

B. Article 1

Brief Reflections on the 8th U.N. Forum on Business and Human Rights

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The 8th United Nations Forum on Business and Human Rights took place in Geneva from 25 to 27 November 2019. I was truly honored to have had an opportunity to attend the Forum, where I presented some preliminary reflections on how my country, Italy, has been implementing the Guiding Principles on Business and Human Rights in the broader context of a globalization led by multi-state initiatives.

These brief considerations are however not about Italy, on-going multi-state initiatives such as the Belt and Road Initiative, and the necessary role these initiatives play in economic globalization. The opportunities and challenges that existed in November 2019 were typical to the field of business and human rights. And typical were also the potential ways to benefit from those opportunities, and to learn from those challenges. Multi-stakeholder initiatives, such as the creation of a toolkit presenting local best practices and consolidating the business and human rights obligations voluntarily undertaken by Italian private, civil society, and public actors and were offered as a suggestion.

These brief considerations are about the UN Forum on Business and Human Rights as an event. The Forum is without doubt the most important global event where business and human rights initiatives and best practices are discussed. At the same time, the Forum displays most of the well-known mechanisms driving the production of discourse, and the creation of regimes of truth. Several of these mechanisms have already been eviscerated in a series of posts published over the last eight years on *Law at the End of the Day*, so they will not be rehearsed here.

What might be worth discussing is instead the role that the Guiding Principles on Business and Human Rights play in relation to the Forum. To some at least, the Guiding Principles might appear closely associated to the annual Forum on Business and Human Rights. So close the connection between the Forum and the Guiding Principles seems to be, that the Guiding Principle risk being overshadowed by the very subculture born around the Forum, with its ecology of roles, characters and collective rituals. Such an overshadowing perhaps poses a formidable challenge to implementation of the 'Protect, Respect, Remedy Framework'.

How has the perception of such a close association come into existence? It seems that an identity between the Guiding Principles and the Forum has been established by 'separating' the document from the context from which it originally arose. This separation, in turn, has led to building a tower of dichotomies around the Guiding Principles. These dichotomies are however more apparent than real. They are furthermore extraneous to the Guiding Principles, the logic and the ethics enshrined in them.

Despite all of the existing challenges, the Guiding Principles are definitely moving from paper to practice, and all members of the family of nations, included Italy, are bringing a meaningful contribution to that process. Much more could of course be done, and perhaps acknowledging the autonomy of the Guiding Principles from institutional fora and formats might be a first step along that journey. This is not a criticism or an indictment of the Forum – I was truly privileged to be able to attend the event, in a year when participation to the Forum was restricted due to renovation works of the UN headquarters.

The idea that economic activity ought to be conducted in ways that are respectful of what we today refer to as 'human rights' has been articulated in different ways at various times in history, by virtually all cultures, long before narratives about 'globalism' and counter-narratives about 'localism' emerged. Closer to us in time, the idea that businesses ought to respect human rights, and efforts to embody this idea in a non-binding document have existed before the convening of the inaugural session of the Forum.

Without going back to the history of the business and human rights 'movement', the Guiding Principles were gestated between 2005 and 2011. In 2005, UN Secretary-General Kofi Annan appointed Professor John Ruggie as his Special Representative on Business and Human Rights. Between 2005 and 2008, Ruggie held extensive consultations with the private sector, civil society, and

national governments. All stakeholders shared a consensus about the need for a framework on business and human rights. At the end of several rounds of consultation, in 2008 Ruggie proposed a policy framework based on the state duty to protect, the corporate responsibility to respect, and access to effective remedy. The framework won praise from private businesses, civil society and governments. It was endorsed by the UN Human Rights Council, multinational corporations, small and medium-sized enterprises, civil society, and states.

John Ruggie received his initial mandate from the UN Secretary-General, yet the Guiding Principles are the product of the painstaking work he, Ruggie, undertook hand in hand with private businesses, civil society, and national governments across five continents. The Guiding Principles were born in a context that was neither public nor private, neither domestic nor multi-lateral. The ‘space’ where the Guiding Principles were created simply arose out of the interaction among those who supported the creation of a framework on business and human rights. Professor Ruggie received his appointment as Special Representative by the UN General Secretary, but the Guiding Principles are not, strictly speaking, a creature of the United Nations. Likewise, they are not a creature of the United Nations Forum on Business and Human Rights. The Forum was established only after the Guiding Principles were endorsed by the United Nations. The Guiding Principles are a creature of John Ruggie, and all the private businesses, civil society groups, and domestic states that supported the effort across the five continents. They were born, exist and operate outside of the conventional framework of international law. They ‘belong’ to all those private and public actors who contributed to creating them, and who are willing to put them into practice.

The ‘Protect, Respect, Remedy Framework’ exists well beyond the physical space of the United Nations Forum on Business and Human Rights. Equating the Guiding Principles with the Forum might lead to overlook the fundamental autonomy of the Guiding Principles, and also to construct a series of dichotomies that do not exist in reality. The dichotomies constructed around the Guiding Principles are not limited to the Guiding Principles. They can spill over to the Forum and all that which goes on at the Forum, and beyond it. As a result, and of course depending on the perspective one decides to adopt, all that which occurs outside of Geneva becomes more or less extraneous to the ‘world’ of the Forum. In the same way, all that which occurs in Geneva for 3 days a year is extraneous to the ‘world’ that exists beyond Geneva. It is as if two completely different worlds existed, in the absence of any

communication or interaction. This dichotomy, however, is only a seeming one. The world cannot be divided between those who are admitted to the ‘inner sanctum’ of the United Nations Headquarters, and those who are left outside its entrance gates. Neither can the world be neatly divided among ‘states’, ‘businesses’ and ‘civil society’. Because none of these divisions are real. They are just perceptions, that can be strengthened by conflating the Guiding Principles with the Forum on Business and Human Rights. Or, alternatively, that can be weakened by considering the Guiding Principles as an autonomous document. Such an autonomy is not limited to the document per se. It involves also the choices of businesses, civil society actors, individuals and governments related to the implementation of its principles, as well as the choices that relate to the interpretation of those principles. The Guiding Principles were not created by any single central authority – they are the product of a collective effort, and to everyone they belong. Likewise, the power to produce meaningful interpretations, that is interpretations of the document that can be used as a basis to enact best practices, belong to everyone.

The Guiding Principles exist both within the four walls of the United Nations Headquarters, as well as in the ample spaces outside its entrance gates. They exist both within the borders of domestic states, and outside of them. They are present across industry sectors, public and private enterprises, national borders, and civil society actors. Such is the power of soft-law instruments. They can be endorsed and used by all those who embrace the ethics behind them. They are not universal, because they are the product of the efforts of a limited number of businesses, academic, practitioners and states. At the same time, they are not local, because they were created across the five continents. They operate within the conventional framework of hard law, because they remind states to act upon the duties states have freely chosen to fulfil. But they do not contain specific prescriptions of ‘recipes’ states should follow. They operate outside of the framework of hard law, because they operated in those spaces state-based regulation cannot reach. The “Protect, Respect and Remedy” framework cannot be captured within any dichotomy, because the logic behind its drafting is a logic of modality. It is a logic that respects the fundamental diversity of all systems, that does not admit of the imposition of a single ‘one size fits all’ model, and yet it maintains the existence of a broader, overarching goal – respecting human rights. Herein lies the strength of this document.

The flexibility and adaptability of the Guiding Principles constitute not only its strength, but also its weakness. The Guiding Principles might be compared to water. Water that flows freely

enlivens the ground but, as strong and beneficial as it is, water sometimes needs to be received and contained within a structure. Otherwise water risks becoming dispersed, losing its usefulness. The Forum provides one of the possible structures where the water of the Guiding Principles can be contained and utilized to irrigate fertile ground. But a still water can become stagnant.

Stagnation can take many forms, but all of these might be conveniently subsumed under a single label – that of ‘dogmatism’. Dogmatism in interpretation, dogmatism in extracting meanings from the text of the Guiding Principles, dogmatism in creating ‘best practices’, and in prescribing them without taking into account local circumstances and their extreme variation within countries, and across countries and the globe. Perhaps, the single biggest challenge ahead for the field of business and human rights is finding approaches and ways to continue to benefit from the vivifying potential of the Guiding Principles, while avoiding stagnation.

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