


DEVELOPMENTS IN THE FIELD

Ukrainian Business and Human Rights Strategy: A Breakthrough Delayed

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Abstract

In 2021, the first-ever Ukrainian business and human rights strategy and action plan were approved. Although a positive political shift, the Government-led endeavour failed dismally. This piece explores the drafting process and content of the policy in question, its many shortcomings and the possible way forward as business and human rights becomes even more pressing matter in times of war and in post-conflict context.

Keywords: Action plan; Business and human rights chapter; National human rights strategy; Ukraine

I. Introduction

Business and human rights (BHR) was a largely unknown topic in Ukraine until about five years ago when the academia-driven BHR discussion reached the Government. Between 2017 and 2020, a governmental BHR agenda emerged, which is best represented by several milestones. The annual BHR international forum in Kharkiv¹ was established, and the state pledged adherence to the OECD Guidelines for Multinational Enterprises, setting up a respective National Contact Point.² It adopted policies promoting responsible business conduct³ and the implementation of the Sustainable Development Goals⁴ and initiated the

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¹ Kharkiv International Legal Forum, 'VII Kharkiv International Legal Forum', <https://legalforum.nlu.edu.ua/en/> (accessed 20 September 2021).

² OECD Directorate for Financial and Enterprise Affairs Investment Committee, 'Adherence to the Declaration on International Investment and Multinational Enterprises, Ukraine: third follow-up report', DAF/INV/RD(2017)6 2 (26 September 2019), 26.

³ Cabinet of Ministers of Ukraine, Instruction No. 66-r of 24 January 2020, 'On approval of the Concept for the Implementation of State Policy in the Field of Promoting the Development of Socially Responsible Business in Ukraine for the Period until 2030' Annex.

⁴ President of Ukraine, Decree No. 722/2019 of 30 September 2019, 'On Sustainable Developments Goals of Ukraine for the Period until 2030'.

implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) by conducting a comprehensive BHR National Baseline Assessment.⁵ It also incorporated BHR into the Ombudsperson's yearly activities⁶ and launched an Intersectoral BHR Platform.⁷ Importantly, the Government publicly committed to pursue the adoption of a standalone National Action Plan (NAP)⁸ in order to frame a national BHR strategy.⁹ The 2021–2023 National Human Rights Strategy (Human Rights Strategy),¹⁰ which was approved in March 2021, sent a positive signal, by featuring a BHR Chapter for the first time, despite some issues with the content. However, the Action Plan that followed in June 2021 put an abrupt stop to this positive trajectory.

This piece analyses the content of the Ukrainian BHR Chapter and Action Plan. It demonstrates that despite representing an important political step forward, they failed to set a sound foundation for the implementation of international BHR standards. While the Ukrainian BHR Chapter and Action Plan illustrate Ukraine's commitment to advancing the BHR agenda, they leave significant room for improvement. This piece is divided into five main parts. Following the introduction, the second section discusses specific shortcomings of the BHR Chapter, while the third section presents the Action Plan drafting process, its scarce final text, and the Government's justification for it. The fourth section derives lessons learned from the Government's argumentation and suggests a way forward. The final section concludes.

II. The Flawed Ukrainian Business and Human Rights Chapter

The inclusion of a BHR Chapter in the Ukrainian Human Rights Strategy seemed like a decisive step forward. However, upon a closer look, it contains major internal incoherencies, as its strategic goals, objectives, expected outcomes and indicators hardly align with the problem to be solved.

The first strategic goal states that businesses ought to 'apply a human rights-based approach while conducting business activity'.¹¹ Notably, it refers to a human rights-based approach (HRBA), that is, '[a] conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights'.¹² As observed,

⁵ Olena Uvarova, *The National Baseline Assessment on Business and Human Rights in Ukraine* (Kharkiv & Kyiv: Yaroslav Mudryi National Law University, Danish Institute for Human Rights & Ministry of Justice of Ukraine, 2019).

⁶ Secretariat of the Ukrainian Parliament Commissioner for Human Rights, 'Strategic Action Plan', <https://ombudsman.gov.ua/uk/strategichnij-plan-diyalnosti> (accessed 25 April 2022).

⁷ It was tasked with ensuring multi-stakeholder cooperation and promoting the UNGPs' implementation. Secretariat of the Ukrainian Parliament Commissioner for Human Rights, 'The Inaugural Meeting of the Intersectoral Platform on Business and Human Rights Took Place', *Ukrainian Parliament Commissioner for Human Rights* (15 December 2020), <https://www.ombudsman.gov.ua/ua/all-news/pr/v%D1%96dbulosya-ustanovchezas%D1%96dannya-m%D1%96zhsektoralno%D1%97-platformi-z-pitan-b%D1%96znesu-%D1%96-prav-lyudini/> (accessed 6 April 2021).

⁸ United Nations, 'High Level Plenary – Forum on Business and Human Rights', *Human Rights Council* (16 November 2020), <https://webtv.un.org/en/asset/k17/k17on6gbb1> (accessed 14 April 2021).

⁹ Thirty countries have published such National Action Plans as of 1 May 2022. Danish Institute for Human Rights, 'National Action Plans on Business and Human Rights', <https://globalnaps.org> (accessed 1 May 2022).

¹⁰ President of Ukraine, Decree No. 119/2021 of 24 March 2021, 'On approval of the 2021-2023 National Human Rights Strategy' Annex s 4 para 16 'Ensuring human rights in the course of conducting business activity'; hereinafter – the translation is kept close to the literal one to highlight that the drafters have not yet adopted terms commonly used in the BHR field.

¹¹ Hereinafter, citations from the BHR chapter will appear in italics.

¹² Office of the High Commissioner for Human Rights, 'Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation', HR/PUB/06/8 (December 2006) 15.

although an HRBA is mainly applied as a methodological framework to development assistance by the UN and other organizations, human rights-based terminology has entered the language of more significant business undertakings, as a result of the UN Global Compact and the UNGPs.¹³ Nevertheless, an HRBA is a broad conceptual/methodological framework that is not specifically designed for businesses. Instead, the ‘Protect, Respect and Remedy’ Framework underpinning the UNGPs, and the following soft and hard law instruments provide more suitable and adequate reference points for businesses.

Therefore, it is unclear, especially considering further references to the UNGPs, why the BHR Chapter refers to the HRBA and the meaning assigned within the BHR context. It is problematic to draw a correlation between the first strategic goal and the elements of other chapters. This is compounded by the fact that another strategic goal (access to remedy), several objectives (capacity-building, awareness-raising) and respective expected outcomes may fall within that broad scope of HRBA.

In addition, under the HRBA’s non-discrimination principles, vulnerable groups should be protected against discrimination,¹⁴ while the UNGPs should be implemented non-discriminately.¹⁵ Despite both frameworks envisioning the inclusion of (all) vulnerable groups, as many as four out of seven key indicators within the BHR Chapter specifically address persons with disabilities. Moreover, the nature of these indicators (social security, employment, access to transportation) makes their link to the strategic goal on the HRBA, as well as to the objective on UNGPs implementation, rather vague. Instead, they align more closely with the Human Rights Strategy’s chapter on discrimination, namely its objective to ensure access to transport and work for persons with disabilities, among other things.¹⁶

The second strategic goal set by the BHR Chapter states that ‘victims of business-related human rights violations have access to effective remedy’.¹⁷ Ironically, it virtually does not address the problem to be solved, which are ‘instances of human rights violations by businesses (in particular, in areas of labour relations, personal data protection, consumer protection, and environmental protection)’.¹⁸ Instead, it aims at achieving access to effective remedy, i.e., something that should go after such violations. Needless to say, both the prevention of violations and access to justice should have been covered by this strategic goal. This discrepancy is particularly noticeable in light of the first objective – *the UNGPs and the Council of Europe Recommendation CM/Rec(2016)3 on Human Rights and Business (CoE Recommendation) implementation* – as preventing business-related human rights violations is one of the underlying principles of both of these instruments. Had prevention been included, it would have addressed the missing link to the problem identified in the BHR Chapter.

Although the second strategic goal has a correlative expected outcome (‘access to judicial and non-judicial remedies for human rights violations that occur while conducting business activity is provided’),¹⁹ the seemingly correlative key indicator for it (‘number of complaints to the state authorities on business-related human rights violations’)²⁰ is inadequate. The number of complaints may not reflect the number of actual violations as not every violation

¹³ Morten Broberg and Hans-Otto Sano, ‘Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences’ (2018) 22 *The International Journal of Human Rights* 664, 667, 676.

¹⁴ Office of the High Commissioner for Human Rights (2006), note 12, 7, 12.

¹⁵ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011).

¹⁶ President of Ukraine (2021), note 10.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

is followed by a complaint. For example, a company may settle an issue with a victim early precisely to prevent her from filing a complaint with the respective state authority. Furthermore, the 2020 National Human Rights Survey showed that 40 per cent of Ukrainians have not tried to protect their violated rights to begin with.²¹

Finally, one more objective of the BHR Chapter that is worth noting aims ‘to strengthen the capacity of state and local authorities to implement the UNGPs [CoE Recommendation]’.²² Conspicuously, none of the expected outcomes or key indicators respond directly to this objective. At the same time, without reaching this objective, the BHR agenda in Ukraine is doomed to remain purely academic. To succeed, the BHR agenda must also become government-led.

The flaws of the BHR Chapter are not an isolated phenomenon, but also encompass a weakly designed Action Plan, as the next section will show.

III. ‘Empty’ Action Plan on Business and Human Rights

The Presidential Decree of March 2021 obliged the Government *inter alia* ‘to develop, involving representatives of public authorities, local governments, civil society institutions, leading national researchers and international experts, and approve *within three months* an action plan for the implementation of the [Human Rights Strategy]’.²³

In fact, the drafting of the Action Plan preceded the adoption of the Human Rights Strategy and took place in late 2020, as announced by the Ukrainian Ombudsperson’s representative at the 1st Regional BHR Forum in Eastern Europe and Central Asia.²⁴ Notably, the drafting process involved online consultations with experts, civil society, and business representatives,²⁵ which resulted, as reported, in more than 50 proposed actions on BHR.²⁶

In early January 2021, the Ukrainian Ministry of Justice (MoJ) published the draft Action Plan for public consultations, which featured four actions:

- (1) Conducting a study on the best practices of implementation of the UNGPs, the Ten Principles of the UN Global Compact, and the CoE Recommendation;
- (2) Consulting with business representatives and state authorities on the aforementioned implementation;
- (3) Developing guidance for businesses to ensure the compliance of internal strategies, policies and operations with international human rights standards including the above;

²¹ Those who tried protecting their human rights appealed to: 15.8% (court), 13.8% (local authorities), 11.5% (police), 6.9% (the Prosecutor’s Office). Ilko Kucheriv Democratic Initiatives Foundation, ZMINA Human Rights Centre & United Nations Development Programme in Ukraine, *What Ukrainians Know and Think of Human Rights: Third Nationwide Study (2016-2018-2020)* (Kyiv: UNDP, 2020) 3–4.

²² President of Ukraine (2021), note 10.

²³ President of Ukraine (2021), note 10, 4 para 2(1) (emphasis added).

²⁴ Elzbeta Karska, ‘Business and Human Rights in Central and Eastern Europe: Restoring Trust for a New Social Contract’, opening speech at the 2020 UN Forum on Business and Human Rights on 18 November 2020, 10, https://static.sched.com/hosted_files/2020unforumbhr/c7/CEE%20session_2020_FINAL%20Rus%20revised.pdf (accessed 31 March 2021).

²⁵ Ministry of Justice of Ukraine, ‘Thematic groups on the development of an action plan for the implementation of the 2021-2023 National Human Rights Strategy to meet in October’, <https://minjust.gov.ua/news/ministry/protyagom-jovtrnya-v-minyusti-vidbudutsya-zasidannya-tematichnih-grup-schodo-rozrobki-planu-diy-z-realizatsii-natsionalnoi-strategii-u-sferi-prav-lyudini-na-period-2021-2023-rokiv> (accessed 1 May 2022).

²⁶ UNDP Ukraine, ‘First findings of UNDP research on Business and Human Rights are presented’ *UNDP Ukraine* (2 December 2021), <https://www.ua.undp.org/content/ukraine/en/home/presscenter/pressreleases/2021/first-findings-of-undp-research-on-business-and-human-rights-are.html> (accessed 1 May 2022).

- (4) Preparing a draft law on introducing economic incentives for business entities that implement and ensure that human rights standards are upheld while conducting business.²⁷

After the Human Rights Strategy was adopted in March, the original draft Action Plan was updated accordingly and, as of late May 2021, included two proposed actions on BHR: a study on best practices and preparing a draft law on introducing economic incentives for responsible business. It is worth emphasizing that the updated draft was not published for public consultations.²⁸

The Action Plan for implementing the Human Rights Strategy was approved by the Ukrainian Government in June 2021,²⁹ complying with the time frame set by the President. However, it did not meet his requirement of developing the plan through a multi-stakeholder process. More significantly, the approved Action Plan featured *just one proposed action on BHR*: the aforementioned study on best practices. This was due to the MoJ's rejection of over 50 actions proposed by the expert community and business. The 'surviving' three actions were then reduced into only one action from the previous drafts. The study on best practices can contribute to raising awareness on BHR³⁰ but cannot by itself bring about change in corporate conduct. For that, wide stakeholder engagement, guidance for business (on BHR in times of war and post-war context in particular) and economic stimuli for responsible business as well as a specific legislative framework, such as mandatory human rights due diligence, are needed. If implemented, the original draft Action Plan with four proposed actions covering some of these critical elements could have made a long-awaited breakthrough.

During the V Kharkiv International Legal Forum in September 2021, the Deputy Minister of Justice of Ukraine, when responding to my question, explained why the Action Plan only includes one proposed action on BHR. According to her, due to the lack of funding, the MoJ needed to be realistic about the actions that should be implemented under such an Action Plan. She emphasized that developing a state policy on business and entrepreneurship does not fall within the scope of the MoJ's responsibilities; however, the state policy on human rights does. The MoJ has to deal with a long list of human rights issues, not just those related to business, and therefore the Deputy Minister suggested that a governmental institution should be designated with responsibility for the implementation of the UNGPs, including the development of a standalone NAP.³¹ In the meantime, the MoJ chose to prescribe a single BHR action in the Action Plan, which can realistically be implemented. As such, the BHR developments in Ukraine leave much to be desired.

²⁷ Ministry of Justice of Ukraine, 'Notice of electronic public consultations on the draft Order of the Cabinet of Ministers of Ukraine "On approval of the Action plan to the National Human Rights Strategy 2021–2023"', <https://minjust.gov.ua/uk/m/04012021-povidomlennya-pro-provedennya-elektronnih-konsultatsiy-z-gromadskisty-schodo-proektu-rozporyadjennya-kabinetu-ministriv-ukraini-pro-zatverdzhennya-planu-diy-z-realizatsii-natsionalnoi-strategii-u-sferi-prav-lyudini-na-2021-2023-roki> (accessed 1 May 2022).

²⁸ I requested and was kindly provided with the updated draft by the MoJ on 24 May 2021.

²⁹ Cabinet of Ministers of Ukraine, Order 756-r of 23 June 2021, 'On approval of the Action Plan for the implementation of the 2021–2023 National Human Rights Strategy'.

³⁰ The similar study identifying key challenges and provides solutions for accelerating the implementation of UNGPs has already been conducted in Ukraine, see UNDP Ukraine (2021), note 21.

³¹ UNDP Ukraine, 'Business and Human rights in Ukraine: Accelerating Sustainable and Equitable Development through Implementation of the UN Guiding Principles on Business and Human rights', *UNDP Ukraine* (16 June 2022), <https://www.undp.org/ukraine/publications/business-and-human-rights-ukraine-accelerating-sustainable-and-equitable-development-through-implementation-un-guiding> (accessed 25 June 2022).

IV. Lessons Learned and a Way Forward

Over the course of approximately five years, the BHR agenda in Ukraine has evolved from discussions in academic circles to a state policy. The response of the Deputy Minister of Justice on why the Action Plan falls short of including all the proposed actions, invites the opportunity to draw several lessons learned.

First, the argument about the necessity to ‘be realistic’ comes from the MoJ’s experience with the 2015–2020 National Human Rights Strategy. In late 2020, human rights experts kept criticizing the MoJ for the strategy’s low performance rate (of about 30 per cent).³² As a result, the MoJ decided to keep the 2021 Action Plan shorter to avoid a similar situation. The underlying logic was that the less they promise, the less they may fail. However, this seems problematic when it comes to a state policy on human rights promotion and protection, for which another logic applies: the less they promise, the more they fail. In this case, by minimizing the ambitions of the Action Plan, the MoJ withdrew the excluded BHR issues from the attention of state authorities, as they can only (be asked to) attend to what is required under the law and policy.

Second, the ‘not our responsibility’ argument could have been persuasive had the MoJ not initiated the implementation of the UNGPs in the first place, conducted the 2019 National Baseline Assessment on BHR, and had the very same Deputy Minister of Justice not confirmed during the 2020 UN BHR Forum that a standalone NAP would be developed.³³ Although the MoJ may be responsible for the BHR Chapter as a policy, its implementation should involve multiple actors, considering that national strategies are complex by design. Notably, two proposed actions which were eventually cut from earlier Action Plan drafts – including the most ambitious one on preparing a draft law which would introduce economic incentives for the responsible business – clearly specified that the Ministry of Economy was primarily responsible for their implementation, not the MoJ. Similarly, the third proposed action cut from the drafts, as well as the single action ultimately approved, named the Ministry of Economy and the Ombudsperson secondarily responsible for their implementation.

Third, I agree with the Deputy Minister of Justice that a designated body should be responsible for the implementation of the UNGPs, including the development a NAP. In this regard, it should be mentioned that in mid-December 2020, the Ukrainian Ombudsperson inaugurated the Intersectoral BHR Platform, which is tasked with ensuring multi-stakeholder cooperation and promoting the UNGPs’ implementation.³⁴ Although the Platform mainly focuses on promotional activities, this kind of multi-stakeholder body can potentially advance BHR development in Ukraine if the political will is there. Another option is to designate a ministry and/or a steering committee to do the job, following the experience of multiple other states. For example, Pakistan’s NAP, developed in a genuine multi-stakeholder process, provides for the establishment of the NAP Secretariat responsible for the coordination of NAP implementation (coordinating relevant entities, strengthening an implementation plan if required, collecting and managing relevant data, promotion, review and evaluation) and a NAP Steering Committee responsible for implementing the proposed actions.³⁵

³² See, for example, ZMINA, ‘National strategy on human rights 2.0: the authorities throw out inconvenient human rights measures from the action plan’, <https://zmina.info/articles/naczstrategiya-z-prav-lyudyny-2-0-vlada-vykydaye-nezruchni-pravozahysni-zahody-z-planu-dij/> (accessed 25 June 2022).

³³ United Nations (2020), note 8 (Deputy Minister on European Integration, Ministry of Justice of Ukraine at 1:33:57–1:34:26), <https://media.un.org/en/asset/k1u/k1udps52j1> (accessed 25 June 2021).

³⁴ Secretariat of the Ukrainian Parliament Commissioner for Human Rights (2020), note 7.

³⁵ Engaging a wide range of stakeholders early on and throughout the NAP drafting process as well as publishing drafts on a government-run website with an open call for public feedback and further incorporation of relevant inputs into the NAP are also good practices to use. Ministry of Human Rights Government of Pakistan, ‘First Five

As for the way forward, Russia's full-scale war of aggression against Ukraine put the BHR agenda under serious threat as the Ukrainian Government justifiably prioritizes national defence and humanitarian matters. Yet, it is crucial to realize that the BHR agenda is even more important in times of war. A brief overview of the existing key guidance on BHR in times of war shows various gaps and shortcomings, in particular due to the realities of interstate wars, such as, for example, the need to focus not only on responsible exit but also on responsibly remaining in countries where active hostilities take place.³⁶ Therefore, it is highly recommended that the future Ukrainian BHR policy includes guidance for businesses on exercising their responsibility to respect human rights in times of war and in post-conflict contexts. Another recommendation for Ukraine, as an EU candidate country, is to align its future BHR policy with the upcoming EU directive on corporate sustainability due diligence.³⁷ Finally, in line with Pakistan's good practice, the Ukrainian Government should design a better BHR policy, as well as an exhaustive NAP that includes a correlative wide-ranging set of proposed actions developed in a multi-stakeholder fashion. This time, crucially, it should be coherent, avoid confusing references, properly incorporate principles of prevention and non-discrimination, elaborate on capacity-building, and clearly define those responsible for implementation, including their roles and functions.

V. Conclusion

The BHR Chapter was included in the Ukrainian National Human Rights Strategy in 2021 for the first time. This marked a significant shift, as Ukraine adopted a BHR policy. The BHR Chapter called for the implementation of the UNGPs and the CoE Recommendation, as well as raising awareness about the UNGPs, and ensuring businesses incorporate BHR standards. It also included access to effective remedies among its strategic goals. Nevertheless, as shown above, the BHR Chapter suffers from internal incoherence and incomprehensiveness.

Moreover, the subsequent Action Plan features only one action: the study on best practices of the implementation of BHR standards. The Action Plan's limited ambition and the BHR Chapter's flaws have delayed a breakthrough in setting a sound foundation for responsible business conduct in Ukraine. Accordingly, the Government should develop a Ukrainian NAP that incorporates lessons learned from previous experiences with the BHR Chapter as well as international best practices, in a manner that is coherent and comprehensive. Most notably, it should prescribe the development of guidance on BHR in times of war and in post-conflict contexts, aligning national legislation with the EU Corporate Sustainability Due Diligence Directive and designating a state body responsible for its implementation.

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Year National Action Plan on Business and Human Rights (2021–2026)', <https://portal.mohr.gov.pk/wp-content/uploads/2021/11/NAP-BHR.pdf> (accessed 1 August 2023).

³⁶ European Coalition for Corporate Justice and Frank Bold, 'Corporate due diligence in times of armed conflict', https://en.frankbold.org/sites/default/files/publikace/eccj_due_diligence_in_armed_conflict_final.pdf (accessed 2 July 2022).

³⁷ European Commission, 'European Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937', COM(2022) 71 final (23 February 2022).