

Applying the First Pillar of the UN Guiding Principles to Development Cooperation: The Performance of Swedish Agencies and State-owned Enterprises[§]

Rasmus KLØCKER LARSEN* and Sandra ATLER**

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I. INTRODUCTION: BUSINESS AND HUMAN RIGHTS IN DEVELOPMENT COOPERATION

The development cooperation agenda is seeing considerable emphasis on business involvement. Having long formed part of financing for development discussions, the Sustainable Development Goals also call on businesses to help solve development challenges. There are obvious reasons for this desire to involve business: private investments offer the dominant source of financing for developing countries, with official development assistance being only 1 per cent of the total international capital flows (2012 figures).¹ Meanwhile, foreign direct investment alone totals 60 per cent of developing countries' capital flows.² This distribution of economic muscle power between the public and private sectors shapes an ongoing redefinition of the respective roles of government donors and businesses, with the public sector increasingly seeking to offer 'catalytic' and 'enabling' instruments to mobilize businesses as development actors.³

In cases where conflicts of interest arise between the state's development objectives and the private sector's business objectives (or even the state's own business objectives), this particular development cooperation paradigm assumes that it is possible to reconcile conflicts of interest by proper policies and procedures. Notably, this ambition is evident

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* Research Fellow, Stockholm Environment Institute (SEI).

** Director, Human Rights and Business Practice Groups, Enact Sustainable Strategies, Stockholm.

¹ The World Bank Group, 'Financing for Development Post-2015' (2013), <https://sustainabledevelopment.un.org/content/documents/2059financing.pdf> (accessed 1 June 2015).

² Ibid.

³ See, e.g., Michael Blowfield, 'Corporate Social Responsibility: Reinventing the Meaning of Development?' (2008) 81 *International Affairs* 515, 524.

in the so-called ‘policy coherence for development’ agenda promoted by, amongst others, the Organisation for Economic Co-operation and Development (OECD) and the European Union, aiming to coordinate actions between sectors on issues of sustainable development in order to minimize contradictions and to build up synergies.⁴ However, European Member States have faced considerable challenges in implementation, owing to both limited political prioritization and a lack of concrete implementing measures.⁵

The United Nations Guiding Principles on Business and Human Rights (UNGPs) offers an authoritative articulation of states’ obligations in relation to potential business infringement of human rights.⁶ Yet, during the mandate of the former Special Representative on the topic of Business and Human Rights (SRSG) – Professor John Ruggie – there were no particular surveys, studies or reports on how the principles would be relevant in development cooperation. Concretizing what the UNGPs mean for development cooperation thus forms part, in Ruggie’s own words, of the continuing journey that will determine if the ‘heterodox approach’ he set out to combine ‘soft’ and ‘hard’ law will generate the intended regulatory dynamic.⁷

In part II of this piece, we report on a study that offers an analysis of the applicability of Pillar I of the UNGPs (the state duty to protect human rights) specifically to bilateral development cooperation.⁸ In part III, we also show how this framework helps understand the performance of state agencies and state-owned or controlled enterprises (SOEs) in one European Member State, namely Sweden. To our knowledge, this represents the first analysis as to whether Swedish development cooperation is aligned with the UNGPs, and also offers a first analysis, on a global level, of the implementation of Pillar I in bilateral development cooperation.

II. APPLYING THE UNGPs TO DEVELOPMENT COOPERATION

The original mandate of the SRSG was, in brief, to propose a conceptual and practical solution to the problem that businesses systematically escape accountability for involvement in human rights violations.⁹ The three pillars of the UNGPs emphasize the following: the *first pillar* outlines that states have a duty to protect human rights (which is fully in accordance with existing international human rights law); the *second pillar* articulates an expectation that businesses should respect human rights (that

⁴ OECD ‘Synthesis Report on Policy Coherence for Development’ (2008), COM/SG/DCD(2008)1/REV1.

⁵ Maurizio Carbone, ‘Mission Impossible: The European Union and Policy Coherence for Development’ (2008) 30:3 *European Integration* 323, 342; Rasmus K Larsen and N Powell, ‘Policy Coherence for Sustainable Agricultural Development: Uncovering Prospects and Pretense within the Swedish Policy for Global Development’ (2013) 31:6 *Development Policy Review* 757, 776.

⁶ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HCR//17/31 (21 March 2011).

⁷ John Ruggie, *Just Business: Multinational Corporations and Human Rights* (London: W Norton and Company Ltd, 2013) 172.

⁸ Rasmus K Larsen and Sandra Adler, *Business and Human Rights in Development Cooperation – Has Sweden Incorporated the UN Guiding Principles?* (2015), <http://eba.se/wp-content/uploads/2016/01/Report08.pdf> (accessed 8 September 2017).

⁹ Human Rights Commission, ‘Human Rights and Transnational Corporations and Other Business Enterprises’, Resolution 2005/69 (20 April 2005).

businesses must not infringe human rights); the *third pillar* stresses the need for access to effective remedy for victims of corporate-related human rights abuse.

Pillar I contains two foundation principles and eight operational principles. The operational principles are divided to target general state regulatory and policy functions at the state–business nexus, supporting business respect for human rights in conflict-affected areas and ensuring policy coherence. Whereas various principles of the UNGPs are applicable in the development cooperation context, in this piece we focus on two principles that most evidently apply in this context: Principle 4 (the state–business nexus) and Principle 8 (ensuring policy coherence). We differentiate between responsibilities of ministries/departments, state authorities/agencies and SOEs and consider the corporate responsibility to respect human rights (Pillar II) of the companies scrutinized.¹⁰

Based on Principles 4 and 8 of the UNGPs, we offer the following guidance on the state duty in development cooperation:¹¹

(a) The state has a duty to protect human rights against abuse, including by companies. To align with Pillar I of the UNGPs and to ensure policy coherence in the development cooperation domain, states should have proper *policies* in place, *instruct* agencies and other organs that are tasked to deliver on development cooperation to ensure that development cooperation when involving private actors does not contribute to infringement of human rights, and *effectively follow up* with the agencies on implementation. As part of their ‘instruction’ duty, a provision of relevant training, information and support should be made.

(b) Development cooperation agencies, though part of the state, have a separate responsibility under Pillar I of the UNGPs. They have a direct responsibility to consider human rights impacts of beneficiary companies that receive support or service by the agency. This would include companies that are partners in development cooperation that receive services from the agencies, including through facilitation and matchmaking and not just those that receive funding.

(c) Under Pillar II, SOEs are expected not to cause, contribute or be directly linked to human rights abuse. The UN Working Group on Business and Human Rights has in fact recommended that SOEs should lead by example.¹² Additionally, when SOEs are part of the delivery of the state’s development cooperation policy, Pillar I may also apply: abuse by SOEs may be attributed directly to the state and this may constitute a violation of the state obligations under international human rights law. Under Pillar I, the State here has a responsibility to utilize specific means of control and/or take additional steps to protect from human rights abuse.

Based on this analysis of how the UNGPs apply in the context of development cooperation and the findings from our examination of the Swedish state, agencies and companies, we have identified eight recommendations as means of guidance. We believe that implementing these recommendations would provide greater protection from corporate-related human rights harm in development cooperation.

¹⁰ For more on the responsibilities of SOEs, see Human Rights Council, ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’, A/HRC/32/45 (18 April 2016).

¹¹ For details, see Larsen and Atler, note 8.

¹² Human Rights Council, note 10.

The state (through its ministries) should at a minimum: (i) ensure that there is policy commitment to protect from human rights abuse by companies in development cooperation; (ii) leverage state agencies or SOEs to conduct human rights due diligence (HRDD) at least in high-risk circumstances; (iii) increase leverage to ensure that agencies and SOEs ensure respect for human rights in practice; and (iv) exercise suitable controls. On the other hand, state agencies and SOEs should: (i) explicitly address human rights impacts in business activities; (ii) require HRDD; (iii) monitor performance; and (iv) be transparent and disclose relevant human rights information.

Turning to the case study of Sweden below, we present the main performance gaps and areas for improvement. The gaps relate to HRDD requirements, controls and follow-up, and transparency.

III. CASE STUDY OF SWEDEN: KEY FINDINGS

Applying the above articulation of the UNGPs, we explored whether a selection of Swedish state actors in development cooperation have incorporated the UNGPs into their policy and procedures. The detailed methodology, evidence and analysis are available in the research report.¹³ We examined three categories of actors: state ministries [Swedish Ministry of Foreign Affairs (MoFA) and Ministry of Enterprise and Innovation (MoEI)], state agencies [Swedish International Development Cooperation Agency (SIDA) and Geological Survey of Sweden (SGU)] and SOEs [Swedish Trade and Invest Council, Business Sweden, Swedfund International AB and Swedish Export Credit Corporation (SEK)].

Data generation took place during 2015 and relied on, amongst others, a systematic analysis (desktop review) of more than 100 policies and implementing procedures of the identified state actors (ministries, agencies and SOEs) and qualitative assessment through more than 30 key informant interviews of how these policies and guidelines play out in select examples of concrete development cooperation activities. Draft results for each institution were shared with the respective contributors for the verification of factual content.

To structure the selection of these activities we focused on development cooperation activities in the African mining context. Human rights impacts frequently occur in this region and industry, necessitating a heightened degree of HRDD from companies and states. Moreover, the Swedish Government, through the MoEI, had recently been promoting an agenda intended to mobilize development cooperation as means to strengthen the participation of Swedish public and private actors in the Africa mining sector.¹⁴

A. Absence of Mandatory HRDD Requirements in High-risk Situations

The application of HRDD by state agencies and SOEs is explicitly required by the UNGPs (Principle 4). However, the Swedish state neither encourages nor requires

¹³ Larsen and Adler, note 8.

¹⁴ Ministry of Enterprise and Innovation, 'Sveriges mineralstrategi – För ett hållbart nyttjande av Sveriges mineraltillgångar som skapar tillväxt i hela landet' (2013).

HRDD of its agencies or SOEs in high-risk situations or in any other situations.¹⁵ The state (MoFA and MoEI) has thus left to the discretion of its agencies and SOEs to decide if and how they define their commitments to due diligence and impact assessment. While some institutions (SEK and Swedfund) demonstrate examples of good practice through their own initiative in encouraging HRDD in limited circumstances, this represents a performance gap in the state's supervision. This is particularly noteworthy combined with our observations of very varied performance of agencies and SOEs, including lack of consistency, insufficient coverage of human rights risks, inadequate level of instruction to beneficiary companies, and lack of routines for non-financial services. The fact that some state actors lacked procedures altogether was demonstrated by this statement of a civil servant: '...it's not easy to map risks in another country ... we had to trust our gut feeling and recommendations from others'.¹⁶

B. Lack of Routines for Follow-up and Controls

In order for Pillar I to be effective, the state (ministries) will necessarily need some means of follow-up and control of its agencies and SOEs. Moreover, Principles 4 and 8 also implicitly assume that controls (e.g., follow-up of HRDD results and policy coherence measures) are effective and reach the desired objectives. However, the Swedish state (MoFA and MoEI) does not have such controls or follow-up processes to ensure that agencies and SOEs live up to the policies that commit them to respecting the UNGPs in their activities.¹⁷ The absence of control is particularly noteworthy in combination with the fact that agencies and companies are left to develop their own interpretation of the human rights requirements flowing from the UNGPs. In sum, it means that the state has little, if any, *de facto* systematic oversight of how its agencies and state-owned companies interpret and enact their obligations.

C. Insufficient Transparency

The UNGPs provide an indirect expectation to disclose relevant information about human rights risks, as legal and procedural transparency is part of the foundation principles of the UNGPs (the commentary to Principle 1). Moreover, the Swedish state and all state agencies are bound by the principle of public disclosure (*Offentlighetsprincipen*) and hence transparency is a prerequisite for state action.¹⁸ However, whereas all agencies and companies examined in the study did disclose policies, only one of the five institutions (Swedfund) was able to disclose selected requested operational procedures and how they were implemented. No agency or company was able to disclose a full, relevant HRDD report. Staff at the agencies and

¹⁵ This is reflected in the review of steering documents from the relevant ministry for all five agencies/companies, none of which mention HRDD.

¹⁶ Interview with an agency representative: Larsen and Adler, note 8, 52.

¹⁷ This was evident from the document review; no steering documents or reports demonstrated systematic monitoring. For instance, SIDA has been given the assignment to formulate and report on indicators related to some of the sub-objectives in the Aid Policy Framework, although not specifically regarding business and human rights.

¹⁸ See Tryckfrihetsförordningen (SFS 1949:105), 2nd chapter. Exception to this rule is outlined in Offentlighets och sekretesslagen (SFS 2009:400). The Swedish Aid Policy Framework (2014) also places particular emphasis on the so-called 'transparency guarantee' in Swedish development cooperation.

SOEs referred to various secrecy clauses in investment, lending and financing agreements as a barrier to disclosure. As one SOE representative stated: 'In the shareholder agreement with the company there are secrecy clauses that state that we cannot disclose information without the consent of the other shareholders'.¹⁹

IV. CONCLUSIONS

This piece has analysed how the UNGPs apply to development cooperation and given examples of how the same framework helps understand the performance of Swedish development cooperation. While we found many examples of diligent efforts in agencies and SOEs, the Swedish state and its agencies and SOEs still have much work left to do in aligning policies, procedures and practices to the UNGPs. One of our conclusions is that the Swedish desire to promote business-supported development cooperation is – at present – prone to run ahead of the ability of state institutions to implement the Swedish state obligations under the UNGPs.

The concrete value of the UNGPs depends on implementing measures being put in place by the state and its institutions.²⁰ Indeed, the Swedish National Action Plan on Business and Human Rights (NAP), launched in August 2015, sets out several important action points in this regard.²¹ These include strengthening of the knowledge base and further integration of human rights considerations in the steering of SOEs. Overall, however, the NAP pays limited attention to the responsibility of the state to implement Pillar I among its ministries and agencies. For instance, throughout the Swedish NAP, HRDD is only expected by state institutions 'where appropriate' and no intentions are declared to require HRDD in line with the UNGPs. Another chief concern is the way business involvement in development cooperation serves to undermine the right to information, one of the assumed cornerstones of modern development cooperation.²² More work could be done in considering how contracts and agreements can be used to overturn general secrecy clauses.

In the interviews, civil servants and SOE staff frequently expressed that they were unsure regarding their business and human rights obligations, suggesting an acute need for training and information. Moreover, many of the policy documents of Swedish agencies and SOEs reflected confusion regarding what make up voluntary corporate social responsibility solutions and mandatory obligations and responsibilities, e.g., regarding the obligation of state institutions to 'know and show' that their support and services to beneficiary companies are not resulting in any human rights harm. Clearly, a

¹⁹ Email correspondence with SOE representative: Larsen and Adler, note 7, 64. Moreover, it was noteworthy that in the private sector partnerships, SIDA allows partner companies to place confidentiality clauses in the due diligence assessments – a mechanism most of the collaborating companies use. Email correspondence with SIDA staff, as cited in Larsen and Adler, note 7, 46.

²⁰ See Michael K Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (2014) 14 *Human Rights Law Review* 133, 147.

²¹ Government Offices of Sweden, 'Action Plan for Business and Human Rights' (2015), <http://www.government.se/press-releases/2015/08/swedens-national-action-plan-for-business-and-human-rights-to-support-swedish-exports/> (accessed 1 September 2015).

²² See Rosemary McGee, 'Aid Transparency and Accountability: "Build It and They'll Come"?' (2013) 31:1 *Development Policy Review* 107, 124.

good deal of work still needs to be done in order to dispel the voluntary–mandatory dichotomy that Ruggie set out to reconstruct into the more heterodox approach through the UNGPs.²³

Given that the UNGPs were endorsed by the UN Human Rights Council just over six years ago, we recognize that this is the beginning of a journey. To facilitate this forward journey, we believe that it could be valuable for the UN Working Group on Business and Human Rights to provide guidance (e.g., in the form of additional commentary to the UNGPs) on how the state should apply Pillar I in the context of development cooperation. Multilateral development organizations could also usefully provide guidance on how the UNGPs apply in the context of increased private sector involvement in development activities, especially in relation to the ‘public–private partnerships’. States could also more clearly describe in their NAPs how their development cooperation internalizes business and human rights norms.

²³ Ruggie, *Just Business*, note 7.