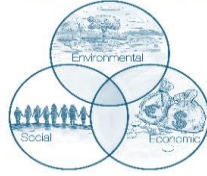




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# The Rule of Law and Corporate Actors

## Podcast with Anita Ramasastry

*About the rule of law, anticorruption and business and human rights in the Recovery Agenda for Ukraine, responsible business conduct in times of the war and post-war time, and special social expectation for corporate responsibility to respect human rights of companies with oligarchs' past.*

*“Companies that are taking a pledge to support reconstruction in Ukraine ... shouldn't just get a congratulations for being companies that support recovery, but should support responsible recovery”, - Anita Ramasastry*

**Olena Uvarova:** Hello. And we continue our podcast series: “The Rule of Law and Corporate Actors”. And today I'm honored to have as our guest Anita Ramasastry, Professor of law and Director of the University of Washington Sustainable International Development Graduate Program, OSCE Special Representative on Combating Corruption, and the former member of the UN Working Group on Business and Human Rights.

Dear Anita, thank you very much for agreeing to participate in this podcast series. And my first question to you actually is: how do you see the connections between these concepts (or frameworks) on anti-corruption, the rule of law and business and human rights? Because it's not very common situation when we discuss these concepts in connection.



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**Anita Ramasastry:** Great. Thank you so much, Olena, for inviting me to join this conversation, this important conversation. I'll first say that really what we need to think about both now and currently in a situation of conflict, but in post-conflict, when we think about Ukraine's recovery and reconstruction. There is a lot of money that is being spent, a lot of resources. For now, it is, of course, dealing with the war and of course, in the future it will be around construction, reconstruction and rebuilding in Ukraine. So when you see large amounts of money changing hands, the private sector will actually have both locally and internationally. Lots of Ukrainian companies, and lots of international companies have opportunities to win big contracts. And what we see is both in times of conflict and in times of post-conflict, when there are large amounts of money being spent in situations that are time-sensitive – we need to get weapons or defense equipment distributed quickly. And in the reconstruction phase, it will be very important for the Ukrainian people to have the economy functioning well again and to have new construction. So when those things happen, often procedures and corners are cut. This is traditional and we've seen this in many different places. We can look more recently at, for example, Iraq or Afghanistan as those situations. There are many opportunities because often there's not a solid basis, an institutional set of mechanisms to oversee the spending of this money.

So how do these different concepts relate? Well, the first one is strong rule of law, when we're talking about lots of contracts being issued by the government, lots of contracts being issued to companies, then we need strong courts that will not only make sure that contracts are properly enforced, but when there is fraud, when there is abuse of government procurement, when there is corruption. You need to have well-functioning courts, anti-corruption agencies that can help oversee and prevent the harm.

Because, again, once the money is gone or if the money is wasted, then the consequences are right now a matter of life. And in the future will again make a difference in a vibrant economy.

Second piece you need is strong safeguards to prevent corruption. We need that on a daily basis. But when the amount of money that is being spent so quickly, the opportunities and the incentives for corruption are much higher. We're not talking about paying a petty bribe to get access to your customs clearance. These are big multi-million, billion-dollar contracts. So anti-corruption and rule of law.

And third, and maybe that's the topic that people don't think about, but they should, is business and human rights, or responsible business conduct. The companies that will get the benefit of these contracts, again, local Ukrainian companies and big international ones, are getting a tremendous opportunity and we need to remember that. And so what kind of companies do we want to award those contracts to – responsible ones? Because, again, we want the construction projects to be done by companies that respect the rights of workers. We don't want forced labor, we don't want unsafe conditions. We want to ensure that the companies that are coming in will protect the rights of their customers.

So, I mean, we can talk about more issues, but just to say that it's also a piece of this. So when we talk about responsible business conduct, to me, these three go together: rule of law, anti-corruption, business and human rights.

**Olena Uvarova:** Thank you very much. And I see in this point, this principle of policy coherence and the UN guiding principles mentions it. But when we see the reality, public sector and private sector prefer to talk about post-war rebuilding and post-war reconstruction without strongly mentioning responsible business conduct. I agree that anti-corruption agenda attracts a lot of attention in Ukraine. But responsible business conduct is still not a focus of attention. And I am wondering how we can raise the interest in this topic in our society.

**Anita Ramasastry:** So I think it's, again, about educating the business community in Ukraine, policy makers, but also just the public about why this is important. And there are a couple of reasons. The first one, which I didn't mention a minute ago, but I

should, is that the other risk in the reconstruction phase is that the people who get awarded the contracts could be anyone from an oligarch to someone who has profited from the conflict. So when we think about that, we want to make sure that we screen those business relationships to make sure that people who aren't war criminals, frankly, or associated with war criminals are not benefiting now in reconstruction. So that is an important role that whatever reconstruction and recovery agency monitors contracts will need to do partner screening. It's very important. You know, we don't want sanctions violators or so forth being the ones to benefit.

Second piece is this idea just again that you want companies who will be responsible and will consider the impacts of their business models. This is not easy. And again, for any economy, but it's more challenging in post-conflict to ask companies at least to make a commitment and perhaps at least identify what are the biggest risks, in different key sectors. So, construction sector is going to be a big one. Transport.

What are the risks? We say salient, but just what are the big human rights risks to people from the reconstruction? We know worker safety issues, labor issues are going to be important. So, we need to deal with those and make sure that there are protections in place. So again, nothing will be perfect, but at least identifying where those risks are and trying to select companies that have at least some commitment to this larger issue. Because the massive scale of reconstruction means that, you know, we'll be dealing with companies who will have a huge impact on the daily lives of people.

**Olena Uvarova:** I agree. And also, I see one more challenge. You know, we don't have a really strong tradition actually to involve different stakeholders and as we know human rights due diligence actually needs to have such involvement. What do you recommend for different actors of Ukraine, for civil society organizations, for governmental institutions in this regard?

**Anita Ramasastry:** Well, I think I'd actually start before I get to civil society and government. I think the first place to start is actually with companies that, you know, we're actually chatting now. Well, the Ukraine Recovery conference is going on in England and there is a set of companies that are taking a pledge to support reconstruction. So, a conversation needs to begin with those companies to say, what are you going to think about issues of human rights and responsible business conduct? So, we should be starting now with those discussions and asking certain companies to be leaders and champions in thinking through how they will implement respect for human rights in recovery. They shouldn't just get congratulations for being companies that support recovery, but should support responsible recovery.

As part of that, I think the next piece can be that the government has an important convening role. So, there's, of course, the Ukrainian government is most important, but there are also donor governments and their encouragement to convene those multi-stakeholder conversations right now with key Ukrainian civil society partners and possibly some international human rights organizations to help develop a plan.

The conflict is still going in Syria, but the UN, as it is thinking about reconstruction in Syria, has embedded or has made reference to the UN Guiding Principles as part of reconstruction plans. So, my hope is we haven't seen that yet, but within Ukraine that we will start to see that. We have to begin the conversation now in order to be ready for those future efforts.

**Olena Uvarova:** I totally agree. And thank you for making that point. I really hope that we will see it. My next question is about what challenges you see as the most problematic? And my second question, you mentioned the Ukrainian government and you mentioned some donor governments, but what about the European Union? I'm wondering why despite having initiatives like the draft of the Directive on corporate sustainability due diligence, at the same time, we don't really see any message to Ukraine, Moldova, or Georgia urging them to make efforts in this regard. It seems like these processes are running in parallel.

**Anita Ramasastry:** Yeah. So you've mentioned, I think, two important questions. The first one is the challenges for any government. Rule of law is a challenge in a post-conflict setting. Courts are going to be tremendously stressed. And so the question is what we need are accountability mechanisms, oversight and accountability. And that's the big challenge for reconstruction. Large amounts of money, large government contracts, money spent quickly. How do you monitor, oversee, etc.?

So, I think it's for the international community to start to develop and basically look at what would be good oversight mechanisms. And they usually involve kind of key independent auditors within the government or in some kind of reconstruction agency. So, some kind of oversight mechanism, possibly alternative kinds of tribunals or dispute resolution in the event there is a problem. But it's sort of working with Ukraine to say what are those accountability mechanisms, while simultaneously investing, as you've mentioned, Olena, in basic support for the courts to be as well functioning in the commercial context in particular as well.

In terms of the European Union, I think one of the reasons and I would hope that with recovery, we'll see more attention through external action and partnership on technical cooperation with Ukraine, Moldova, and Georgia.

I think it will happen. What you're seeing now as we are talking, is that in the European Union, they're just beginning the three-party negotiation on the Directive on Corporate Sustainability Due Diligence. Heightened human rights due diligence, the whole concept of that sort of higher standard in conflict and that would include post-conflict settings, is kind of step one. That would create for many of the companies we're talking about who will be doing work in Ukraine that extra layer. So they will have to do human rights due diligence. And if not, there may be consequences. So I think that that debate is still playing out. And so, let's hope fingers crossed we see that remain. I think alongside that, you're starting to see in the trade and investment debate or agenda that discussion of the need for appropriate enhancements and measures for partner countries. So, I think it's more just about timing.

And I would say that again for you and others who are Ukrainian scholars and advocates, you're doing the right thing and, you know, making that case now about if you need more than the directives just on paper.

**Olena Uvarova:** Thank you very much for this comment. And you mentioned the oligarchs and the oligarch`s companies. And, I have this dilemma for some period of time. We still have, of course, companies which have this oligarch`s past, but actually these companies are operating quite successfully in the Ukrainian market. And they don't recognize that they had negative impact on the political system in Ukraine, on human rights, on the environment in Ukraine, on the rule of law environment in Ukraine. And now some of them pretend, you know, to be even something like a responsible business conduct champions. And I'm just thinking about what is the good solution for this situation. From one side, they are trying to do right things. From another side, they don't recognize their negative past. Should we believe them and just support them in their positive efforts, or should we make some pressure of public opinion on these companies that before you are starting to call yourself as responsible business and for being a responsible business, you should recognize that you had this negative impact on the political system of Ukraine.

**Anita Ramasastry:** You're a great professor, Olena, with a very hard question. So, you know, here's my answer. And it's one that acknowledges that moments of post-conflict are also transitional times. And so, we can think about principles of transitional justice. So, there's the immediate part, which is that what Ukraine and many economies need to sort of be resilient and strong after war is they need sort of open, transparent, and competitive markets. That what want all businesses. Because as we think about it, the oligarch-based companies historically are actually stronger and able to continue now, whereas smaller companies and companies that have never benefited from kind of cutting corners are struggling. So, I think there's sort of two pieces to this.

One is that the government and donors will need to, I think, provide incentives for smaller local companies that have been harmed by the conflict. So giving them priority because they have either been harmed before or didn't have those advantages that an oligarch-based economic enterprise did. So that's my first response.

My second one is that moving forward in the short term, it may be about making sure that the future economic transactions are as protected and as competitive and open as possible. And I'll get to the past in a minute. So that's my sort of like no matter what, looking forward, I think trying to rectify the harm to businesses that didn't play and compete honestly. And that and those tend to be smaller businesses and so forth. So, coming up with special incentives and programs to help them.

Second one is to make sure that future contracting and economic processes are as strong and open as possible. And then that third question about what to do about the past is truly one that is political. So it's not for me to say it really is for Ukraine and the Ukrainian people to decide if and when they're going to address those issues, meaning that if you can move forward in a more transparent and fair way, the fact that previously certain businesses benefited from their close relationships to politicians or got contracts based on relationships or were able to get a government license for a company and they got their wealth through this influence and relationship building. Could it be prosecuted? Maybe. Could they be stripped of their licenses? Possibly. But the resources for doing that will be significant. And when you start dealing with that kind of an issue, it becomes politically sensitive. So, it's just to say it could happen, but that is very much a political decision. It's political. Does that make sense?

**Olena Uvarova:** Yeah, I totally agree. And also, I see, you know, this link again with the UN Guiding Principles and even mostly with John Rudge's Framework about social expectations. So yeah, probably, it's about this moment when we will have this social request.



**Anita Ramasastry:** And that's just it. I mean, I think the larger issue for people who are, you know, historians, political scientists, researchers, right, is again, as a matter of transitional justice, is that part of moving forward, is acknowledging or at least somehow trying to recognize the company's past. How that happens and when it happens, and what's the right framework for addressing kind of that previous injustice or unfairness is important. But as we're seeing in many countries, right. I mean, we're still dealing with the legacy of colonial privilege that companies have. And we still haven't sorted that out. So, it's something we should just not forget. But it doesn't mean that it'll be addressed quickly.

**Olena Uvarova:** Agree. Thank you for this response. It really makes sense for us. And probably my final question, I can't stop myself from asking you about it, I think that in our region, the business and human rights agenda is replaced by the social corporate responsibility agenda. And now when we are trying to talk with companies about business and human rights, we start this conversation with business and human rights risks. We are telling: you have human rights risks in your operations. But companies take these conversations very, very hard because in their mind they are doing a lot to support Ukrainians. And we even have such label as Brave Ukrainian Business. And when you try to speak with them about human rights risks ... they take it as a criticism of them. And that's why I'm still struggling how to communicate about human rights risks with companies which have this kind of thinking and probably absolutely understandable kind of thinking in these circumstances.

**Anita Ramasastry:** Yeah, I agree with you that it is understandable. And it's not just in the context of the Russian war of aggression that you have these ideas of brave kind of companies stepping up in situations of natural disasters. If there's an earthquake or there's some kind of major issue or even the pandemic, that companies will step up and often provide positive aid. If they're a food company, they provide food, if they're pharmaceutical etc... And I think part of beginning that conversation is to say: yes, they

are addressing human suffering and the public goods. So that is a form of help and it's very important. But then I think it's just to say that they will continue to be credited and recognized for that. The business and human rights agenda is doing two things.

One is your work. It has been groundbreaking here in the context of conflict, there are very specific risks to people. If you're a utility company or a food company or a grocery store, suddenly you have different issues and really difficult decisions that have day to day impact. So, I think talking about the urgency of those decisions.

But then the longer term and I think that's what you're asking about is like, why would they want to invest in the UN Guiding Principles and all of these sort of technical things when they're just so busy dealing with the immediate crisis and trying to do good? I think that's really back to the discussion of in the future as the economy needs to be rebuilt and you want a strong Ukraine.

This is true of any country. You want to invest in those business and human rights processes because it will make your workers safer and sounder. It will make you more attractive to international markets. That this expectation is not going to go away. So don't ignore it, because it will be what makes you a more attractive company and your country a more attractive market. The fact that you are dealing with these issues that can negatively impact your supply chain, your workers and your company. So I think it's about this sort of resilience and the fact that in the future, companies that are competitive, transparent and who have invested in human rights will be the ones that will be chosen. And that's, I think, the bigger piece of that.

**Olena Uvarova:** Thank you very much. And actually these are amazing responses. And I hope that your messages will be heard by many actors in Ukraine and beyond Ukraine, because it's really important. So, thank you. Thank you very much, Anita.

**Anita Ramasastry:** And thank you so much, Olena. And again, it's been a pleasure for me to learn from you because I think again, your research is really looking at the specific situations for companies. And I think that evidence base is so important as we

try to make these more theoretical arguments. So, thank you for all the work you're doing.

**Olena Uvarova:** Thank you for your support. And it's really important to know that we have such support as yours.

**Anita Ramasastry:** Great. Thanks so much.