Human Rights Law Centre

An Australian National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights

Background Paper

24 April 2014

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1. Executive Summary

While corporations have the capacity to contribute to economic growth, poverty alleviation and human development, they can also harm the human rights of individuals and communities. The challenge for governments, business and civil society is to ensure that the power and influence wielded by corporations does not lead to human rights violations and that when violations do occur, victims are able to access a remedy.

To this end, the UN Guiding Principles on Business and Human Rights (the **Guiding Principles**)[1] were developed in consultation with key stakeholders and adopted unanimously by the Human Rights Council in 2011. They provide a single, coherent set of standards addressing the respective responsibilities of states and corporations with regard to business impacts on human rights. The Guiding Principles set out concrete and practical steps to ensure that the state protects those within its jurisdiction from corporate human rights violations, companies respect human rights and victims of human rights violations are able to access remedies.

As a non-permanent member of the UN Security Council, a candidate for the UN Human Rights Council and a wealthy, stable middle power, Australia is well-placed to play a lead role in the implementation of the Guiding Principles. Yet, while the Australian Government co-sponsored the UN Human Rights Council resolution endorsing the Guiding Principles, it has not yet formally incorporated them into national law and policy.

The primary way in which governments are driving and guiding implementation is through the development of National Action Plans on the implementation of the Guiding Principles (**NAPs**). The UK, the Netherlands and Denmark have recently released NAPs and over 30 countries are in the development stage.

An Australian NAP would identify measures to ensure the effective implementation of the Guiding Principles in Australia and, in doing so:

- provide a platform for dialogue on business and human rights between government, business and civil society;
- identify, prioritise and monitor the Government's regulatory and policy action on business and human rights;
- establish a process for responding to emerging needs in the area of business and human rights; and
- ensure transparency and accountability on the steps taken to implement the Guiding Principles.

This briefing paper is intended to provide background on the Guiding Principles and outline the case for the development of an Australian NAP. It draws on the experience of other states and on the significant work of UN bodies, civil society organisations and National Human Rights Institutions that are working to promote coherent and effective practice in the implementation of the Guiding Principles.

[1] The UN Guiding Principles on Business and Human Rights are available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

2. Background to the UN Guiding Principles

2.1 Business and human rights under international law

The modern notion of human rights came of age with the *Universal Declaration of Human Rights* in 1948. Since then, a number of major international human rights instruments have come into force, including the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.*

The focus of international law had been on state rather than private actors, which has meant that much of the way we think and talk about human rights has been bound up with concerns about the way a state behaves towards its citizens, and not about how citizens (including corporate citizens) behave towards one another. However, international law has traditionally recognised the state's obligation to protect people in its jurisdiction from harm by third parties, including companies.

Companies may be subject to obligations arising under an ad hoc catalogue of local domestic laws that protect or are relevant to human rights (anti-discrimination, workplace relations, native title, environmental and consumer laws, for example). In practice, these laws represent a regulatory 'patch-work', and there remain significant legal gaps through which corporations, in particular multinationals, can avoid legal liability for the human rights impacts of their operations.

In recent decades the incidence and severity of human rights impacts related to corporate activity has attracted high profile attention from governments, NGOs and the media, leading to serious attempts being made to fill legal and regulatory gaps. An increasing number of companies too are acknowledging their capacity to influence the welfare of the communities in which they operate, and are working to embed internationally recognised human rights standards into their business practices. This attention is starting to translate into legal and regulatory obligations on corporations, as well as a range of instruments, voluntary initiatives and accords. Key among these are the UN 'Protect, Respect and Remedy' Framework and the related Guiding Principles on Business and Human Rights.

2.2 The 'Protect, Respect and Remedy' framework

In 2005, the UN Human Rights Commission requested that the UN Secretary General appoint a Special Representative with a mandate to identify standards of corporate responsibility and accountability regarding human rights and the respective roles of both states and business in this area. As a result of that mandate, in 2008 the Special Representative, Professor John Ruggie, and his team produced the 'Protect, Respect and Remedy' Framework (the 'UN Framework'). The UN Framework comprises three pillars:

- Pillar 1 - the **state duty to protect** those within the State's jurisdiction from human rights impacts, including by corporations;
- Pillar 2 - the **corporate responsibility to respect human rights,** including the role of due diligence in meeting this obligation, and the need to avoid corporate complicity in the human rights violations of others; and
- Pillar 3 - the need for greater **access to remedies** for those affected by corporate human rights impacts at the international, regional, national, and company levels.

2.3 The Guiding Principles

Following additional and extensive consultation with all key stakeholders – including governments, business, experts, various affected communities, and civil society – Professor

Ruggie published the *Guiding Principles on Business and Human Rights*. The UN Human Rights Council unanimously endorsed the Guiding Principles in 2011.

The Guiding Principles were designed to 'operationalise' the three pillars of the UN Framework; that is, to provide concrete and practical recommendations for its implementation. Each pillar is an essential component in an inter-related system of preventative and remedial measures.

Broadly speaking, under the Guiding Principles companies are expected to:

- avoid causing or contributing to adverse human rights impacts through their own activities; and
- prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not directly contributed to those impacts.

The Guiding Principles recommend that, to ensure compliance with the responsibility to respect human rights, companies:

- express their commitment through a statement of policy:
- implement effective human rights due diligence to identify, prevent and address actual or potential human rights impacts;
- mainstream human rights consideration across business operations and activities based on that due diligence; and
- enable access to effective grievance mechanisms by affected groups and individuals.

The state duty to protect requires governments to take all reasonable measures to investigate, prevent, punish and redress business-related human rights violations through adjudication, legislation, policies, and regulations. The Guiding Principles include recommendations on matters such as:

- states' regulatory and policy functions;
- the conduct of state-owned enterprises;
- the incorporation of human rights requirements into public procurement policies; and
- supporting business respect for human rights in conflict-affected areas.

At a most basic level, states should clearly and coherently set out the expectation that businesses domiciled in their territory or jurisdiction respect human rights throughout their operations, and should ensure compatibility and coherence between human rights and other policy decisions involving business (across departments and issue areas, including those not typically connected to 'human rights').

Since their publication, the influence of the Guiding Principles on national and international policy and approaches to regulation has been significant and continues to grow. The Guiding Principles represent a global standard of conduct for all business enterprises wherever they operate.

3. Business and human rights in Australia

The Australian Government co-sponsored the UN Human Rights Council resolution endorsing the Guiding Principles in June 2011. The Government has since taken a number of steps that broadly reflect its support for the Guiding Principles. However, it has not made efforts to incorporate the

Guiding Principles into domestic law, nor has it issued any formal policy document outlining its plan for their implementation in Australia.

Within Australia the human rights impacts of corporate operations are instead currently governed by a disparate collection of domestic laws, and by a wide variety of international and local voluntary initiatives and guidelines aimed at improving business human rights performance.

3.1 Corporate liability for human rights abuses under Australian domestic law

Examples of domestic Australian 'hard laws' which protect or are relevant to human rights in a business context include:

- laws addressing equal opportunity and discrimination;
- laws regulating conditions of work (including occupational health and safety, terms and conditions of employment, minimum wage protections, collective bargaining, and prohibition of child labour and forced labour);
- native title laws;
- laws regulating the collection and use of personal information; and
- laws imposing liability on companies for certain acts which impact on human rights, such as bribery of foreign officials, or for complicity in gross human rights abuses.

3.2 Voluntary initiatives and guidelines

The various non-binding, 'soft law' initiatives with which the Australian Government and/or Australian corporations are involved include voluntary codes of conduct, monitoring and reporting procedures, and socially responsible reporting indexes, such as:

- The UN Global Compact and the UN Global Compact Network Australia[2]
- OECD Guidelines for Multinational Enterprises[3]
- IFC Performance Standards on Environmental and Social Sustainability[4]
- Equator Principles[5]
- Voluntary Principles on Security and Human Rights.[6]

3.3 Recent policy announcements

Although the Australian Government has neither incorporated the Guiding Principles into domestic law, nor issued any formal policy document outlining a plan for their implementation, it has taken a number of initiatives in keeping with its endorsement of the Guiding Principles. Recent examples include:

- In November 2012, Australia joined the Voluntary Principles on Security and Human Rights (***VPs***), an extractives sector initiative that addresses human rights

[2] See http://www.unglobalcompact.org/ and http://www.unglobalcompact.org.au/

[3] The OECD guidelines are available at http://www.oecd.org/corporate/mne/

[4] The IFC Performance Standards are available at http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps

[5] The Equator Principles are available at http://www.equator-principles.com

[6] The Voluntary Principles on Security and Human Rights are available at http://www.miga.org/documents/VPSHR_Toolkit_v3.pdf

issues associated with the security arrangements adopted by companies in Australia and overseas (including the use of both public and private security forces). The VPs aim to assist companies to manage their legal and related risks associated with security and human rights issues. As a participant in this initiative, Australia is expected to promote the VPs and proactively implement or assist in their implementation, and to share information with, and to respond to reasonable requests for information from, other VPs participants.

- In April 2013, the Government announced a whole-of-government strategy in relation to the Commonwealth's procurement practices in order to ensure that goods and services provided to the Commonwealth do not involve slavery or people trafficking anywhere in the supply chain. This strategy did not require suppliers to guarantee their goods/services were free of human trafficking or slavery and relied on Commonwealth purchasing officers to carry out supply chain due diligence.[7]
- The Australian Human Rights Commission has published a fact sheet, based on the UN Framework, setting out the business case for addressing human rights, and has also developed specific fact sheets on human rights issues relevant to the finance, mining and resources, and manufacturing and retail sectors.[8]

4. The case for an Australian NAP

4.1 Why a National Action Plan?

Since their publication, much of the attention given to the Guiding Principles has focused on those principles relating to the second and third pillars of the UN Framework (those concerning the duties and responsibilities of companies).

Less attention has been given to understanding and giving practical expression to the first pillar of the UN Framework: the state duty to protect. Yet, the three pillars of the UN Framework are interdependent. The principles of 'respect' and 'remedy' cannot be met in isolation from the activities of the state. In particular:

- business needs clear and coherent guidance in law and policy from states as to their obligations in relation to human rights (including in relation to home-State obligations for conduct in other jurisdictions); and
- business requires state support in order to make sure that they are operating on 'a level playing field'.

The Introduction to the Guiding Principles warns that they 'are not intended as a tool kit, simply to be taken off the shelf and plugged in … When it comes to means for implementation, therefore, one size does not fit all.' Different geographic, economic and political contexts will call for different approaches from governments in meeting their duty to ensure that business respect human rights in practice.

Recognising this, global efforts around the implementation of the Guiding Principles have recently shifted emphasis to focus on the state duty to protect. A number of countries have committed to publishing a National Action Plan outlining their policies and initiatives for implementation.

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[7] For information on the Australian Government's procurement policy as it related to human trafficking, see http://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Humantraffickingguidelinesandfactsheets.aspx

[8] See Australian Human Rights Commission, 'Good practice, good business – Fact Sheet 1': https://www.humanrights.gov.au/good-practice-good-business-fact-sheet-1

The UN Working Group on Business and Human Rights resolved to devote its 2014 report to the General Assembly to the subject of National Action Plans,[9] holding the view that NAPs are a key instrument in the implementation of the Guiding Principles.

While the Australian Government has endorsed the Guiding Principles, a clear, coherent, whole-of-government policy approach is required in order to translate those standards into concrete action.

Using the Guiding Principles as its framework, such a policy might:

- set out Australia's business and human rights objectives, both domestic and international;
- detail the means by which the Government will comply with the state's duty to protect human rights and to support business in its obligation to respect human rights, both in Australia and transnationally;
- identify priorities for action and make concrete, measurable commitments across all areas of Australian business, trade and investment policy which impact on human rights;
- identify ways in which remedy and grievance mechanisms could be strengthened or made more effective; and
- include means of measuring progress, such as milestones for delivery, identifying regular reporting cycles and/or performance indicators.

4.2 A NAP would strengthen human rights protection

A company's operations can affect the human rights of a range of people, including employees, customers, suppliers and their employees, business partners, and the communities in which a company operates. And, as is acknowledged in the Guiding Principles, "business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights".[10]

Some, but not all, potential human rights impacts are regulated under Australian law. Where Australian companies are operating in countries with poor governance, they are generally subject to weaker standards and accountability mechanisms. This 'governance gap' can result in businesses operating with uncertainty regarding their human rights responsibilities. In some cases, it can also contribute to corporate complicity in human rights violations.

The various soft law initiatives outlined at 3.2 above are insufficient to ensure compliance with the Guiding Principles. These initiatives fail to fill the legal lacuna between the relevant international laws and ad hoc domestic laws, especially when those domestic laws deal only with conduct carried out within Australia and do not extend to a company's overseas operations. Even in cases where occasional domestic laws do extend to a company's overseas operations, they are for a very limited range of situations, leaving significant gaps in the system of human rights protection.

The Committee on the Elimination of All Forms of Racial Discrimination in 2010 noted with concern the absence of an adequate legal framework regulating the obligations of Australian corporations at home and overseas. The Committee encouraged Australia to:[11]

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[9] Invitation to an Open Consultation on the strategic elements of National Action Plans in the implementation of the UN Guiding Principles on Business and Human Rights, Thursday 20 February 2014, Palais de Nations (available at http://www.ohchr.org/Documents/Issues/Business/Session7/CNOpenConsultation20Feb2014.pdf)

[10] UN Guiding Principles on Business and Human Rights, Commentary to Guiding Principle 12.

[11] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia, 77th session, UN Doc. CERD/C/AUS/CO/15-17, 13 September 2010.

> take appropriate legislative or administrative measures to prevent acts by Australian corporations which negatively impact on the enjoyment of rights… and to regulate the extraterritorial activities of Australian corporations abroad.

Similarly, in 2012, the Committee on the Rights of the Child raised concerns regarding the impact of Australian corporations' activities on children, and recommended that, among other things, Australia: [12]

> Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations.

An Australian NAP would facilitate the better protection of human rights and improve outcomes for communities whose human rights are impacted by business conduct. The following examples illustrate some of the human rights issues that Australian companies have encountered in recent years.[13]

Labour rights

On 24 April 2013, Rana Plaza, an eight storey building in greater Dhaka, Bangladesh, collapsed killing 1100 workers and injuring 2,500. The Rana Plaza housed several garment factories which reportedly supplied major global brands, including Benetton, Primark and Wal-Mart. Reports emerged following the collapse that the building was structurally unsound and that, despite the appearance of cracks, a factory manager had assured workers that it was safe to enter.

The incident brought global attention to the working conditions at many garment factories in Bangladesh, the second biggest world exporter of apparel. (Bangladesh's garment industry employs over 4 million people and generates 80 per cent of its export earnings). Trade unions and labour rights organisations called for immediate action on health and safety from the implicated brands and asked them to sign the Bangladesh Accord on Fire and Building Safety in Bangladesh. There were also calls for the Bangladeshi Government to improve workers' rights, including allowing workers freedom of association.

The Bangladesh Accord requires companies to commit to ensuring that repairs are carried out, that sufficient funds are available to do so, and that workers at affected factories continue to be paid a salary. It has now been signed by over 150 companies from 20 countries, including Australian companies Cotton On, Forever New, K-Mart Australia, Pacific Brands, Target Australia and Woolworths Australia. The International Labour Organisation acts as an independent chair.

Right to life and security of the person

On 14 October 2004 there was a small-scale uprising in the town of Kilwa in the Democratic Republic of the Congo (DRC). The following day soldiers from the Congolese Armed Forces (FARDC) moved into the town and captured or killed the rebels as well as a significant number of

[12] Concluding Observations of the Committee on the Right of the Child: Australia, 60th session, UN Doc. CRC/C/AUS/CO/4, 28 August, 2012

[13] See, in particular, the *Interim Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations or other business enterprises*, E/CN.4/2006/97, 22 February 2006, which maps instances of alleged corporate human rights abuses across sectors and countries (p8-9)

civilians. At the end of the FARDC raid, over 70 people had been killed and many more raped and injured by the troops.[14]

Anvil Mining Limited, the Australian company that owned the nearby Dikulushi silver-copper mine, provided logistical assistance to the troops by providing access to Anvil vehicles, planes, drivers and access to Anvil's guesthouse. Nine months after the incident, Anvil claimed for the first time that it had no choice but to let the army use its vehicles. This claim had not been raised in any of the company's press releases, notices to the market or media interviews following the incident. The then Managing Director of Anvil Mining, Bill Tuner, told the ABC's 4 Corners program:[15]

> Can you imagine us sitting there expecting the protection of the [DRC] government? We've got all these vehicles there and these soldiers just making their 200 kilometre trip down to Kilwa…could we just sit there and let these guys walk past the mine. I don't think so.

Attempts to hold Anvil Mining accountable for their role in the massacre in Australian and Canadian courts have been unsuccessful. According to the 2010 UN Mapping Report, 'The Kilwa case demonstrates the difficulty in proving the legal responsibility of private companies in the perpetration of serious human rights abuses and violations of international humanitarian law'.[16]

The right to adequate housing

Early in 2014, Australian media outlets reported that ANZ's Cambodian joint-venture, ANZ Royal Bank is financing a Cambodian sugar plantation responsible for forced evictions, among other rights violations. The plantation, run by Phnom Penh Sugar Company, is accused of forcibly evicting more than 1000 families, leading to food insecurity and child labour.[17] Audits revealed that Phnom Penh Sugar Company had not implemented environmental, health and social management programs required by ANZ to meet its ethical lending obligations.

In response to the reports, an ANZ spokesperson said that the bank would review Phnom Penh Sugar's social and environmental impact assessments and the company's plans to mitigate the project's negative impacts. The company said, "where we have found that a client does not meet our environmental and social standards and they are not willing to adapt their practices, ANZ has declined funding or exited the relationship."[18]

4.3 A NAP would be good for business

Businesses incorporated or with activities in Australia face a number of risks if their practices fail to adequately respect human rights. Risks currently faced by business include:

- Litigation under domestic law, both in Australia and in other jurisdictions in which the company operates. We have provided at section 3.1 examples of Australian laws which may impose liabilities and obligations on business for direct involvement or complicity in human rights violations. In addition, as the Guiding Principles (as well as other 'soft' law initiatives outlined above) gain wider

[14] United Nations Organization Mission in the Democratic Republic of Congo (MONUC), 'Report on the conclusions of the Special Investigation into allegations of summary executions and other violence of human rights committed by the FARDC in Kilwa' (Province of Katanga) on 15 October 2004.

[15] Four Corners, '*The Kilwa Incident*' transcript, 6 June 2005, 9.

[16] Office of the High Commissioner for Human Rights, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003"

[17] Richard Baker and Nick McKenzie, "ANZ ethics under scrutiny over Combodian sugar plantation load", *Sydney Morning Herald*, 23 January 2014.

[18] Ibid.

acceptance and inform industry practice, they are impacting on the common law tort of negligence, both in terms of the content and extent of a duty of care owed by a company to its employees and other affected stakeholders and in the determination of whether that duty of care has been breached.

- Potential shareholder action in the form of activism at annual general meetings. For example, in May 2013, the AGM for The McDonald's Corporation in the US considered a shareholders' resolution demanding that McDonald's perform human rights due diligence on its operations and disclose the findings to the public. The resolution was ultimately unsuccessful (28.33% in favour, 53.65% against and 18.01% abstaining), but the proposal came close to receiving the 30% support required to compel action under the company's own rules.
- Complaints to OECD National Contact Points (***NCPs***). In February 2013, a complaint was filed with the Australian NCP alleging that Minerals Resource Commodity Ltd, an Australian venture capital mining company, co-opted, intimidated and subverted the members of the indigenous Amadiba clan in order to obtain their consent for the issuing of a mining licence on ancestral land in South Africa. Other issues raised in the complaint included adverse environmental impacts, loss of livelihood, inadequate disclosure of project plans and impact assessments, and bribery. After conducting an initial assessment, the Australian NCP rejected the case on the grounds that the complainants expressed unwillingness to enter into mediation with the company and because the mineral exploration rights are currently being considered by the relevant local authorities.
- Complaints to other international and national human rights bodies. Many countries have national human rights institutions with a mandate to investigate and report on human rights violations involving business. These institutions are generally accredited by a UN body, and have a mandate that enables them to act independently and authoritatively. There are also complaint and referral mechanisms to numerous international initiatives such as the World Bank, the UN Global Compact, the UN Special Representative on Extra-Judicial Killings, the UN Human Rights Committee, and the UN Permanent Forum on Indigenous Issues.
- Finance risk. With initiatives such as the Equator Principles and the IFC Performance Standards, financial institutions (defined broadly to include multilateral financial institutions, private lenders, and investors) now commonly address human rights performance in project finance arrangements. Where project operators fail to meet expectations, their financing arrangements may be reviewed or revoked. For example, the Norwegian Pension Fund reviews its investments annually, and divests from any entity known to be involved or complicit in human rights violations. Reports of its reviews are publicly available. Westpac, ANZ and NAB are all signatories to the Equator Principles. Australia's export credit agency, the Export Finance and Insurance Corporation (***EFIC***), has recently introduced a grievance mechanism that is open to a broad range of stakeholders, including individuals, communities and customers, and enables complaints to be made about projects financed by EFIC. This grievance mechanism may place at risk project finance for EFIC-supported projects.
- Operational risks associated with actual or perceived involvement with human rights impacts. These include a failure to obtain community consent to business

activity, project blockades, vandalism, strikes and protests. Such operational impacts create significant costs, disrupt work and attract a high level of media attention. They may reflect or contribute to a breakdown of the company's relations with local communities.

- Reputational risk. Reputational damage can be significant in its own right, but can also contribute to legal and financial risks by prompting litigation or financier withdrawal. Companies may also lose their social licence to operate in an area.

A NAP will assist businesses to better navigate and avoid these risks while operating in Australia and in other jurisdictions. In addition, it is in Australian companies' interests to maintain a reputation as good corporate citizens that comply with human rights in their operations at home and abroad.

4.4 A NAP would promote the interests of Australian businesses abroad

In September 2013, the Coalition committed to ensure that:

> Australia's economic interests underpin the operations of the Department of Foreign Affairs and Trade. There will be an unambiguous focus on promoting the interests of Australian businesses abroad.

A NAP will demonstrate Australia's commitment to ensuring that Australian companies respect human rights, which will assist in promoting and strengthening Australian businesses' interests. Providing guidance and support for Australian companies to meet their human rights obligations – particularly where they operate in jurisdictions with limited governance and regulation - would enhance and protect Australian businesses' reputation abroad and would contribute to a more stable, predictable, efficient, competitive and rules-based international business environment.

5. Lessons from other jurisdictions

5.1 Global snapshot

Thirty states are in the process of developing NAPs,[19] but most activity in this space has been driven by EU Member States. The European Commission published a White Paper on Corporate Social Responsibility in 2011 inviting all EU Member States to develop NAPs for the implementation of the Guiding Principles by the end of 2012.[20] In the same year, Member States were also invited to update their lists of national CSR actions being taken. Subsequently, in 2012, the European Council included a requirement that all EU Member States develop their NAPs by the end of 2013.

To date, only three countries have published final NAPs: the UK, the Netherlands, and Denmark (which are discussed in further detail below). Italy has published a foundational document for its

[19] These figures are drawn from (1) submissions to the 2010 UN Annual Forum on Business and Human Rights, where it was reported that approximately 19 European states were developing NAPs; and (2) responses to the pilot survey conducted by the UN Working Group on the issue of human rights and transnational corporations and other business enterprises. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and corporations* A/HRC/23/32/Add.2 (available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-32-Add2_en.pdf)

[20] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 (25 October, 2011) (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF)

NAP, still in development.[21] Many other European governments have begun the process of developing a NAP or have expressed a clear intention to do so.

The US Government has not yet developed a formal NAP, but in April 2013 it published the *U.S. Government Approach on Business and Human Rights*, which outlines the approach taken by the US Government by reference to examples of laws, regulations and policies 'relevant to the intersection between these issues [of business and human rights], and what U.S companies should know when it comes to respecting human rights throughout their global operations'.[22] The *Approach* states that the US Government 'will continue to consult with stakeholders as it implements its duty under the first pillar', although it is unclear the extent to which the *Approach* itself was a result of stakeholder consultation and, if so, what form such consultation took or what weight and status the *Approach* has within US domestic policy. The US State Department has a dedicated Business and Human Rights team.

In August 2013, the International Corporate Accountability Roundtable (ICAR) and the Danish Institute of Human Rights launched a joint project – *National Action Plans: State Strategies for the Implementation of the UN Guiding Principles on Business and Human Rights* – which aims to produce a toolkit for NAPs to support the development and evaluation of state-level measures to implement the UNGPs. The toolkit will include:

- a model National Baseline Assessment to provide a framework for assessing State progress in UNGPs implementation;
- a model National Action Plan; and
- proposals for reporting and reviewing States' implementation of NAPs.

The toolkit and report is due to be released in June 2014 and will provide a source of additional guidance.

5.2 The UK 'Good Business' plan

The British Government called for the development of a NAP shortly after the UN Human Rights Council endorsed the Guiding Principles in 2011 and, in September of that year, a steering group drawn from different ministries was created. Over the next year-and-a-half, the steering group orchestrated a series of workshops in which stakeholders were asked to provide their input.

Drafting of the plan began in June 2012 and, following extensive consultations, ended one year later. The UK's NAP – the *UK 'Good Business' Plan* – was published in September 2013.[23]

The UK NAP does not propose any new legislative obligations for UK businesses, but it reminds them of the existing obligations under the UK *Bribery Act* and under section 172 of the UK *Companies Act* (in the context of the duty to act to promote the success of the company, requiring a company director to include the impact of the company's operations on the community in considering matters that might have a bearing on that success). The plan also notes the then forthcoming amendments to the UK Companies Act, which, from 1 October 2013, require company directors to include human rights issues in their annual reports.

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[21] A repository of finalised NAPs is maintained by the UN Working Group and Business and Human Rights at: http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx

[22] US Department of State, Bureau of Democracy, Human Rights & Labor, *U.S Government Approach on Business and Human Rights* (2013), available at http://www.humanrights.gov/wp-content/uploads/2013/06/USG-Approach-on-Business-and-Human-Rights-updatedJune2013.pdf

[23] A copy of the *UK 'Good Business' Plan* is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf

In order to support business in meeting those expectations, the plan outlines a number of steps the UK Government is taking, including developing an online 'Overseas Business Risk' service, funding an online hub to provide guidance and information on the Guiding Principles, and encouraging dialogue between various stakeholders, in order to support business in countries with human rights concerns.

The expectations on business are complemented by measures taken or planned by the UK Government to meet its own obligations – as a state player – under the UN Framework. These include commitments to:

- carry out a review of the degree to which the activities of UK state-owned, controlled or supported enterprises are executed with respect for human rights, potentially influencing the approach taken in the UK to public procurement (the UK public procurement rules already permit public bodies to exclude bidders where there is information showing grave misconduct by the company in the course of its business or profession);
- ensure that agreements facilitating investment overseas by UK or EU companies (which would include, for example, bilateral investment treaties) 'incorporate the business responsibility to respect human rights, and do not undermine the host country's ability to either meet its international human rights obligations or to impose the same environmental and social regulation on foreign investors as it does on domestic firms'; and
- take into account negative findings against a company by the UK's OECD National Contact Point when considering requests for export credit.

The plan also notes that the UK hosts a wide range of remedy mechanisms for the resolution of human rights concerns, including judicial resolution, alternative dispute resolution, and the UK OECD National Contact Point. Through the UK Trade and Investment teams, the UK Government also plans to support the development of company-specific grievance mechanisms.

The UK plan has been criticised for its reliance on voluntary corporate self-regulation, without creating legal obligations or an effective and transparent compliance mechanism.[24] It has been commented that the Plan "contains no real incentives for compliance or sanctions for non-compliance". [25]

5.3 The Netherlands

The Netherlands published its NAP on business and human rights on 20 December 2013.[26]

The Dutch Ministry of Foreign Affairs was responsible for co-ordinating the process. In mid-2012, an inter-ministerial working group was established, with representatives from the Ministries of Economic Affairs, Finance, Security & Justice, and Social Affairs & Employment. This working

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[24] The Corporate Responsibility Coalition, Media Release, *Action plan on human rights must go beyond business as usual*, available at http://business-humanrights.org/media/documents/ngo-statement-uk-natl-action-plan-sep-2013.pdf; Gerry Boyle, '*UK guidance for business on human rights issues needs some legal teeth', The Guardian*, 5 September 2013, available at http://www.theguardian.com/sustainable-business/blog/uk-guidance-business-human-rights-legal; Rights and Accountability in Development, Media Release, *The UK Action Plan on Business and Human Rights will bring little comfort to victims of corporate abuse*, 4 September 2013, available at http://raid-uk.org/docs/Press_Releases/PR_UK_Action_Plan_130904.pdf.

[25] Professor Robert McCorquodale, *Expecting business to respect human rights without incentives or Sanctions – Robert McCorquodale*, 4 September 2013, available at http://ukhumanrightsblog.com/2013/09/04/expecting-business-to-respect-human-rights-without-incentives-or-sanctions-robert-mccorquodale/#more-19483

[26] A copy of Netherland's NAP is available at http://www.nbbp.org/_downloads/Ruggie_Framework_National_Action_Plan_Business_Community_and_Human_Rights.pdf

group conducted an internal 'mapping' of current government policies in comparison with the Guiding Principles.

An independent expert was used to hold interviews and consultations with 50 representatives from business, civil society, implementing organisations and other experts. The results of those interviews and possible options for the NAP were then discussed at three meetings: the first with representatives of civil society organisations, the second with members of the business community and the third with the implementing organisations.

On the basis of those interviews and meetings, the inter-ministerial working group identified the 'most important' viewpoints and ideas on the NAP. The drafting process began in early 2013 and the plan was debated at government level in November that year.

Features of the Dutch NAP include:

- The development of an e-learning course for ministries and implementing organisations enabling them to provide reliable information on human rights and business.
- An evaluation of the central government procurement policy to test its consistency with the Guiding Principles and the OECD Guidelines, and to determine whether the procurement policy can be rolled out to municipal, provincial and water authorities.
- Provision for an independent committee to investigate whether the obligations of Dutch companies in relation to CSR are adequately regulated in Dutch law.
- A reminder of the existing obligations of management and supervisory boards under the Dutch Corporate Governance Code to take into account CSR in fulfilling their duties, and that their reports should include more information on their CSR policies.
- Provision for the government to create a law allowing it to request the Dutch OECD 'National Contact Point' to carry out sector-wide investigations into CSR issues.
- Funding for a provider of dispute resolution services in relation to disputes between companies and communities.

5.4 Denmark

The Danish Government released a Danish NAP in March 2014. It is primarily based on recommendations made in January 2012 by the Danish Council for Corporate Responsibility, a Government advisory group representing trade organisations, NGOs, civil society, local municipalities and trade unions.

The NAP summarises action taken by Denmark since the UN ratification of the Guiding Principles to implement the state duty to protect, the corporate responsibility to respect, and in relation to access to remedies.

The NAP sets out its expectations for companies in relation to what it calls ‘corporate social responsibility’, based on Guiding Principle recommendations. The NAP states that fulfilment of these expectations will be encouraged through increased transparency of private companies and public authorities, supported by the new non-judicial remediation mechanism.

In furtherance of the State duty to protect, the Government has introduced statutory reporting requirements for large Danish companies on human rights impacts, and has developed various tools and other guidance to promote company and NGO compliance with the Guiding Principles.

In 2012, the Government established a Mediation and Complaints-Handling Institution for Responsible Business Conduct that can investigate cases involving potential adverse impacts by Danish public authorities and private organisations on human rights. The institution will base its assessments on the OECD Guidelines for Multinational Enterprises, which incorporates the Guiding Principles.

The Government does not commit to introducing any additional legislative requirements, but will:

- promote 'corporate social responsibility' in the public sector, including by publishing a set of guidelines for public sector procurement;
- recommend that the Council of Europe take the lead on discussion of extraterritoriality issues, in relation to gross violations of human rights; and
- form an inter-ministerial working group to discuss the need for domestic legislation with extraterritorial effect to allow for prosecutions of particularly gross violations based on the nationality of the perpetrator.

5.5 Spain

The Office for Human Rights of the Spanish Ministry of Foreign Affairs commissioned two external experts to assist them with the drafting of a Spanish NAP, and with the related consultation process. An initial round of informal consultations with various stakeholders, including multiple government ministries, was held between December 2012 and February 2013, during which the external experts, supported by the Office for Human Rights, developed a work plan for the preparation of the draft NAP. The external experts formed an ad hoc group of 20 academics from the fields of law, economics, political science and development studies to advise on specific parts of the plan which related to their areas of expertise. Stakeholders were invited to make written submissions, and most of these were received between February and March 2013.

On the basis of those initial consultations and written submissions, the external experts published a first draft of the NAP in June 2013, which included suggestions as to how existing Spanish legislation might be adapted to incorporate the Guiding Principles. Owing to internal governmental and external opposition to the draft document, the Office for Human Rights returned to consultations in September 2013, including renewed discussions with MAEC, the Spanish department for foreign affairs. The Office of Human Rights also sought advice from the British Embassy in relation to the UK's *'Good Business'* Plan.

A revised draft of the NAP was published in late 2013, together with a proposal to establish a Multi-stakeholder Monitoring Committee responsible for periodically evaluating the execution of the NAP and for making proposals for its effective implementation. The Spanish NAP is expected to be finalised in early 2014.[27]

5.6 Norway

The Norwegian government began developing its NAP in early 2013 under the leadership of an inter-ministerial working group which was responsible for producing a government CSR White Paper in 2009.

Between April and June 2013, an external consultant conducted a mapping and gap analysis of government involvement in business and human rights in order to identify areas which should be

[27] See 'Comments on the second draft of the Spanish National Action Plan for the implementation of the UN Guiding Principles', FIDH, 5 February 2014, available at http://www.fidh.org/en/globalization-esc-rights/business-and-human-rights/14562-comments-on-the-second-draft-of-the-spanish-national-action-plan-for-the; Spanish Office of Human Rights, Hoja de Tua Sobre La Elaboracion del Plan Nacional Empresas y Derchos Humanos, 12 November 2013

a focus during the development of the NAP. The mapping was conducted by way of interviews with various ministries and government institutions, including the Ministry of Labour, Ministry of Children, Equality and Social Inclusion, Ministry of Industry and Trade, and the Ministry of Foreign Affairs. Analysis was also conducted of the relevant government White Papers, official strategy documents, laws and regulations, and ministries web pages. Interviews were held with various civil society and trade union groups.

The results of the study were published in August 2013.[28]

6. The NAP process

6.1 Common process characteristics of the NAPs developed so far

A number of common features of the process for the development of the NAPs emerged from those NAPs that have been published or are substantially progressed. These features are outlined in more detail in a report produced by SwissPeace which aims to take stock of the process employed in the development of a number of the national actions plans discussed above, but key features include: [29]

- The process is generally structured around: (i) an initial phase of stakeholder consultations and/or mapping of government activities relevant to business and human rights; (ii) a drafting phase; and (iii) a phase of political deliberation and redrafting.
- The NAP process is typically led by the Ministry of Foreign Affairs, with cross-ministerial and cross-agency cooperation (by way of an inter-ministerial 'working group' or 'steering committee') a key feature.
- Key activities of the working groups included: defining the work place, holding interviews and consultations, conducting the drafting process, and managing the process of political deliberation.
- Mapping and gap analyses are used to complement or precede the consultation phase. The Dutch working group engaged in an internal mapping of relevant government policies, laws and regulations, while the Norwegian group retained an external consultant to perform that task.
- The working groups sought to consult with multiple non-government stakeholders before the drafting process. Civil society, business and government groups convened separately and jointly and consultations were sometimes facilitated by an expert.
- In some cases, external consultants were engaged in order to facilitate stakeholder workshops, and to provide occasional input during the drafting phase.

[28] Executive Summary, Mark B. Taylor, 'Kartleggings- og avviksanalysen: Statens plikt til å beskytte', Fafo Notat 2013:12 (translation M.B. Taylor) (available at http://www.fafo.no/pub/rapp/10178/10178-summary.pdf)

[29] Andreas Graf (Swiss Peace), *Developing National Action Plans on Business and Human rights*, April 2013, p11-12 (available at http://www.swisspeace.ch/publications/essentials.html)

6.2 What makes the development process successful?

The SwissPeace report and a paper developed by the European Group of National Human Rights Institutions identify several factors as being key to a successful NAP development process.[30]

- An inter-ministerial working group, led by a central government agency, should be established early in the process.
- A mapping process or baseline study of government activities that relate to the implementation of the Guiding Principles (including shortcomings) should be conducted to provide a credible, transparent basis for a NAP.
- The inter-ministerial working group should conduct extensive stakeholder consultation. On the basis of these consultations, together with the mapping analysis / baseline study, stakeholders should determine a catalogue of policy areas to be addressed in the drafting phase.
- Time plans should be agreed upon, but handled with flexibility.
- In collaboration with non-government stakeholders and external experts, the implementation of the plan should be co-ordinated by inter-ministerial working group and the plan should be periodically monitored and progress reported.

[30] The *European Group of National Human Rights Institutions Implementing the UN Guiding Principles on Business and Human Rights: Discussion paper on national implementation plans for EU Member States* (2012) is available here: http://business-humanrights.org/media/eu-nhris-paper-on-national-implementation-plans-for-ungps-210612-short.pdf