through existing coordination mechanisms?
- To what extent do the report on EU priorities and the possible development of national plans for the implementation of the UNGPs by EU Member States need to be coordinated?

4.3 EU leadership at the global level

It is crucial that the EU ensures that its own house is in order in terms of implementing the UNGPs. Doing so should further increase the ability of the EU to promote the UNGPs globally, including through engagement with and support for the UN Working Group. This may be an important part of the EU's added value.

- To what extent should the EU consciously seek to play a leading role at global level in the field of business and human rights? Are there any risks involved?
- What could the EU do to maximise its global influence in the field of business and human rights?