

The UNGPs Third Pillar in the Italian Action Plan: an assessment of the existing NAPs and of the barriers to the Italian judicial system

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INTRODUCTION

The present contribution to the Italian Action Plan aims at giving a comprehensive overview of the right of access to judicial remedy for victims of business-related human rights abuses. This document is divided in two sections. The first part will analyse the measures related to the Third Pillar included in the National Action Plans adopted so far. The second part will focus on the main categories of existing barriers to Italian judicial remedies and will analyze the possible solutions to overcome them by providing recommendations for feasible long- and/or short-term legislative reforms.

FIRST PART: How the NAPs adopted by the EU Member States to date address the GPs Third Pillar

Due to the emerging cases of human rights violations involving transnational corporations worldwide, the conditions under which a company could be held responsible for this kind of abuses are increasing. As a consequence, the State duty to protect human rights by ensuring that victims have access to judicial mechanisms – both for human rights violations occurred within the national boundaries and abroad – could be considered as part of the State obligation to guarantee the access to remedy in such situations. In case of a lack of access to judicial remedies provided by the Home State (the State where the violation occurred), some negative impacts on the effective exercise of human rights could arise. However, in general terms, International Law provides for the right to an effective remedy, and in particular the Third Pillar of the UN Guiding Principles on Business and Human Rights (hereinafter UNGPs or GPs) is completely devoted to this topic, along with the State duty to guarantee State-based judicial mechanisms (First Pillar) and the corporate responsibility to respect human rights by providing the access to non-judicial and non-State-based mechanisms (Second Pillar).

According to the International Law, the State duty to guarantee the access to justice is strongly grounded on both the general obligation for States to protect human rights and the right of access to effective remedies. The State duty to protect has been identified by the UN Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR)¹,

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whilst the right to an effective remedy has been recognized by various UN Bodies and regional organizations, such as: (i) the UN Committee of the International Covenant of Economic, Social and Cultural Rights (ICESCR); (ii) article XVIII of the American Declaration of Rights and Duties of Man and article 25 of the American Convention on Human Rights; (iii) article 13 of the European Convention on Human Rights that calls for an “effective” remedy. Both duties apply to private entities for territorial and extraterritorial situations and are thus relevant in case of corporate-based violations of human rights.

As far as the UNGPs are concerned, the most relevant GP referring to the State duty to guarantee access to remedy is Principle No. 25, that stresses: «As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy». Following the international jurisprudence, the GPs have affirmed a positive obligation for States to conduct effective enquiries on human rights violations, including extraterritorial ones. Furthermore, GPs No. 22, 29 and 31 refer to the corporate obligation to support the establishment of State and non-State based, judicial and non-judicial remedies, that under Principle No. 31 should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue among all the involved stakeholders. In general terms, the main features of an effective judicial or non-judicial remedy should be: (i) an impartial investigation conducted by the mechanism; (ii) the cessation of the violation (if ongoing) as a primary commitment; (iii) the provision of an adequate reparation (including interim measures).

The Third Pillar within the existing NAPs

According to the available toolkits for the development and assessment of NAPs on Business and Human Rights², one of the most relevant gaps in the existing NAPs concerns the Third Pillar: no one of the NAPs, indeed, identifies an effective grievance mechanism, especially in relation to judicial actions. Consequently, it is worth mentioning the risk of a high level of impunity due to the limited possibility to file judicial and administrative claims. To this regard, States should commit to guarantee the victims with their right to have access to justice, in order to achieve some effective and relevant objectives in relation to corporate responsibility. However, some obstacles are still present and could lead to a restricted application of the Guiding Principles, both for companies – that would be compliant with human rights principles - and for victims – that would be guaranteed from human rights corporate-related abuses. Among the main obstacles identified, the insufficient financial resources available remain the most predictable one and States are thus requested to facilitate the access to financial support and justice for affected people, as well as financial reparation provided by companies. Moreover, States are asked for: (i) better coordinating the State and non State-based remedies; (ii) raising the awareness of the affected communities

¹ Human Rights Committee, General Comment No. 31, “Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, ç 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

² Namely the ENNHRI Discussion Paper (2012), International Corporate Accountability Roundtable and Danish Institute for Human Rights (ICAR-DIHR) Toolkit (2014), the updated version of the UN Working Group Guidance (2015).

about the existing mechanisms; (iii) establishing or supporting the intermediary institutions (such as the National Human Rights Institutions – NHRIs), in order to ensure a continuous information for victims.

To date, eight countries have already adopted a NAP on Business and Human Rights worldwide (six EU Member countries plus Colombia and Norway)³, namely the UK and the Netherlands in 2013, Denmark and Finland in 2014, Lithuania, Sweden and Norway in 2015. The first NAP to be released in September 2013 was the UK one. Based on the experience of the London 2012 Olympic Games, the UK Government decided to develop a report on the application of the Sustainable Sourcing Code by its business partners and to promote a wider implementation of grievance mechanisms by corporations, including extraterritorial activities. The Dutch NAP, instead, includes the so-called “Access to Facility” mechanism, established in December 2012 in order to raise the awareness of public opinion on the access to remedy. For example, the Dutch Government has committed to organize some workshops on the functioning of judicial and extra-judicial grievance mechanisms and to involve the OECD National Contact Point (NCP) in conducting CSR investigations, if necessary. The Danish NAP, instead, established a Mediation and Complaints-Handling Institution for Responsible Business Conduct aimed at ensuring a responsible corporate conduct and analyze some cases causing an adverse impact under the OECD Guidelines for Multinational Enterprises. This institution is grounded on the mediation as the main solution mechanism for finding out a common approach, both for companies and for victims. In other cases, it is possible to conduct an investigation and release a public statement (similar to the World Bank CAO Ombudsman). Furthermore, Finland and Sweden decided to promote the role played by their OECD NCPs as assessment and divulgation bodies for all the information related to the NCPs’ functioning and as a tool for filing complaints (actually, the Swedish NAP does not include specific States commitments in relation to the Third Pillar). Finally, the Lithuanian NAP contains some tools that should be realized by the Government in order to better apply the Third Pillar, such as: (i) the introduction of the class action in the administrative proceedings; (ii) the promotion of self-regulation and self-assessment activity for companies; (iii) the development of pacific resolution mechanisms for judicial and extra-judicial actions for consumers; (iv) the establishment of a pre-trial mechanism for administrative disputes.

Along with the seven countries that have already released their NAPs so far, other countries have demonstrated their pledge to be compliant with international human rights principles and standards in relation to business activities, by promoting and supporting the adoption of a National Baseline Assessment (NBA), Working Outline or draft NAPs. The first example to be considered is the Spanish second draft NAP released in June 2014, that provides for the development of judicial mechanisms for judging alleged corporate-related human rights violations committed in the Spanish territory or abroad. Furthermore, it suggested extending the extraterritorial jurisdiction, in spite of the recent change of the judicial discretion to judge on human rights abuses committed outside the Spanish territory (Art. 23, Ley Orgánica 6/1985). On the other side, among all the provisions related to non-judicial remedies, the most appreciated measure was the improvement of the OECD Spanish NCP functioning,

³ The Norwegian NAP is only available in Norwegian (January 2016).

through the establishment of a commission composed of external experts for analysing its competences and practices.

More recently, the German Government published its NBA in May 2015. Although only available in German, some information about the State-based judicial and extra-judicial remedies, as well as non-State-based mechanisms, can be found within the document. In December 2015, the Irish Government released a Working Outline of Ireland's National Plan on Business and Human Rights 2016-2019: taking into consideration the priorities set out by the Irish Government in this document, one of the most relevant action points identified concerning the access to remedy is the need to ensure it for victims of human rights abuses occurred overseas and committed by Irish companies. As far as the non-judicial mechanisms are concerned, the Irish Government committed to adopt the Draft Mediation Bill (published in 2012), that provides for the integration of mediation into the civil judiciary. Moreover, the Irish Working Outline calls for the inclusion of the OECD NCP as a mediation body for cases arising under the OECD Guidelines for Multinational Enterprises. Finally, the Irish document also refers to the individual enterprise grievance mechanism, as provided by GP No. 31, in order to investigate international best practices in terms of operational level grievance bodies for individuals and communities potentially affected⁴.

Concerning extra-European countries' experience, the US Government's commitment to develop a NAP on Business and Human Rights was clearly stated by President Obama in September 2014. According to the existing data on the content of the US NAP, with regard to the Third Pillar the document will look at the existing legal and non-legal procedures and mechanisms, including the ones designed to provide control and address allegedly irresponsible conduct of companies. Furthermore, the ICAR "Shadow US National Baseline Assessment" on Third Pillar includes some Government-wide recommendations, as well as recommendations for executive officers and departments, judiciary bodies and the Congress. Among the most interesting remarks at State level is the development of a policy taking into account businesses that do not uphold US standards for human rights and the articulation of a centralized strategy for supporting multi-stakeholders initiatives aimed at monitoring and assessing corporate conduct. As far as the South American countries are concerned, the Colombian Government launched its NAP on Business and Human Rights in December 2015, after the publication in 2014 of a first national guide for developing a public policy on Business and Human Rights. The last two parts of the Plan are devoted to the judicial and non-judicial mechanisms. In particular, Part X concerns a twofold action aimed at improving and enhancing the existing judicial remedies at State level and the right to access to justice, and it lists some measures to be undertaken, such as: (i) the promotion of a leading role of the national Ombudsman (Defensoría del Pueblo) in implementing some policies concerning the access to remedy; (ii) the drafting by the Colombian Working Group on Business and Human Rights of a baseline study referred both to judicial and non-judicial remedies for alleged corporate-related Human Rights violations; (iii) the implementation by the Ministry of Justice of some strategies for training all the judicial personnel about the relevant international

⁴ The Irish Government is also engaged in participating in the global consultation of the OHCHR Accountability and Remedy Project, following the example of the Finnish NAP.

Human Rights standards. It will also release a Settlement Plan aimed at mitigating the most relevant obstacles to an effective remedy. Finally, referring to the non-judicial remedies in Part XI the Colombian Government has committed to strengthen its cooperation with the national Ombudsman. Furthermore, it will promote a campaign for raising the awareness on the so-called mediation mechanisms and in particular the OECD National Contact Point. It will also promote a proactive dialogue among employees, trade unions, Government and businesses in order to support the use of mediation and negotiation bodies for solving labour claims and disputes.

Recommendations

It is thus possible to point out some common provisions within all the NAPs analysed, especially regarding:

- the need of promoting the engagement of the OECD NCPs in managing the instances of victims of corporate-related human rights abuses;*
- the implementation of existing legislation aimed at facilitating the access to judicial State-based remedies;*
- the establishment of mediation mechanisms, for example through the existing intermediary bodies such as the National Human Rights Institutions. All these requirements could be taken into consideration as specific recommendations for the Italian Action Plan on Business and Human Rights.*

SECOND PART: Overcoming the existing barriers to the Italian Judicial System

Access to effective judicial remedies for human rights' violations is the core requirement of the Third Pillar of the UN Guiding Principles on Business and Human Rights (UNGPs). In fact, paragraph 26 of the UNGPs, which is the first operational principle of the Third Pillar, provides that «*States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*». The commentary to this paragraph provides further guidance, but most importantly it clearly explains in the first sentence that «*effective judicial mechanisms are at the core of ensuring access to remedy*». The duty of States to ensure access to judicial remedy in cases of human rights violations is a requirement of the international law, which sets the paragraph 26 aside from the rest of the UNGPs provisions on access to remedy. The Third Pillar has to be considered in connection with the Second Pillar and in particular with the process of Human Rights Due Diligence to be carried out by businesses. The profiles of this interdependence are examined in depth below.

With respect to overcoming barriers to domestic judicial remedy, in particular regarding transnational claims, much can be done by Italy and by the European Union. The barriers to

Italian justice for claims against corporations are similar to those that are present in the legislation of other European Member States. Therefore much can be learned by the debate that has been carried out at the European level and in particular by studies like "*The Third Pillar*", published in 2013 by ECCJ, ICAR and CORE, and "*The EU's Business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts*", published at www.accessjustice.eu. These studies also well summarize the importance for victims to file their claims against the parent company based in the EU and not against a subsidiary located in a State where access to judicial remedy is often not possible due to corruption, lack of rule of law or because the subsidiary company alleged to have caused the tort does not have major assets in that State.

Below we will describe the major categories of existing barriers to Italian judicial remedies and we will analyze the possible solutions to overcome them by providing recommendations for feasible long- and/or short-term legislative reforms.

Principal categories of barriers

Firstly, considering that corporate groups are organised as a network of distinct legal entities, their separate personality and limited liability makes it difficult for victims of the subsidiary's conduct to seek reparation by filing a claim against the parent company based in Italy. Secondly, limited rules of discovery or disclosure of information makes it hard to fulfill the burden of proof in cases concerning mass violations of human rights or serious environmental damages, especially in case the tort occurred outside the EU. Thirdly, claimants have to face significant financial and procedural burdens associated with pursuing remedies through the courts. In addition, in our judicial system a fourth category of barrier to justice is represented by the excessive length of the proceedings.

Proposed solutions and recommendations

a) A mandatory Human Rights Due Diligence in order to establish the responsibility of a parent company based in Italy when a subsidiary commits a violation of human rights

Due to their limited liability and separate personality, parent companies are protected from liability when their subsidiaries (whether based abroad or not) cause harm through their direct or indirect involvement in human rights abuses. In fact, the liability of the parent company may not be engaged solely on the basis of the control it exercises or enjoys over the subsidiary where the latter commits human rights violations or contributes to such violations. Moreover, even when the claimants can overcome procedural objection of capacity raised by the defendant in the trial (*eccezione di carenza di legittimazione passiva*), it is still very difficult for the claimants to obtain evidence regarding the system of control within a transnational corporate group and/or regarding several aspects of the harmful operation occurred abroad. The outcome is that businesses receive tax-benefits and other kinds of advantages from using wholly-owned or otherwise controlled subsidiaries operating abroad while being able to avoid liability when those subsidiaries engage in human rights violations.

The UN Guiding Principles of Business and Human Rights provide a useful mechanism to alleviate this hurdle: the Human Rights Due Diligence. The notion of due diligence linked to the notion of corporate responsibility is a central piece of the Guiding Principles and involves a duty to identify, prevent, and mitigate human rights impacts that are directly linked to businesses' operations, products, or services by their business relationships, even if they have not contributed to those impacts. Moreover this process involves formal reporting to external stakeholders, including providing specific human rights impact assessments, in order to provide a measure of transparency and accountability to individuals or groups who may be impacted. In line with the Human Rights Due Diligence concept, this includes reporting on their subsidiaries, wherever incorporated and operating, and their business relationships.

Proper implementation of the UN Guiding Principle would require integrating the full extent of the Human Rights Due Diligence in civil law and if the parent company fails to exercise such due diligence in controlling the acts of its subsidiaries then a direct civil liability of the parent company should arise. In this way parent companies will have a due diligence obligation to ensure, by taking reasonable steps corresponding to the nature of their involvement and the extent of their leverage, that human rights are complied with within their sphere of influence. This kind of legislation wouldn't represent an exception in our legal system. Similarly to what may happen with regard to crime-related liability under Italy's Law 231/2001, if a business's subsidiary has engaged in human rights violations, the parent company must prove that it established and implemented an effective Human Rights Due Diligence to avoid the presumption of direct civil liability. In this context, in order to be exonerated by direct civil liability, the parent company would have to show: (a) that the subsidiary in question committed the tort/human rights violation on its own behalf and not on behalf of the parent company; and (b) that the parent company has adopted adequate, effective and specific internal compliance measures based on the due diligence process carried out.

Recommendations

- Italian law should define the level and extent of mandatory Human Rights Due Diligence required from corporations. With a mechanism similar to Law 231/2001, the parent company should be required prove that it has established and implemented effective Human Rights Due Diligence otherwise it will arise a presumption of direct civil liability in case of a human rights violation committed by its subsidiary company.

- Italy should give a clear mandate at European level to the European Commission to present a legislative proposal that would introduce such duty based on Human Rights Due Diligence for corporations to ensure a harmonized approach in all EU Member States.

b) Facilitate access to evidence in case of mass violations of human rights by expanding the scope of Article 210 c.p.c.

The capability of victims to access evidence is crucial because claimants have to provide proof that the defendant business managed, failed to manage, or was otherwise involved in the

harmful operation carried out by its subsidiary or other business partner. Such information is, however, rarely publicly available and in most situations, it is in the possession of the defendant. Limited rules of discovery or disclosure of information have a direct impact on admissibility and reliability of evidence, thus making it more difficult for victims to obtain adequate evidence.

In particular, the order of exhibition of evidence provided by Art. 210 of the code of civil procedure (c.p.c.), and especially the strict way in which it has been interpreted by the Case-Law of the Corte di Cassazione, makes this provision completely inadequate in the context of transnational litigation. In fact, such order of exhibition of evidence cannot obviate to the burden of proof on the claimant, it can concern only a specific existent document that must be specifically indicated by the claimant, and it is subject to the discretionary power of the judge. Moreover eventual costs should be anticipated by the claimant according to Art. 210 comma 3 c.p.c.

Recommendation

- Italy should modify Art. 210 c.p.c. in order to empower the judge to order the disclosure of information in the company's possession at least in the context of civil cases related to human rights violations.

c) The "Tribunale delle Imprese" (Court of Businesses) should be competent also for civil transnational claims for business-related human rights violations and judges of "Tribunale delle imprese" should receive specific training

As we can learn from the civil transnational claims for business-related human rights violations promoted in the U.K., France or the Netherlands, it is clear that these kind of lawsuits involve complex legal and procedural issues (often related with specific issues of company law or conflict of laws). For example, when courts consider cases for harm arising in another jurisdiction, a crucial juridical issues to be determined by the judge is the applicable law. Generally, the result of the analysis affects not only the applicable law for liability but also other aspects of the proceedings, such as time limitation, immunity, and remedy. When a court chooses to apply the law of the State where the harm occurred, i.e. the law of the host State, the result could form barriers for victims bringing human rights cases against businesses. Therefore there is a need for a competent judge to deal with this and other sensitive issues arising from claims for business-related human rights violations.

The specialized section in the field of business (so called "Tribunale delle Imprese"), instituted in the Courts and Courts of Appeal located in the capital of each region by D.L. 24 gennaio 2012, n. 1, seems appropriate to receive this kind of cases. Moreover the judges of those specialized sections should receive appropriate legal training on the UN Guiding Principles and on other procedural and legal issues that are common to these cases. Assigning these kind of cases to the Tribunale delle Imprese could also have the benefit to reduce the length of the proceedings.

Recommendations

- *The specialized section in the field of business (so called “Tribunale delle Imprese”) should be competent for civil transnational claims for business-related human rights violations.*

- *Judges of “Tribunale delle imprese” should receive specific training on the UN Guiding Principles and on other procedural and legal issues that are common to these cases.*

d) The instrument of class action should be improved and extended also to victims of mass abuses of human rights committed by businesses

In cases concerning mass abuses of human rights or serious environmental damages, victims should be able to pursue and settle a claim as a group. The possibility of promoting a class action would reduce the amount of time and financial resources that victims and their litigators spend on the case. Currently, it is financially and practically impossible for most victims to access courts and for lawyers to represent them. A possibility of pursuing redress collectively would provide a common access to remedy to all people affected by a particular harm. Higher damages resulting from collective actions would make litigation more feasible financially for law firms. The access to class action introduced by Art. 140-*bis* of Codice del Consumo is currently limited only to certain categories of damages suffered by consumers. Class action should be improved and amended in order to include victims of mass abuses of human rights or serious environmental damages committed by businesses.

Recommendation

-The instrument of Class Action should be improved and extended also to victims of mass violations of human rights or serious environmental damage committed by businesses.

e) National Legal aid “patrocinio a spese dello Stato” should be made accessible also to non-national claimants not residing in Italy

The existence and modalities of free national legal aid directly affect access to courts and demand for justice and influence whether victims of business-related abuses can pursue proceedings against multinational enterprises. The legal institute of “patrocinio a spese dello Stato”, as regulated by the Law on judicial expenses (D.P.R. 30 maggio 2002, n. 115), guarantees the constitutional right to access to justice provided by Article 24 of the Italian Constitution. Currently, in order to accede to the “patrocinio a spese dello Stato” the applicant should prove to have an annual income under € 11.528,41. According to Art. 90 of the over-mentioned Law, not only Italian citizens, but also foreigners and stateless people who have their legal residence in Italy have full access to the national legal aid. The Italian Case-law seems to allow the access to “patrocinio a spese dello Stato” also to claimants that are not of Italian nationality and not resident in Italy, such as asylum seekers or irregular immigrants. This principle should be clarified at legislative level.

Moreover the requirements for applicants who are not resident in Italy should be simplified, at least for victims of human rights violation. Indeed, Art. 79, D.P.R. 115/2002 requires that, in order to be admitted to the national legal aid, non-EU citizens must attach to their application

a document issued by the competent Consular or Diplomatic Authority in Italy, that certifies their income in the Country of origin. Some judicial decisions avoid this burdensome requirement for asylum seekers. This judicial solution should be recognized by law and extended to all the victims of human rights violations.

Recommendation

-“Patrocinio a spese dello stato” should be made accessible also to non-national claimants not residing in Italy.