The UN Guiding Principles on Business and Human rights. A challenge for the European Union or only for its Member States? Towards a EU National Action Plan

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INTRODUCTION

On 16 June 2011 the United Nations Human Rights Council (UNHRC) adopted by unanimity the United Nations Guiding Principles on Business and Human Rights (hereinafter UNGPs). The UNGPs are an important result (although not the final result) of a debate[2] that had strongly emerged in the 1970's with a proposed UN Code of Conduct on Transnational Corporations – which never entered into force – coupled with a UN Commission on Transnational Corporations together with the United Nations Centre on Transnational Corporations (UNCTC) [3]. But with changes in the economic and political climate over the 1980s and 1990s, the UNCTC was abolished in 1993 and its continuing work was merged with the UN Conference on Trade and Development (UNCTAD).

After further attempts and failures to regulate with *hard law* the activities of transnational corporations culminated, in 2003, with the proposed "Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights"[4], the UN Secretary General Kofi Annan appointed professor John Ruggie as the UN Special Representative for Business and Human Rights to work and elaborate proposals on the issue. His work ultimately produced the UNGPs that, today, remain the most important set of guidelines agreed by the international community at large: an indispensable framework to address and elaborate policy actions on business and human rights matters.

The UNGPs are a set of 31 guiding principles, structured according to three distinct but interrelated pillars:

(1) The state duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation and adjudication;

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[2] See F. Marrella, "Protection internationale des droits de l'homme et activités des entreprises transnationales", in Recueil des Cours de l'Académie de droit internationale de La Haye (hereinafter RCADI), Boston-The Hague, 2017.

[3] In the 1970s, international political economy discussions were dominated by the demand for a new international economic order (NIEO) and a more aggressive UN advocacy role. See for ex., D. Carreau, P. Juillard, Droit international économique, Paris, Dalloz, 2014, p.1 ss.; C. Tomuschat, "New International Economic Order", in Enc. Pub. Int. Law, as well as G. Sacerdoti, "Nascita, affermazione e scomparsa del Nuovo Ordine Economico Internazionale: un bilancio trent'anni dopo", in Problemi e tendenze del diritto internazionale dell'economia. Liber amicorum Paolo Picone, a cura di A. Ligustro e G. Sacerdoti, Napoli, 2011, p.127 ss.

[4] On which see for ex. D. Weisbrodt, M. Kruger, "Current Developments: Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights", in AJIL, 2003, p.901 ff.

(2) The corporate responsibility to respect human rights, in essence meaning to act with due diligence to avoid infringing on the human rights of others; and
(3) The need for greater access by victims to effective remedy, judicial and non-judicial[5].
Some of its core provisions have already been incorporated into some other international instruments such as the new human rights chapter in the OECD Guidelines for Multinational Enterprises and ISO 26000. They are reflected also in specific documents adopted by international institutions, such as the new Sustainability Policy of the International Finance Corporation, the EIB's Environment and Social Handbook and the European Commission's policy on Corporate Social Responsibility.
Currently, the UN Human Rights Council has established a 'Working Group on Human Rights and Transnational Corporations and other Enterprises' in 2011, renewing the mandate in 2014. Its main task is to promote and disseminate the UNGPs even if at the June 2014 Human Rights Council session, a resolution establishing another Inter- Governmental Working Group (IGWG) to elaborate an international legally-binding instrument was adopted and the debate is currently ongoing.
The UN Economic Social and Cultural Rights Committee is also working on a General Comment on the matter.

With my essay in the *festschrift* for Professor Stelios Perrakis who, beyond the honor of his friendship -and enlightening teachings at EIUC- embodies unique qualities of a remarkable scholar and practitioner of International Law, I wish to advocate the periodic elaboration of a comprehensive *EU National Action Plan* to implement the UNGPs *as if* the EU was a federal state. As a matter of facts, there are many policies and activities that the EU is doing or has already done to implement, even *ex ante* and spontaneously, the UNGPs. Thus, to avoid the risk of fragmentation of actions and policies between the EU level and the Member States, such a living document would serve as a compass for policy action and would increase consistency and coherence of the EU as a whole. It would also help Member States to understand their respective policy space and responsibilities to complement and effectively support EU action to fully implement the UNGPs.
But are the UNGPs applicable to the EU or rather are they addressed solely to its Member States? This will form the first part of this essay. Here, it will become evident that the EU has developed many activities even before the UNGPs were elaborated.
In the second part, my essay turns less optimistic. The role of the EU may be put to a test when dealing with UNGPs Pillar three, namely the "access to remedies" pillar. Under this perspective it emerges that Member States cannot do much today since fundamental matters such as "private international law" including "conflict of jurisdiction" rules have been largely regulated by the EU. Beyond EU private international law there are national solutions which provide a scattered and unsatisfactory picture facilitating forum and law shopping. Hence, any reform of EU Private International Law as a whole should be considered under the light of the UNGPs.

[5] The UNGPs are neither legally binding nor do they introduce new international law on Business and Human Rights. As Dr. Ruggie stated in his report to the UN Human Rights Council (UNHRC), their "normative contribution lies […] in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it could be improved."

I. THE "DUTY TO PROTECT" PILLAR. HAS THE EU THE "RIGHT" COMPETENCIES IN THE FIELD OF BUSINESS AND HUMAN RIGHTS?

The first pillar of the UNGPs highlights the *State* duty to protect. It should therefore be understood that the primary responsibility for the protection of human rights lies with States such as the *EU Member States*. However, since the EU is a special kind of international organization, a unique supra-national entity with a sophisticated system of competencies it follows that it may also have responsibilities along with its Member States. In other words, the EU cannot just sit down and transfer the UNGPs issue to its Member States.

First of all, the EU may share with Member States a "duty to protect" with regard to areas of *exclusive* or even *shared* competence. Furthermore, the EU has a role in protecting, promoting and furthering human rights and in *supporting* its Member States in effectively fulfilling their obligations.

It is well known that under art.5 TEU and art. 3-6 TFEU, the EU's scope of action is governed by the so-called principle of *conferral of competencies*[6]. Accordingly, the EU may only act within the confines of the competences conferred upon it by its Member States in pursuance of the objectives set out in the Treaties. Conversely, competences not conferred upon the EU by the constituent Treaties remain with the EU Member States.

However, the entire field of "Business and human rights" involves different subject matters and therefore, it entails different competencies of the EU.

As a matter of facts, the UN Guiding Principles refer, *inter alia*, to human rights, labour and employment, the environment, anti-discrimination, international humanitarian issues, investment and trade, consumer protection, corporate and even criminal matters.

Therefore, the UNGPs involve different EU policies to be translated into different EU action, the latter depending on the scope of specific competences received by the EU from its Member States and subject to the interpretation of the European Court of Justice.

Generally speaking, human rights are addressed already at art.2 of the TEU among the common values upon which the EU is founded. These fundamental values include the respect for human dignity, freedom, democracy, equality, the rule of law, respect of human rights, rights of persons belonging to minorities, pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men.

All that is widely reinforced by the EU Charter of Fundamental Rights which has become legally binding since the entry into force of the Lisbon Treaty (Art. 6 TEU), in line with international human rights obligations that already bind the EU Member States but adding on a specific EU dimension of such rights. The EU Charter of Fundamental Rights applies to the European Union in all its actions[7]. It also applies to Member

[6] See, among many others, A. Dashwood, 'The Attribution of External Relations Competence', in A. Dashwood and C. Hillion, The General Law of EC External Relations , London: Sweet & Maxwell, 2000, 115-138; P. Craig, 'Competence: Clarity, Conferral, Containment and Consideration', 29 European Law Review (2004) 323; M. Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process', in A. Dashwood and M. Maresceau (eds.), Law and Practice of EU External Relations: Salient Features of a Changing Landscape, Cambridge: Cambridge University Press, 2008, 34-69 as well as P.C. Müller-Graff, 'The Common Commercial Policy enhanced by the Reform Treaty of Lisbon?', ivi, p. 188 ff.; P. Eeckhout, EU External Relations Law, 2 ed., Oxford, 2011, at 122; R. Adam, A: Tizzano, Manuale di Diritto dell'Unione europea, Torino, 2014, p. 427 ff.; J. P. Jacqué, Droit institutionnel de l'Union européenne, Paris, 8 éd., 2015, p. ; U. Villani, Istituzioni di diritto dell'Unione europea, 4 ed., Bari, 2016, 67 ff..

[7] See, inter multos, P. Gragl, The Accession of the European Union to the European Convention on Human Rights, Oxford, 2014, passim.

States whenever they implement EU law. As such, and giving the fact that its normative content provides a uniform human rights platform, a sort of an umbrella over Member States (which may be bound to different human rights treaties and therefore different specific obligations), it is a platform that goes even beyond the level of protection of certain human rights treaties. The EU Charter does not extend the EU competencies but rather obliges the EU and its Member States to comply with human rights standards whenever EU law is implemented. However, such an "umbrella" does not necessarily translate all that is required by the UNGPs into EU Law.

Further legal basis on matters of human rights are found in the rules concerning the Union's external action, art. 21 TEU states that "the Union shall define and pursue common policies and actions, and shall work for a high degree of co-operation in all fields of international relations, in order to (…) consolidate and support democracy, the rule of law, human rights and the principles of international law".

Furthermore, with regard to right to equality and non-discrimination art.10 TFEU stipulates that in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

This principle is reaffirmed in Article 207(1) TFEU, which highlights that the *EU's trade relations* and international agreements have to be in line with such goals, stating that "the common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action", and in Article 208(1) of the TFEU regarding EU development policy, which states that "Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action". The same is true for economic, financial and technical cooperation with third countries with reference to Article 212, and for humanitarian aid with reference to Article 214 TFEU.

In light of those considerations, it is now time to try to value the connections between the first pillar of the UNGPs and the EU competencies through five different set of principles. The first two are Foundational principles (UNGPs 1 – 2); the other principles concern the General State regulatory and policy functions (UNGP 3); the state business nexus (UNGP 4 – 6); the issue of supporting business respect for human rights in conflict affected areas (UNGP 7) and finally the importance of ensuring policy coherence (UNGPs 8 – 10).

The foundational principles address the duty of each State to protect against human rights abuses within its *territory* and *jurisdiction* by third parties. At the same time, the same principles invite States to set out clearly their expectations towards business enterprises. Once ascertained that, *ex natura rerum*, the EU is also responsible for the implementation of the UNGPs, it must ensure the coherence of its policies both at the internal level (A) and at the external policy level (B).

A. EU Human Rights protection in its internal policies

Within the EU, policy coherence on business and human rights has to be seen at different levels. It must be organized both at the horizontal level, within different EU institutions and at the vertical level, between the EU and its Member States.

Even if the competencies of the Union may be limited on each specific issue, they may still be necessary to fully implement the UNGPs. At a minimum, the European Commission may *facilitate* the sharing of experience and good practice on business and human rights among EU Member States. Always at the minimum, the EU may develop its 2011 *Communication setting out the European Strategy on Corporate Social*

Responsibility (CSR)[8]. It literally 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. However, in the Communication, as well as in the UNGPs, the concept of "responsibility" is not that of a liability, a legal concept. It is merely a political concept, namely the expectation of the society that companies *will do their best* to promote and respect human rights. In other words, instead of providing regulatory policies with sanctions, it leaves human rights compliance by business to market mechanisms.

The *CSR Strategy* embodied in said Communication sets out an agenda for action, including: enhancing the visibility of CSR and disseminating good practices; improving and tracking levels of trust in business; improving self- and co-regulation processes; enhancing market reward for CSR; improving company disclosure of social and environmental information; further integrating CSR into education, training and research; emphasizing the importance of national and sub-national CSR policies; better aligning European and global approaches to CSR[9].

Hence, the Commission's approach to CSR is built upon "a smart mix of voluntary policy measures and, where necessary, complementary regulation" as well as on the notion that "the development of CSR should be led by enterprises themselves". This approach also holds true for implementing the UNGPs.

In its 2011 CSR Communication, the Commission invited Member States to produce business and human rights *action plans*. Subsequently it established a peer review process on CSR, to *inter alia*, assist Member States in developing national action plans. Therefore, several governments have adopted such nation plans such as, the United Kingdom, the Netherlands, Italy, Denmark, Finland and Lithuania[10].

In parallel, the EU has adapted its legal system, to include regulations that are conducive to responsible business.

However, the impact of EU Law on business should also be considered with reference to financial funds managed and allocated by the EU. If, the EU, as a global soft power, determines and refurnishes its budget lines in consideration of its policy priorities, then even not formally being a "State", the EU policy actions fall completely within the range of UNGPs 4-6: the so called "State-business nexus".

1. The EU-business nexus

States have a heightened responsibility (UNGP 4) 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". When a State-business nexus exists, as it does when States purchase goods or services from companies. Specifically, UNGP 6 says that "States should promote respect for human rights by business enterprises with which they conduct commercial transactions."

The commentary to Principle 6 goes on to note that States – but the same happens with the EU - engage in a variety of commercial transactions

[8] COM(2011)681 of 25/10/2011

[9] The EU has also published specific materials on the implementation of the UNGPs in three sectors, namely employment and recruitment agencies, ICT companies, and oil and gas companies. A separate guide was elaborated to help SMEs translate human rights in their operations. The guides are consistent with the UNGPs and take account of the experience of EU companies, but aim to be as globally applicable as possible.

[10] V. http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/ nonché http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx

with business, including through procurement, and that this engagement provides "unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts…".

All that is applicable, by analogy, to the working of the EU as a supranational entity, regardless its nature of intergovernmental organization.

Two recent examples include the Directive on Public Procurement and the Directive on Non-Financial Information Disclosure, both of which are currently being transposed by EU Member States.

2. Public Procurement Rules

In February 2014, the EU completed a major reform of its public procurement rules[11]. Hence, the award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the TFEU "and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency". The new provisions include critical modifications to facilitate the use of social and environmental criteria in public procurement processes. For this purpose, the new rules include a cross-cutting 'social clause', under which Member States and public authorities must ensure compliance with fundamental ILO Conventions on Freedom of Association and Protection of the Right to Organise (N°. 87), Right to Organise and Collective Bargaining (N°. 98), Abolition of Forced Labour (N°. 105), Minimum Age (N°. 138), Discrimination (Employment and Occupation) (N°. 111), Equal Remuneration (N°. 100) and Worst Forms of Child Labour (N°. 182).

Any company failing to comply with the relevant obligations may be excluded from public procurement procedures and, by the same token, public authorities will be required to exclude any abnormally low tenders if these result from failure to comply with environmental, social or labour law obligations under EU or national rules, collective agreements or International Law.

3. Deepening the EU and Member States regulatory functions: accounting directives and non financial information disclosure

In the last years, the EU has adopted legislation to implement, in particular, UNGP 3. Under this guiding principle, a State must, *inter alia*, "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". Under this perspective, the EU has fine tuned Company accounting directives, has prohibited any trafficking in human beings and, more generally, has introduced a set of measures aimed at streamlining human rights in its policies.

It is well known that, in the EU, more than ten Company Law Directives, adopted since 1968, have largely harmonized Company Law of Member States on many key aspects of forming and operating public companies as well as – albeit with a minor impact – private companies.

Among such instruments of EU Law, since 1980s, specific directives have harmonized accounting[12].

Professor Antoine Lyon Caen, in a seminar held at Cà Foscari University of Venice has said that Accounting, today, is "la grammaire de la

[11] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0024

[12] See for ex. The Fourth Company Law Directive, the Seventh Company Law Directive and the Eight Company Law Directives up to the recent IFRS Regulation. For a discussion of such measures, within a vaste literature in different languages, see for ex., Grundmann, Moslein, 2007, at 15-18; Edwards, 1999, Chap.V-VII.

globalisation".

Secondly, one should also note – with some surprise - that, at the Comparative Law level, the policy space of the EU on this matter is bigger than that of the U.S. Federal Government. In each EU Member State, companies have to deliver their annual accounts to the companies registrar, they have to prepare financial statements in accordance with applicable accounting standards and make those available for public inspection, in order to comply with the First Company Law Directive[13].

Conversely, in the USA, the Federal Government cannot enact such rules and impose State legislatures to comply with them in the same way. US Federal Laws operate on a plane which is separate from that occupied by State Company Law. There are two parallel corporate regulation systems that may collide or even leave gaps, and that happens even within a Federal State. It follows that, while U.S. closely held corporations are under no duty to disclose their financial accounts to persons other than their stakeholders, the contrary happens in the EU thanks to the First Company Law Directive[14].

As far as public companies are concerned, in the U.S. the matter falls much more into Federal Law and in particular within the realm of Securities Law. Under this perspective, a company issuing publicly-traded securities must disclose all relevant information in a registration statement filed with the Securities and Exchange Commission (S. E. C.). In addition to that, each publicly-traded company must periodically prepare financial statements in accordance with U.S. GAAP and file them with the S.E.C.

The EU requirements for public companies are more and more similar to the U.S. requirements, except that instead of the U.S. GAAPs, reference is made to the International Accounting Standards (IAS) and International Financial Reporting Standards (IFRS) and related interpretations (SIC/IFRIC) as adopted by the EU[15]. But the two sets of Accounting rules are gradually converging.

A remarkable development in this area is that, as a result of the revision of existing Accounting Directives[16] regarding the disclosure of non-financial and diversity information, large companies and groups will be required, as of 2017, to *disclose information* on policies, risks and results as regards the respect for human rights, anti-corruption, bribery issues, environmental matters, social and employee-related aspects, as well as, even, the diversity on boards of Directors. In such a framework, the UNGPs are specifically referred to as one of the international frameworks that companies may rely on when complying with this Directive. Hence, under such Directive on Non-Financial Information Disclosure, companies with over 500 employees (i.e. large companies) will be required to disclose information on policies, risks and results as regards their respect for human rights.

In 2013, the EU also introduced a new reporting obligation for large extractive and logging companies on payments they make to governments

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[13] See arts. 2 (1) (f); 3 (1), 2 of the First Company Law Directive.

[14] See, for ex., Kraakman, Armour, Davies, Enriques, Hansmann, *The Anatomy of Corporate Law*, 2 ed., OUP, 2009, at 124.

[15] Standards are issued by an international private organisation such as the International Accounting Standards Board (IASB) and must go through a process of endorsement before becoming law in the EU. See Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, available at http://ec.europa.eu/finance/accounting/ias/index_en.htm .

[16] Adopted by the European Parliament on 15 April 2014 and by the Council on 1 October 2014, and published in the Official Journal on 15th November 2014. Member States are required to implement the terms of the Directive into domestic law by 6 December 2016.

(the so called country-by-country reporting: CBCR)[17] . The new Accounting Directive, repealing the Fourth and Seventh Accounting Directives on Annual and Consolidated Accounts (78/660/EEC and 83/349/EEC) introduces a new obligation for large extractive and logging companies to report the payments they make to governments all over the world (the so called country by country reporting-CBCR). Reporting would also be carried out on a project basis, where payments have been attributed to specific projects. By requiring disclosure of payments at project level, local communities and the civil society will have insight into the sums paid by EU companies to governments for exploiting local oil/gas fields, mineral deposits and forests. This will also allow these communities to better hold their own governments to accounts for how money has been spent locally. Civil society will be in a position to question whether State contracts with companies have delivered adequate value to society and government. By the same token, the EU aims to promote the adoption of the Extractive Industries Transparency Initiative (EITI) in these same countries[18]. This happens to be in line also with other international developments in this field, in particular the inclusion of a requirement to report payments to governments in the Dodd Frank Act in the United States.

On 4 March 2014, the European Commission High Representative of The European Union For Foreign Affairs and Security Policy, through a Joint Communication to the European Parliament and the Council about *Responsible sourcing of minerals originating in conflict-affected and high-risk areas Towards an integrated EU approach*[19], backed an integrated approach to tackle the problem of the use of trade in certain minerals for the financing of armed groups in conflict and high-risk areas such as Africa's Great Lakes Region. As a result, the Commission proposed a EU Regulation[20] setting up a voluntary system of supply chain due diligence for EU importers, which is now in the ordinary legislative process. This Regulation lays down the supply chain due diligence obligations of EU importers who choose to be self-certified as responsible importers of minerals or metals containing or consisting of tin, tantalum, tungsten and gold.

B. Human Rights protection in EU external action policies

In addition to the UNGPs, the EU also recognises and actively promotes other international guidance tools which address responsible business and thus facilitate the implementation of the UNGPs. These include the ISO 26000 Standard on Social Responsibility, the ILO MNE Declaration, the UN Global Compact and the OECD Guidelines for Multinational Enterprises.

Even if EU internal policies and external actions are increasingly interlinked and in line with the Europe 2020 agenda and the Lisbon Treaty, the mutual reinforcement of internal and external actions is important to ensure the necessary policy coherence.

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[17] Accounting Directive 2013/34/EU of 26 June 2013.

[18] The Extractive Industries Transparency Initiative (EITI) is a voluntary initiative with the objective of improving transparency and accountability in countries rich in oil, gas, and mineral resources. Once a host country endorses the initiative, the EITI process is mandatory for all extractive industry operators (including those that are state-owned) operating within that country. Thus, the EU mandatory disclosure requirement is aimed to complement the EITI by requiring companies registered or listed in the EU to disclose payments to governments along the same lines as EITI.

[19] JOIN(2014) 8 final.

[20] COM(2014) 111 final of 5.3.2014.

Regulation (EU) n.235/2014 of the European Parliament and of the Council of 11 March 2014 has established a financing instrument for democracy and human rights worldwide. Today, Business and Human Rights has become one of the priorities of the EU external policy.
The 2012/2014 EU Action Plan on Human Rights and Democracy already set out clear objectives in this regard, highlighting the importance of promoting the implementation of the UNGPs by issuing guidelines to specific business sectors and setting EU priorities for the effective implementation of the UNGPs.
This happens through the elaboration of an EU Strategic Framework and Action Plan on Human Rights and Democracy (1); which is reflected in the policy strategy concerning trade and investment agreements (2), as well as in EU Bilateral human rights dialogues (3). The EU fosters responsible supply chains (4) while keeping human rights as a key priority in its development policy (5), including its GSP+ regime (6) and the operation of the EIB (7).

1. The EU Strategic Framework and Action Plan on Human Rights and Democracy

As said, the main external policy comprehensive framework is the EU Strategic Framework on Human Rights and Democracy, adopted in June 2012. The 2012/2014 Action Plan on Human Rights and Democracy, annexed to it, already comprised 97 specific actions designed to implement, streamline and promote human rights in all aspects of EU politics and policies, addressing EU institutions as well as Member States[21].
The Council Working Group on Human Rights (COHOM) is charged to monitor the state of implementation of the Action Plan on Human Rights and Democracy and it works mainly through an informal peer review among Member States.
On 28 April 2015, the Commission' published a Joint Communication with the EEAS on the Action Plan on Human Rights and Democracy (2015-2019) "Keeping human rights at the heart of the EU agenda."[22]
Regarding the implementation of the UNGPs, the Communication at point 18 proposes future activities focusing, in particular, on further awareness-raising of the UNGPs in the EU's external action, strengthened capacity-development of tools and initiatives in relation to the implementation of the UNGPs, as well as a proactive engagement with business, civil society and public institutions.
The Communication also proposes, at point 25, a specific item on how to realise the systematic inclusion in trade and investment agreements of references to internationally recognised principles and guidelines on Corporate Social Responsibility “such as those contained in the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding principles on business and human rights (UNGPs), the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and ISO 26000”(point 25.d).

2. Trade and Investment agreements

[21] With regard to Business and Human Rights, in line with the Commission's business and human rights activities of its 2011 CSR strategy, Action 25 provide, inter alia, to: - 25a. Ensure implementation to the Commission Communication on CSR, in particular by developing human rights guidance for three business sectors. -25b. Publish a report on EU priorities for the effective implementation of the UNGPs . -25c. Develop National Action Plans for EU Member States on implementation of the UNGPs.
[22] JOIN(2015) 16 final.

In EU trade treaties following the Yaoundé through Lomé to Cotonou practice, a progressive politicization and insertion of non-trade values has taken place. The inclusion of human rights and democratization clauses in trade and investment treaties concluded by the EU started in 1986 with their addition to the preamble of Lomé III and has developed since then. Such a clause has become an "essential element clause" of the treaty in the sense of the 1969 Vienna Convention on the Law of Treaties[23]. Nonetheless, the practical application of this clause has been more an invitation to a bilateral political dialogue before an effective suspension or, rather theoretically, a termination of the treaty.

Impact assessments are carried out for Commission's proposals with significant economic, social or environmental impacts, including the opening of trade and investment negotiations with third countries. The 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 […]."[24] By virtue of the Regulation 1219/2012, Member States may be authorised by the Commission to negotiate Bilateral Investment Treaties with third countries on condition, *inter alia*, that such agreements are consistent "with the Union's principles and objectives for external action as elaborated in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union" (Article 9 (1)(c) of the Regulation), which include human rights and fundamental freedoms.

The Commission's communication on "Trade, Growth and Development - Tailoring trade and investment policy for those countries most in need"26 (January 2012) sets out explicitly to ensure coherence between trade and investment and development policies; it encourages responsible business conduct, promotes CSR instruments and has been welcomed by Member States.

All recent Free Trade Agreements (FTAs) concluded by the EU with third countries (e.g. Korea, Colombia/Peru, Central America, Georgia, Moldova, Singapore; the EU-Caribbean Economic Partnership Agreement - EPA) include provisions on the promotion of CSR, and these have been addressed as part of their implementation, well as in other trade-related meetings, such as the EC-Turkey sub-committee on Industry and Trade, and the EU-Chile Association Committee meeting[25].

3. Human rights dialogues at bilateral level and co-operation with regional organisations

At bilateral levels, the EU is increasingly discussing and exchanging experience on Business and Human Rights in *EU human rights dialogues* and dedicated seminars and workshops with a number of partner countries. The same is done with regional partners such as with the African Union.

The EEAS conducts regular human rights and other dialogues with third countries. Topics discussed are decided on a country-by-country and case-by-case basis. In an increasing number of cases, the topic of business and human rights has been included for discussion and exchanges of experiences, in particular with countries in Latin America (Mexico, Brazil, Peru, Colombia and Ecuador), Asia (China, Indonesia) and Africa (South Africa). The EU Special Representative for Human Rights facilitates the process of exchanging views and sharing practices on business and human rights during his

[23] On that see generally D. Carreau, F. Marrella, Droit international, 11 éd., Paris, 2012 as well as Diritto internazionale, Milano, 2016.

[24] See article 51 of the EU Charter.

[25] See F. Marrella, "Unione europea ed investimenti diretti esteri", in SIDI, *L'Unione europea a vent'anni da Maastricht: verso nuove regole*, a cura di S. M. Carbone, Napoli, 2013, pp. 107-140; as well as F. Marrella, S.De Vido, "On The Possible (Re-) Negotiation of BITs by the European Union and its Potential Impact on Latin America" in A. Tanzi, A. Asteriti, R. Polanco Lazo, P. Turrini, *International Investment Law in Latin America. Problems and Prospects*, Leiden/Boston (USA), Brill/Nijhoff, 2016, pp. 497-523.

meetings with partner countries.
The EU promotes a dialogue on business and human rights with regional organisations, such as the African Union (AU) and the Association of Southeast Asian Nations (ASEAN). Following up on the November 2013 EU-African Union human rights dialogue, a joint EU-AU event on business and human rights has been organised in Addis Ababa in September 2014. The EU is working on the practical follow-up to that event which may serve as a model with other partner countries such as the Community of Latin American and Caribbean States (CELAC) [26].
EU Delegations in third countries increasingly may be called on to advise companies seeking to do business in the countries in which they are situated. Training activities on business and human rights are organised for the benefit of officials working in the network of EU delegations throughout the world.
Last but not least, the EU supports UN activities designed to foster the implementation of the UNGPSs such as the annual Forums on Business and Human Rights in Geneva.

4. Supporting CSR and business in conflict affected areas (GP 7) and fostering responsible supply chains

The European Commission's support to responsible business practices in developing countries is relevant for companies investing or operating in fragile developing countries, since the so called "failed" or "collapsed" States face specific challenges in protecting, respecting or fulfilling human rights. One of the principles underlined in the Commission's Communication 'A stronger role of the private sector in achieving inclusive and sustainable growth in developing countries' of 13 may 2014, is that specific approaches are required particularly for fragile and conflict-affected states that are urgently in need of jobs and economic opportunities to restore social cohesion, peace and political stability.
One of the most difficult issues remains to ensure the protection of human rights throughout the transnational business supply chain. This is a difficult job since it involves different subjects of law, each one having a distinct legal personality even rooted in different legal systems.
In 2015, the European Union participated in the G7 dialogue[27], with specific reference to global supply chains and decent work.
But, if a quarter of the 100 largest companies in the world have their headquarter in EU Member States, global supply chains may generate adverse effects on a global scale. If European firms outsource their activities to local suppliers in countries with weak governance mechanisms that cannot effectively address working conditions, enforce social rights and health, protect the environment or struggle with the rule of law.
Thus, on such a matter a global solution still need to be found and it certainly cannot be left in the hands of EU Member States acting *uti singuli*. The political dialogue providing a platform for sharing experience and solutions to mitigating risks in supply chains across sectors is just the beginning of a process than must go much further than that.
The extraction, handling, trading and processing of minerals have been often associated with the misuse of revenues, corruption, political conflict and state fragility, which contribute to jeopardising countries' long-term development efforts. Specifically, in the case of Central Africa, the United States have adopted provisions under Dodd-Frank Wall Street Reform and Consumer Protection Act (hereafter, "Dodd-Frank") sections 1502 and 1504 respectively addressing the supply chain and financial transparency. In particular, section 1502 requires all U.S.-listed companies to disclose annually whether they and their suppliers use "conflict minerals" (specifically: tin, tungsten, tantalum and gold) defined as those minerals originating

[26] http://www.eeas.europa.eu/la/summits/docs/2013_santiago_summit_declaration_en.pdf
[27] Dialogue on responsible supply chains and decent work, German Presidency of the G7 in 2015.

from the Democratic Republic of Congo or a neighboring country. Companies must report on the measures taken to exercise due diligence and to mitigate potential risks. They are liable for the accuracy of the information provided and accountable to the general public for their corporate behavior. In the EU, the European Parliament passed a resolution on 7 October 2010 calling for the EU to legislate in this area, while a number of EU Member States have taken initiatives relating to conflict minerals. Building on the experience of the Kimberley process, the Extractive Industries Transparency Initiative (EITI), the Forest Law Enforcement, Governance and Trade (FLEGT) and the EU Timber Regulation, the Commission has supported initiatives to further transparency throughout the supply chain, including aspects of due diligence in different sectors. The Commission has encouraged use of the OECD Guidelines for multinational enterprises, and OECD's due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas. In March 2014, the Commission has even proposed "A comprehensive EU supply chain initiative for responsible sourcing of minerals originating in conflict-affected and high-risk areas" This initiative aims to stop profits from trading minerals being used to fund armed conflicts and support responsible sourcing by promoting transparent supply chains of minerals (namely tin, tantalum, tungsten and gold) originating from conflict-affected and high-risk areas. This should also improve the ability of EU operators to comply with existing frameworks and the livelihood of local communities dependent on mining activities.

A draft Regulation sets out an EU system of self-certification for importers of tin, tantalum, tungsten and gold which choose to import responsibly into the Union[28]. The system is based on the five steps of OECD Due Diligence Guidance. To increase public accountability of smelters and refiners, enhance supply chain transparency and facilitate responsible mineral sourcing, it is also proposed to publish an annual list of EU and global 'responsible smelters and refiners'. The proposed Regulation should be read together with a joint Communication presenting the integrated external policy approach on how to tackle the link between conflict and the trade of minerals extracted in affected areas. The initiative also proposes a number of incentives to encourage supply chain due diligence by EU companies, such as public procurement incentives for companies selling products such as mobile phones, printers and computers containing tin, tantalum, tungsten and gold; financial support targeting Small and Medium sized Enterprises (SMEs) to carry out due diligence and for the OECD for capacity building and outreach activities as well as policy dialogues with governments in extraction, processing and consuming countries to encourage a broader use of due diligence.

At the same time, the European Union continues to provide support to developing country partners on sustainable mining, geological knowledge and good governance in natural resources management.

5. EU Development Policy

All of the above has an impact on the EU development policy which is organized on the basis of art.208(1) TFUE.

Here, the Commission has been moving towards a more intensive rights-based approach encompassing human rights in EU development cooperation, including private sector development support. The Communication on *'A stronger role of the private sector in achieving inclusive and sustainable growth in developing countries*[29] has well defined the future direction of EU "devco policy" and support to private sector development in EU partner countries. No surprise then that even such important policy has consistently introduced private sector engagement as a

[28] http://eeas.europa.eu/responsible_sourcing_minerals/index_en.htm

[29] (COM(2014)263) adopted on 13th May 2014.

condition of operation.

Such Communication clearly talks about the *promotion of responsible business practices through EU development policy*. That means that companies investing or operating in developing countries should respect human rights, and should prevent violations by ensuring that specific preventive systems to assess risks and mitigate potential reverse impacts related to human rights, labour, environmental protection and disaster-related aspects of their operations and value chains are in place. In order to do that and to show that these issues are properly taken care of companies should follow the UNGPs.

Even if it is not formally based on UNGP 4, about the State/EU business nexus, the same Communication proposes guiding principles for the design and implementation of public support to private sector development and public-private collaboration in development cooperation. This translate into the elaboration of criteria for support to private sector actors. All in all, for private business the message is clear: in order to qualify to receive public funding there must be adherence to social, environmental and fiscal standards, including respect for human rights.

The Communication 'A Global Partnership for Poverty Eradication and Sustainable Development after 2015'[30] forms EU positions in preparation for the Third Financing for Development Conference in Addis Ababa in July 2015 and the Post-2015 UN Summit in New York in September 2015 on the Post 2015 Development Agenda (including the Sustainable Development Goals). The global partnership needs to promote more effective and inclusive forms of multi-stakeholder partnerships, operating at all levels involving the private sector and civil society, including social partners. In order to achieve that, the principles of shared responsibility, mutual accountability, respective capacity, human rights, good governance, the rule of law, support for democratic institutions, inclusiveness, non-discrimination, and gender equality, have to be mainstreamed.

The same Communication highlights that need for each country of an effective legislative and regulatory framework to achieve policy objectives, including by providing fair and predictable legal frameworks that promote and protect human rights. It recalls EU efforts to facilitate private sector engagement, encourage responsible investment and production in developing countries as well as sustainable consumption, and to enhance market reward for CSR, including by promoting the uptake of internationally agreed principles and guidelines, such as the UNGPs. Private sector, however, should further improve its contribution on protecting human rights including through addressing labour conditions, health and safety at work, access to social protection, voice, empowerment and gender-related issues.

6. The EU Generalised Scheme of Preferences

A new reformed Generalised Scheme of Preferences Regulation entered into force on the 1st of January 2014 [31].The Generalised Scheme of Preferences Plus (GSP+) is a key EU trade policy instrument to promote human rights, labour rights, environmental protection and good governance in vulnerable developing countries. It provides unilateral, generous market access to vulnerable developing countries that commit to ratify and effectively implement 27 core international conventions (among which 7 UN Human Rights Conventions and the 8 ILO fundamental Conventions).

GSP+ countries are subject to a stringent and systematic EU GSP+ monitoring mechanism. The monitoring is built on two inter-related tools: the "scorecard", summarising the list of most salient issues identified by the monitoring bodies (or any other accurate and reliable source) under the 27

[30] COM(2015)44) and its annex adopted on 5th February 2015

[31] http://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of- preferences/index_en.htm . See for ex. F. Marrella, "Unione europea, commercio internazionale e diritti umani", in Treccani. Il Libro dell'anno del Diritto 2014, Roma, pp. 747-750.

Conventions and the "GSP+ dialogue", engaging with authorities in an open discussion on actions (prioritisation and timing) to deal with those shortcomings. In this way, the EU can build a relationship of cooperation with GSP+ countries and raise their awareness on the shortcomings to implement those conventions.

7. A specific role for the European Investment Bank?

The European Investment Bank (EIB) is the European Union's bank. Therefore, it cannot escape from the application of the UNGPs. And the challenge has been met with the revision of the EIB Environmental and Social Handbook[32] at the end of 2013. Here, the EIB integrated the UNGPs in its standards on investments abroad. This Handbook sets out the EIB's policies, principles and standards when investing in non-EU countries and is applicable to EIB staff and external actors alike. The UNGPs therefore have provided a core international text on which the EIB's environmental and social standards have been based.

II. THE EU AND THE ACCESS TO REMEDY PILLAR. MUCH ADO ABOUT NOTHING?

Once highlighted what the EU has already done and still can do in terms of pillar one of the UNGPs while recognizing, *en passant*, its positive role in encouraging CSR practices at the business level, one should ask the question about what can be done at the level of pillar three, namely the "access to remedy" pillar.

No human rights policy can seriously be put in place if it is not complemented by a strong access to remedy dimension, since as the British says, *remedies precede rights*!

From this perspective, once again, there is a fundamental tension between the competences vested in the EU and those still in the hands of Member States.

The third pillar of the UNGPs specifies at UNGP 25 that "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". This important principle is backed up by three operational principles related to: judicial remedies (UNGP 26), non-judicial remedies (UNGPs 27-30) and effective criteria for such non-judicial grievance mechanisms (UNGP 31).

Since the latter principle (UNGP 31) contain common characters applicable to both States and the EU, I will turn herebelow to the first two principles since, from this angle, the "competence trap" between the EU and Member States can be illustrative.

A. Judicial remedies and the "competence trap"

[32] http://www.eib.org/attachments/strategies/environmental_and_social_practices_handbook_en.pdf

Judicial remedies are addressed at UNGP 26. Once again, "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".
However, here the European Union has a bigger role to play, together with EU Member States. One should just read in combination art. 47 of the EU Charter of Fundamental Rights and art. 81 and 82 TFEU. Their application do contribute, *ipso jure*, to the realization of UNGPs.
In addition to that, today, a full body of EU Private International Law exists, including EU rules governing issues of jurisdiction and the recognition and enforcement of judicial decisions in civil and commercial matters, the applicable law, as well as judicial assistance in cross-border situations[33].
In terms of Private International Law, the policy space of EU Member States has never been so marginal, transforming national and "exorbitant" PIL solutions into exotic issues, albeit useful to entertain the students in Universities lectures. Today, we may say that ninety per cent of private international law textbooks in any EU language is made of EU Private International Law.
This may be a good thing since it shows that the EU legislator has achieved much more success with uniform rules of Private International Law than it has obtained talking for decades about a uniform substantive EU Contract Law for the EU single market.
Be it as it may, this means, that only outside areas already regulated by the EU, Member States remain competent for ensuring effective remedies for victims of corporate-related human rights harm.

Therefore, one should praise the recent efforts to ensure that EU judiciary systems are made simpler and more effective for the protection of human rights, as to foster the right to an effective remedy before a court. The Communication '*A Global Partnership for Poverty Eradication and Sustainable Development after 2015"*[34] even notes that simple, transparent and stable rules and institutions, backed up by functioning justice and dispute-resolution systems are crucial elements for an inclusive and conducive business environment and to promote sustainable investments.

1. Establishing jurisdiction: Brussels I *recast* Regulation

The so-called "Brussels I *recast* Regulation" [35] establishes rules about the allocation of jurisdiction in civil or commercial disputes of cross border nature, including civil liability disputes concerning the violation of human rights. The Regulation ensures that judgements are recognised and enforced among EU Member States on the model of the *Full faith and credit clause* in US Law.
According to such Regulation, a person domiciled in an EU Member State can generally be sued in the courts of that Member State (Art. 4). This means that if a transnational corporation commit human rights violations, it can be sued before the courts of the EU Member State where the company has its *seat, central administration or principal place of business*, even for human rights violations committed outside the EU.

[33] See, *inter multos*, M. Fallon, "Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne", RCADI, t.253, 1995, p. 9 ff.; A.V.M. Struycken, "Co-ordination and Co-operation in Respectful Disagreement : General Course on Private International Law", RCADI, 2004, p. 9 ff.; A. Borras, "Le droit international privé communautaire : réalités, problèmes et perspectives d'avenir", RCADI, t.317, 2005, p. 313 ff..
[34] (COM(2015)44).
[35] Regulation No. 1215/2012/EU of 12 12 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. As of 10 January 2015, this Regulation replaced Regulation No 44/2001/EC on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The definition of the *domicile* of the company in art. 63 is rather extensive thus allowing to sue companies before the courts of a given EU Member State in cases where the company's seat is not formally located in an EU Member State but the company nevertheless has its central administration there.
The same Bruxelles I *recast* regulation allow a claim against an EU domiciled company in disputes relating to tort or, more generally, non-contractual obligations. Here, in matters relating to tort, proceedings may be brought in the place where the *harmful events* occurred or may occur (art. 7(3)). There is a rich case body of case law on the application of this formula and, assuming it is still applicable to the Bruxelles I *recast* rule, this means that jurisdiction is provided at the place where the tort occurred or even, to the convenience of the victim, at the place of the event giving rise to the damage.
Conversely, if a dispute is related to contractual obligations, then while recognising arbitration and choice of court agreements, the default forum is that of the courts of the place of performance of the contractual obligation in question.

2. The prohibition of *Forum non conveniens*

The Brussels I Regulation prevents (within its scope of application) national courts from applying the *forum non conveniens* doctrine[36]. In fact, the European Court of Justice clarified in a milestone case[37] that Art. 4 of the Brussels I Regulation precludes a national court of a Member State from declining the jurisdiction conferred on it on the ground that a court of a third State would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other Member State is in issue or the proceedings have no connecting factors to any other Member State. Hence, no *Bhopal case* seems possible under the Bruxelles I *recast* Regulation.
Thus, the Brussels I Regulation ensures access to the courts of EU Member States in actions against companies domiciled in the Union. The Regulation does not regulate international jurisdiction of national courts of the Member States over defendants domiciled in third states (e.g. third state subsidiaries of Union companies) except for limited exceptions concerning claims brought by consumers and employees and some other claims where the domicile of the defendant is irrelevant (e.g. claims falling under exclusive jurisdiction). Jurisdiction in such cases is determined by the domestic law of the Member States. Most EU Member States provide for jurisdiction of their courts over third state defendants when some connection to the Member State concerned exists, for instance when the defendant company has assets within that Member State or on the basis of *forum necessitatis* rules.
Significantly, the UNGPs had no practical impact in EU Legislative activities when the extension of jurisdictional rules of the Brussels I regulation to third State defendants was discussed in the framework of the recast of the former Brussels I Regulation (i.e.: Regulation 44/2001).
But, it should be highlighted that, in its proposal of 2010, the Commission had proposed to increase access to European Member States' courts in civil and commercial disputes even if the defendant was domiciled in a third State, insofar as there was a link with the European Union. In the same spirit, always the Commission, had proposed to establish a *forum necessitatis* which would allow claims to be brought before the courts of the Member States in situations where there would be a risk of denial of justice if no access to court were foreseen in the EU.

[36] The *forum non-conveniens* doctrine allows, where it is applied, courts to prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is ostensibly more convenient for the parties and witnesses.
[37] Reference is made here to the ECJ judgement Owusu v. N.B. Jackson Case C-281/02 concerning the Brussels I Convention.

Reaching its policy *zenith*, the Commission finally proposed an additional jurisdiction rule for disputes involving third State defendants, namely, a jurisdictional ground based on the presence of the defendant's assets in the Union.
Quite surprisingly – but one get many surprises when looking into the decision making of the EU Parliament on Private International Law issues – the Commission proposal, although happening to be in line with the UNGPs, was not supported by the Council and the European Parliament.
As a conclusion, Regulation Bruxelles I *recast* does not contain a fully harmonised jurisdictional regime (except for the benefit of EU consumers and employees) nor does it contain a *forum necessitatis,* nor it provides rules to ground jurisdiction on transnational corporations organized as a group of companies.

3. Collective redress

Collective redress mechanisms could decrease the costs of litigation for victims of human rights infringements. At EU level, the Commission adopted a Recommendation on collective redress[38], which establishes common principles on collective redress for ensuring effective access to justice against violations of rights granted under EU law. The Recommendation encouraged EU Member States to establish collective redress mechanisms and implement these principles by July 2015. However, it does not seem that all EU Member States have implemented that.
Hence, countries like Lithuania, France, Belgium and United Kingdom have recently adopted new legislation in the field of collective redress. The Netherlands is considering introducing judicial compensatory collective redress in its national system.
Yet, even from the perspective of regulating collective redress, the EU is in a unique position to assist Member States in adopting appropriate and possibly uniform measures and, in this way, contributing to the full realization of the UNGPs under pillar three.

4. Application of legal aid in cross-border disputes

Another problematic area from the standpoint of the UNGPs is that concerning the costs involved in cross border disputes. Here Directive 2003/8/EC on legal aid ensures that persons lacking sufficient resources are offered legal aid on the assumption that it is necessary for them to pursue their claim and ensure their access to justice. The Directive applies to persons domiciled or habitually resident in a Member State, irrespective of whether they are an EU citizen or third country national. However, it does not apply to third country residents although they may be covered by other international instruments. Legal aid in the sense of the Directive includes pre-litigation advice and legal assistance and representation in court, as well as an exemption from the cost of proceedings. It notably covers costs related to the cross-border nature of the dispute. All this are barriers to access to justice in the spirit of the UNGPs and thus the EU may exercise its competencies to harmonize further this matter.

5. The applicable law: Rome I and Rome II Regulations

If a court in a EU Member State has jurisdiction in a case with a cross-border element, then the next step is to determine which country's law is

[38] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law, OJ L 201, 26.07.2013, p. 60.

applicable to the dispute. The main conflict of laws rules to be applied by EU Member States Courts have been largely unified at the EU level by the Rome I Regulation for contractual obligations[39] and by the Rome II Regulation for non-contractual obligations (including torts and delicts)[40]. It could have been a conflict of laws revolution but instead it has been a partial conflict of laws evolution[41], especially when confronted with the UNGP framework.

The Rome I Regulation may be relevant whenever corporate human rights violations occur vis-à-vis parties with whom a European parent corporation has a contractual relationship, for example in a supply chain. If a code of conduct embodying human rights has been incorporated in a transnational supply contract, we have what I have called a "contractualization of human rights"[42]. The Regulation generally allows the parties to choose the applicable law. In the absence of choice, it prescribes the applicable law of the country where the party required to effect specific performance under the contract has its habitual residence. This can be the law of a third country. Irrespective of the applicable law in a given dispute, the court will be able to apply the overriding mandatory provisions of the law of the forum. Special rules also exist to protect employees under the Regulation and it is undisputed that human rights are part of the *ordre public* of each EU Member State[43].

With regard to tort, according to the general rules of the Rome II Regulation, the applicable law is that of the country where the damage occurs(*lex loci damni*, art.4.1 and 7). This rule is irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

In the case of corporate human rights violations this rule could lead to application of the substantive laws of the third State which would then govern the establishment of liability, damages, the limitation periods, etc. However, if the *lex loci damni* contains very low level of human rights protection this solution is definitely not the best one in terms of policy since the victim will have to hope that the Court will apply the overriding mandatory rules (*lois de police*) or the *ordre public* of the *lex fori.*

This rationale explains why the EU legislator has introduced a special rule only for transnational environmental damages. In these special circumstances, the law applicable to a noncontractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the *lex loci damni*, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred. This special conflict of law rule, leads to a policy of prevention, by indirectly compelling companies established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries. This particular technique removes the incentive for an operator to opt for low-protection countries[44], in line with art.191 TFEU.

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[39] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

[40] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

[41] See for ex. R. Michaels, "The new European Choice of Law revolution", in Tulane Law Rev., 2008, '.1607 ff.; N. Boschiero (ed.), La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I), Torino, 2009; F. Galgano, F. Marrella, Diritto del commercio internazionale, 3 ed., Padova, 2012, 328 ff.

[42] F. Marrella, "Human Rights, Arbitration and Corporate Social Responsibility in the Law of International Trade", in W. Benedek, K. De Feyter, F. Marrella (eds.), Economic Globalisation and Human Rights, CUP, Cambridge, 2007, vol. 1, pp. 266-310.

[43] See for ex. P. Kinsch," Droits de l'homme, droits fondamentaux et droit international privé", RCADI, 2005, v.318, p.9 ff.

[44] See Commission Proposal COM(2003) 427 final 2003/0168 (COD) of the 22 Jul. 2003 for a Regulation of the European parliament and the Council, on the Law Applicable to Non-contractual Obligations (« Rome II ») and comments by H. Muir Watt, "Rome II et les "intérêts gouvernementaux" : pour une lecture fonctionnaliste du nouveau règlement du conflit de lois en matière délictuelle", in Le règlement communautaire "Rome II" sur la loi applicable aux obligations non

Thus, it is not by chance that *whereas* n.25 of Regulation Rome II states that "Regarding environmental damage, Art.174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised". A consideration that should not be limited to environmental issue but should be extended by the European legislator to the entire spectrum of UNGPs issues.

Finally, the Rome II Regulation builds in certain safeguards allowing exceptions to the obligation to apply foreign law when it is necessary to take into account considerations of public interest. Under the Regulation, Courts may refuse to apply a provision of a foreign law on the grounds that the result of such application would be incompatible with their public policy. This may be the case for example if the foreign law legitimises manifest breaches of human rights. The ECJ has already developed clear guidelines on the concept of public policy under the EU civil justice instrument, particularly in the framework of the Brussels I Regulation. The Rome II Regulation also allows not applying foreign law when certain provisions in the forum State are of an overriding mandatory nature, which means that the forum State may apply such provisions irrespective of the law otherwise applicable to the non-contractual obligations at issue.

6. Mutual recognition

When it comes to fostering access to judicial remedies in civil and commercial matters, the EU has developed a functioning system of mutual recognition between EU Member States. The EU's legal framework lays down clear rules on the recognition and enforcement of judgments between EU Member States. This legal framework is backed up with rules which allocate jurisdiction as well as applicable law between EU Member States, and which set certain mandatory standards of procedural law to be applied across the EU. However, recognition is made within the confines of ordre public which embodies human rights standards before EU Member States domestic courts.

7. Towards an EU criminal justice for business and human rights?

Often, business-related human rights abuses are crimes. Thus, it is legitimate to wonder whether also in this field the EU has the competence to regulate.

The EU has started to adopt acts concerning the financial sector concerning, *inter alia*, the fight against crimes in the financial sector, fraud and the protection of the euro. The Lisbon Treaty has provided a specific legal basis to adopt criminal legislation at an EU level in the area of procedural criminal law and substantive criminal law.

Under art.82 of TFEU, the EU may establish minimum rules to facilitate mutual recognition of judgements and judicial decisions, as well as police and judicial cooperation in criminal matters that have a cross-border dimension. So far, legislation was adopted on the mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings, or the rights of victims. In the future, this scope may be extended

contractuelles, S. Corneloup et N. Joubert (eds.), op. cit., p. 129 ff.; O. Boskovic, Les atteintes à l'environnement, in Conflits de lois et régulation économique, M. Audit, H. Muir Watt et E. Pataut (eds.), Paris, 2008, p. 195 s.

if the EU Council wishes to identify other aspects of criminal procedure for approximation.
Art. 83, on the other hand, concerns the regulation of substantive criminal law, and states that the EU Council and the European Parliament may establish minimum rules on the definition of criminal offences and sanctions in the area of particularly serious crimes with a cross- border dimension. This concerns terrorism, trafficking in human beings and sexual exploitation of women and children, drugs and arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.
In addition, Article 83(2) allows the establishment of "minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to a harmonisation measure". This rule does not list specific crimes, but makes the fulfilment of certain legal criteria a precondition for the adoption of criminal law measures at EU level. Nonetheless, there are a number of policy areas which have been harmonised and where it has been established that criminal law measures at EU level are required. This concerns notably measures to fight serious damaging practices and illegal profits in some economic sectors in order to protect activities of legitimate businesses and safeguard the interest of taxpayers[45].
In the field of the protection of the Union's financial interests, the EU can establish a European Public Prosecutor's Office responsible for the investigation, prosecution and bringing to judgment of perpetrators of, and accomplices in, offences against the Union's financial interests[46].

8. Liability of Legal Persons for offenses in the EU

There have been already instruments adopted at the EU level that require Member States to ensure the liability of legal persons, such as the Second Protocol of the Convention on the protection of the Communities' financial interests of 1997[47]. Member States should ensure that legal persons held liable are punished by effective, proportionate and dissuasive sanctions, which may be in the form of criminal or non-criminal fines and may include also other sanctions. Similar provisions exist in the area of environmental law. However, uniformity has not yet fully achieved among EU Member States even if some States, such as Italy, do have adopted specific and effective measures for criminal liability of legal persons. Today, *societas delinquere potest!*
Finally, in the area of Criminal Procedural Law, measures have also been taken to facilitate the mutual recognition of decisions and judgments. These aim to combat serious cross-border crime, which may include crimes perpetrated by business entities. Measures include the European Arrest Warrant, the European Investigation Order, the Framework Decision on the Mutual Recognition of Financial Penalties, and the Framework Decision on the application of Mutual Recognition to Confiscation Orders (2006)[48]. Many of these instruments contain remedies provisions to protect the fundamental rights of the suspected/accused person.

[45] Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse, OJ L 173/179 of 12 June 2014.
[46] COM(2013) 534 final.
[47] OJ C 221, 19.7.1997, p. 12..
[48] Council Framework Decision 2006/783/JHA of 6 October 2006, OJ L 328 of 24.11.2006, p59-78.

9. Other specific regulatory instruments

In other policy areas as well as sector-specific policies, the Commission adopted measures to ensure that victims of corporate-related harm have access to judicial remedies. For instance, in terms of trafficking in human beings, art. 5 in the anti-trafficking Directive (2011/36/EU) clearly stipulates that Member States shall take the necessary measures to ensure that legal persons can be held liable for the offense of trafficking in human beings.

The *Employer Sanction Directive*[49] forbids the employment of irregularly staying third- country nationals and establishes minimum standards across the EU on financial and criminal sanctions and measures against employers who violate this prohibition. Under the Directive, before recruiting a third-country national, employers are required to check if they are authorised to stay, and to notify the relevant national authority – the start of a working relationship; employers who comply with these obligations in good faith cannot be held liable if it turns out that a third-country national produced a forged document and was not entitled to stay and work in the EU. As many irregularly-staying migrants work in private households, the Directive also applies to private individuals as employers. This Directive also provides for criminal sanctions for the employers of illegal third country nationals who use work or services from these persons with the knowledge that they are victims of trafficking. At the same time, this instrument grants some rights to and facilitates access to justice for irregular migrants either directly or through third parties, such as trade unions or other relevant associations. Member States have to ensure that employers who hire irregular migrants are liable to pay any outstanding remuneration to them, even after they have left the EU.

B. Non-judicial remedies and UNGPs 27-30

Alternative Dispute Resolution (ADR) mechanisms may be effective and in some cases preferable, for example by providing early-stage recourse and resolution. Such mechanisms may be based on mediation (such as via National Contact points under the OECD Guidelines) or adjudication (such as government-run complaints offices), but in all cases should meet the criteria set out in UNGP 31. There should be no practical or procedural barriers to access for non-judicial remedies.

1. Mediation, "the queen" of ADR methods

EU Law promotes the use of mediation in cross-border disputes by obliging EU Member States to grant the parties certain procedural guarantees and to ensure that the agreement resulting from mediation are enforceable[50]. While this obligation is limited to disputes involving both parties domiciled in different Member States, some Member States have transposed part of the rules in a broader way, thus covering cases involving parties from third countries.

[49] 2009/52/EC of 18.6.2009, Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

[50] See Mediation Directive 2008/52/EC which is designed to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes. The Directive requires Member States to establish a procedure whereby an agreement reached through mediation can be made enforceable by a court.

2. The EU and OECD National Contact Points

The European Commission takes part in the work of the OECD, but does not have the right to vote on decisions or recommendations presented before the OECD Council for adoption. Nonetheless, the European Commission contributes to work on the OECD guidelines for multinational enterprises. However, since National Contact Points (NCPs)[51] are set up by adhering governments there is no NCP for the EU. The main role of NCPs remains that to undertake promotional activities, handling enquiries and contributing to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances.

Under this mechanism, NCPs are tasked to provide a platform for discussion and assistance to stakeholders to help find a resolution for issues arising from the alleged non-observance of the Guidelines, thereby contributing to the implementation of UNGPs. In such a framework, the European Commission encourages coordination among EU Member States NCPs, including concerning their working practices and monitoring.

3. Information on access to justice: the role of the EU Fundamental Rights Agency (FRA)

Last but not least, the EU is active in the study and evaluation of access to remedies in order to gain a coherent understanding of the legal and institutional frameworks pertaining to civil justice in business and human rights. In this respect, in June 2016, the EU Fundamental Rights Agency (FRA) has published a valuable report that summarises the key European legal principles in the area of access to justice, focusing on civil and criminal law[52]. Such a report has collected the key legal standards set by the European Union (EU) and the Council of Europe, particularly through the case law of the Court of Justice of the European Union and the European Court of Human Rights.

CONCLUSION. A CURIOUS EXAMPLE OF SHARED RESPONSIBILITY.

Today, the UN Guiding Principles on Business and Human Rights remain the most practical, widely-endorsed and wide-ranging approach to preventing and redressing business-related human rights abuses.

Being the first economic power on Earth, the EU has the potential to be an international game-changer when it comes to business and human rights. It also has a moral responsibility, because of the large numbers of European companies involved in global value chains. But there are also key legal aspects to consider.

In the general context of International Law, another EIUC Colleague, Jan Klabbers has observed that "the coexistence of different systems of responsibility sometimes makes for uncomfortable decision-making, and brings its own bucket of philosophical problems with it" [53]. But it should not be uncomfortable for EU institutions to realize that the responsibility of the EU as an international organization projected towards becoming a federal

[51] http://www.oecd.org/corporate/mne/ncps.htm .
[52] http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice .
[53] J. Klabbers, International Law, Cambridge, 2013, p.137.

State and EU Member States is an awkward example of shared responsibility in terms of UNGPs implementation.

At national level, EU Member States have committed, and are in many respects at the forefront in the world as regards the elaboration and publication of *National Action Plans*. The development and implementation of those plans, as well as the sharing of experiences and best practices in this regard, are crucial to move forward on the improvement of human rights in business and accordingly constituted one of the objectives set out in the EU Action Plan on Human Rights and Democracy 2012-2014.

Clearly, Business and human rights policies at national and EU level should be developed, monitored and implemented with the participation of relevant stakeholders. They should cover all three pillars of the UNGPs, and give particular consideration to lowering barriers for access to effective remedy. At the same time, the EU and its member states should consider applying a smart mix of measures to foster business respect for human rights throughout their operations.

In order to get such a "smart mix" and to assess the success of a "European global compact" in terms of full implementation of the UNGPs, it is obvious that the principle of conferral of competences from Member States to the EU should also govern the allocation of responsibilities. If the EU has "exclusive competences" then it will have an *exclusive responsibility* to make sure that its policies, internal and external, are all in line with the UNGPs.

In the case of *shared competences*, it follows that the EU and its Member States have a *shared responsibility* to implement the UNGPs[54].

If a matter falls into the category of *supporting competences,* meaning that the EU may only intervene to support, coordinate or complement the action of EU countries, then there will be an assessment of what has been done in this specific respect.

Thus, it becomes evident that the EU needs a *EU National Action Plan* as if it was a federal state. This Plan will be composed of three main parts depending on the kind of competences (exclusive, shared and supporting) and explaining what the EU has done to implement the UNGPs.

This tool will be essential both for EU policy makers and for EU Member States in order to understand, report and assess the level of horizontal and vertical coherence of policies. Not only the effectiveness of the entire "European Compact" may be periodically evaluated and appreciated, but also it will increase the Rule of Law in the EU. Finally, such a framework should also be appreciated by transnational business since stability and predictability of the Law, even in the "old continent" are key values for modern transnational corporations.

[54] This concept should be understood and developed under the light of modern International Law thinking about shared international responsibility. See A. Nollkaemper and Dov Jacobs, "Shared Responsibility in International Law: A Conceptual Framework", in Michigan Journal of International Law, 2013, p.359 ff.