

A Mapping and Gap Analysis: The State's Duty to Protect

A mapping and gap analysis as a basis for Norway's national action plan for implementation of the UN Guiding Principles on Business and Human Rights

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Preface

In this report I have tried to identify the measures that are relevant to the duty of the state of Norway to protect human rights against infringement by business. The aim has been to identify the areas for consideration in the development of a national action plan by Norwegian authorities. The principle question this work has attempted to answer is, How can the Norwegian authorities ensure that human rights are respected by business?

The mapping was conducted by means of interviews with officials from various ministries and government institutions, including the Ministry of Labour, the Ministry of Children, Equality and Social Inclusion, the Ministry of Government Administration, Reform and Church Affairs, the Ministry of Industry and Trade, and the Ministry of Foreign Affairs. As part of the mapping, an analysis was conducted of the relevant White Papers, official strategy documents, laws and regulations and ministries web pages. Follow-up interviews were conducted by email and telephone. A selection of texts from the interviews and email correspondence are included in the mapping section of the report. Interviews were also conducted with representatives of NGOs, including Amnesty International Norway, Fellesforbundet (a trade union), Forum for Environment and Development, the Norwegian Peace Association, LO (the principle trade union federation) and NHO (the principle association of employers).

In addition to mapping, the study includes a gap analysis based on a review of the government's efforts to protect human rights against violations by business. This part of the study examines state policies and practices in light of the State's duty to protect human rights, as described in the UN Guiding Principles on Business and Human Rights.

Due to limited time and resources it has not been possible to complete a detailed review of the entire apparatus of state institutions, nor all business activities. It has not been possible to identify all the instruments the civil service has available to influence the private sector's behavior in relation to human rights. Nor has it been possible to conduct a thorough review of all the gaps identified in the analysis between state practice and the Guiding Principles. The purpose of the study is to create a basis for further work in the formulation of a national action plan. With this in mind, the study has attempted to identify the risk of human rights violations from business and the corresponding human rights protections – or gaps in protections – within the jurisdiction of the different ministries.

I want to thank everyone who has been willing to be interviewed and all who have submitted comments on the text. I also want to thank the Are-Jostein Norheim, Henning Kloster-Jensen, Vibeke Knudsen and Turid Arnegaard from the Ministry of Foreign Affairs for their support during the work. Many thanks also to Kristin Jesnes, Fafo, for help in helping to shepherd the text to publication. Responsibility for any errors is my own.

Oslo, August 2013
Mark Taylor

Executive Summary

The Norwegian government has decided to develop an action plan for national implementation of the UN Guiding Principles on Business and Human Rights (hereafter Guiding Principles). This mapping and gap analysis¹ has been conducted as a contribution to that effort. The study identifies the measures that are relevant to the state's duty to protect human rights against infringement by business. The aim has been to identify areas which should be a focus during development of the action plan.

This study consists of two parts: a survey of Norwegian public bodies and their relevance to business and human rights, and the identification of the gaps between Norwegian state practice and the standards set out in the UN Guiding Principles. The study has attempted to identify some of the risks of human rights violations by business and the corresponding human rights protections – or gaps in protections - within the jurisdiction of the different ministries.

Mapping

As expected, the mapping part of the study found that Norway has a well-established rule of law that governs most aspects of human rights and business. Norwegian law provides citizens access to different types of measures to protect against human rights abuses. In cases where the state protects human rights against abuses by business, this is often described in language specific to the issues – e.g. gender equality, labour rights, and environmental protection - and refers to legal or regulatory forms of protection against abuses by business. These forms of protection have often grown out of the social dialogue between trade unions and employers, or through collaborative efforts where business, civil society and the state have joined together to solve specific problems. The study found that Norwegian policy and legislation rests on the fundamental assumption that where businesses activities cause harm, the state will intervene with various forms of regulation.

In Norway, human rights are enshrined in law. The major international and European human rights conventions are formally integrated to Norwegian law through legislation. In this sense, corporate responsibility for the social impact of their business is not simply a matter of voluntarism: businesses is bound by numerous laws protecting human rights in Norway, although often the term "human rights" is not used when referring to these protections. For example, the Norwegian law is well enforcement with respect to labour rights, gender equality and environmental or workplace violations that threaten lives, livelihoods and property. Some of these laws apply to Norwegians also when they travel abroad, such as the prohibition against bribery, or sex tourism and through laws governing international crimes (war crimes, crimes against humanity, genocide , torture and slavery).

All government departments in Norway have direct relevance for business activities. There is no department which does not in some way affect the private sector, either as a regulator, an advisor, as an owner, an investor or as a purchasers of goods and services. In this sense, the human rights aspect of corporate social responsibility (CSR) is about the design of a "smart

¹ In this report, a «gap» is defined as follows: a gap between a state's duties as defined by the Guiding Principles and implementation of these duties.

mix" of incentives and regulations that require and encourage business to comply with human rights. The study found that in Norway the authorities usually do this through a combination of policy and practice, by:

- Communicating expectations about corporate behavior through policies and dialogue.
- Strengthening rights-holders and their representatives through dialogue, regulation and financial support.
- Imposing conditions that require that certain standards be met as a condition for state support.
- Enforcing the law and imposing sanctions if companies do not comply with the standards set down in law.

The overall purpose of this approach is to establish social and economic structures that prevent or reduce the risk of human rights violations by business. Government measures include attempts to integrate social dialogue in economic management, the promotion and integration of environmental concerns in government and market-based activities, facilitating integration into the labor market for immigrants and minorities, and support for Sami institutions of self-government. Laws and regulations can also have the objective of improving respect for rights, such as through the introduction of health and safety controls in the workplace, investigations of environmental impacts, provision of security for people and property, facilitating the use of non-judicial mechanisms in a variety of industries, and provision of an independent and effective judiciary.

Norway has played an active and leading role at the UN Human Rights Council in helping to guide the Guiding Principles to adoption by the Council in June 2011. Norway also supported the revision of the OECD Guidelines for Multinational Enterprises in order to bring them into coherence with the GPs, and has also supported the Global Compact. Norway has been an active participant in the development of an alternative model of bilateral investment agreements. In addition, Norway has given active support to the UN's Special Rapporteur on Indigenous People's and his focus on extractive industries, while at the same time Norway's National Contact Point (NCP) for the OECD Guidelines has been reformed and has taken an active part in developing the peer-review process for NCPs. The Ethical Council of Norway's Pension Fund – Global (PFG) has been a leading example of responsible investment, and has contributed to the development of socially responsible investing (SRI) generally. Norway's export credit agency, GIEK, has been a leading participant in work to integrate human rights into the OECD's Common Approaches on Export Finance and in the International Finance Corporation's Performance Standards. The Directorate for ICT and Administration (Difi) has worked both domestically and internationally to develop common standards in ethical procurement in Europe. Norway has tightened its weapons export licensing regulations and has revised the country's accounting law with respect to company reporting of human rights. Norway has also supported civil society and trade unions with technical expertise and support in different countries and industrial sectors.

Nonetheless, the survey suggests that there is a risk that human rights are violated by business within certain areas of ministerial responsibility. These include:

Risks in Norway

- Violations of human rights through privatization of public services.

- Violations of workers' rights through the undermining of wages and working conditions, or through discrimination and social dumping.
- Violations of human rights through the exclusion of immigrants from the labor and discrimination in the workplace.
- Infringement of the rights of indigenous peoples in the light of increasing activity in the mining sector in Norway.
- Violations of human rights through the provision of services related to asylum seekers in Norway.
- Violation of human rights by private security companies.
- Violation of human rights in the ICT sector with a view to personal data.
- Violations of human rights through environmental or other economic crimes, including when aspects of those crimes occur abroad.

Risks abroad, connected to Norway

- Violation of human rights in the supply chains of public procurement.
- Violation of human rights in foreign countries committed by businesses that receive, convey or manage Norwegian investment, development aid, loan guarantees and export credit/insurance.
- Violations of human rights committed abroad by companies that are owned by the Norwegian state, or their partners.
- Violation of human rights in connection with arms exports.
- Violation of human rights in connection with strategic business cooperation in the defense sector.
- Violation of human rights in connection with the export of ICT.
- Violations of human rights committed by private security services in joint operations overseas.
- Violations of human rights committed abroad by companies that receive non-financial support, such through the promotion of Norwegian industry by state bodies.
- Violations of human rights committed abroad by companies that also operate in Norway, including in the Norwegian oil sector.
- Infringement of Norwegian citizens' human rights during service overseas.

Gap Analysis

The UN Guiding Principles on Business and Human Rights were unanimously approved by the UN Human Rights Council in 2011. The Guiding Principles affirm a state duty to protect human rights, including against abuses by third parties such as businesses. The Guidelines clarify the company's responsibility to respect human rights through steps to ensure that their own activities do not infringe the rights of others. One of the most important measures identified by the Guiding Principles is due diligence, which the Guiding Principles define as

follows: steps a business takes to identify, prevent, mitigate and explain its impacts on human rights.²

In 2012 and 2013, the both the Foreign Minister and the Industry Minister of Norway publically stated that the government supports the Guiding Principles and that they expect that Norwegian companies³ respect human rights, especially in their international activities. To analyze the differences between state practice and the Guiding Principles, the gap analysis has followed the structure of the Guiding Principles,⁴ as follows:

- General government context and approach (GP 1)
- Extraterritoriality (GP 2)
- Regulation and policy (GP 3)
- Nexus between government and business (GP 4)
- Privatization and public procurement (GP 5 to 6)
- Conflict areas (GP 7)
- Coordination and policy coherence (GP 8 to 10)
- Access to effective, state- based judicial and non-judicial remedies and redress (GP 25-28)

As expected, the gap analysis describes a situation in Norway that is generally in accordance with requirements for the protection of human rights. The analysis has also reveals some gaps between legislation, policy or current practices and the standards set out in the UN Guiding Principles.

General Government Context and Approach

1. Three government White Papers provide a sound basis for a strategy.⁵ However, the principle gap between state practice and the Guiding Principles is a problem of coherence across ministries and agencies. There are four elements that help to create this lack of clarity and coherence in government's relationship to business on issues of human rights(see also points 11, 12 and 13 below):

- (a) The definition of corporate social responsibility (CSR) used as the basis for state policy is no longer in compliance with international standards. The definition of CSR used in the White Paper "Corporate Social Responsibility in a Global Economy " has been superseded in international standards by the UN Guiding Principles, revisions of the OECD Guidelines and the EU's CSR strategy, which now defines respect for human rights as operating with due diligence to avoid infringing on the rights of others.

² "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." "17. Human Rights Due Diligence" Guiding Principles (2011)

³ For the purposes of this report, the term "Norwegian company" refers to a company or business registered in Norway, including those with head offices abroad.

⁴ The structure of the gap analysis is based on a research guide (Part I, State Duty) developed by the UN Working Group on Business and Human Rights (draft November 2012).

⁵ "Corporate Social Responsibility in a Gloabl Economy" (St.meld. nr. 10 (2008-2009)); "A Strategy for Decent Work" (2. september 2008) and "White Paper on Active Ownership" (St.meld. nr. 13 (2010-2011)).

- (b) There is no authoritative statement that clearly communicates across departments what the government means when it says that business must should respect human rights.
- (c) Administration of human rights standards is fragmented in its approach: a handful of institutions have recently begun to communicate clear expectations (due diligence) in line with international standards, but most do not and instead refer most often in an undifferentiated manner to international instruments without clarifying expectations as to compliance.
- (d) Efforts to encourage or require that businesses respect human rights lack strategies that combine social expectations and measures (e.g. General Framework Agreements), market-based incentives (e.g. investment, procurement), and legislation to ensure respect for human rights.

Extraterritoriality

In general, investigation and enforcement of human rights violations is thorough when the adverse impacts of business activity occur domestically, while at the same time moral condemnation and conditionality are deployed when such activities in Norway (e.g. investment decisions, management of supply chains) have impact overseas. The gap with respect to extraterritoriality consists of two elements:

2. Beyond communicating expectations, there is no policy for how to respond to those private sector activities that take place within Norwegian territorial jurisdiction, but which have impacts on human rights abroad.

- (a) There is an absence of a central policy document that conveys what a business is expected to do to respect human rights through its global business activities, such as due diligence (due diligence) through business relationships.
- (b) There is no policy on whether administrative or other measures which have legal force for business transactions conducted within Norwegian territorial jurisdiction may also have legal force when such activities have impacts on human rights abroad (e.g. subcontractors, partnerships, investments and supply chains).

3. There is no clear policy, and there is a lack of practice, regarding criminal and civil (tort/delict) liability for human rights violations committed abroad by companies domiciled in Norway. In principle, it appears that the legal framework is in place, but there is no clear policy in support of such legal actions.

Regulation and policy

In the regulation of commercial activities there are certain gaps in legislation and administration:

4. Company law undermines the responsibility businesses have for respecting human rights. For example, company law does not require respect for human rights and the law neither encourages nor requires that business managers should consider the effects their company's activities may have on human rights.

5. The advice from state institutions in different fields (e.g. CSR) says nothing about how a business can respect human rights in practice, i.e. respect means to operate with due diligence to avoid violating the rights of others.

6. Compared to the extensive relationships that exist between government and business, there are few mechanisms for government to review in practice a company's diligence activities. Exceptions to this rule include the National Contact Point for the OECD guidelines, procedures implemented by GIEK, and the Ethical Council of the State Pension Fund - Global.

7. There are apparently no guidelines or procedures for how officials should respond when they become aware of business-related human rights violations (i.e. through their contacts with industry), for example in the context of established dialogues with state-owned enterprises, through the formation of trade delegations or through contacts with embassies abroad.

Reporting

The new reporting requirements for CSR (Accounting Law, April 2013) have for the first time incorporated human rights. However, the revisions to the law create certain gaps:

8. The regulation uses the phrase "with reference to human rights" rather than the international standard that a business should "respect human rights". This creates uncertainty about which standard a company should seek to comply.

9. There is no requirement that a company must disclose information about violations of human rights. The reporting requirement is a procedural one which focuses on the systems and measures in place, not on what risks the company has detected and the steps it has taken to prevent or mitigate those risks.

The State-Business Nexus

In the various relationships between government and business, there are certain gaps in legislation and administration:

10. In general, there does not appear to be an express requirement for due diligence in the following relationships between the state and business

- a) Public procurement (both central government and local municipalities or regional authorities)
- b) Management of the State's financial investments.
- c) Contracts governing development assistance.
- d) Decisions regarding which companies should be included in the trade delegations or other types of government support for exports (including through embassies)

Where these expectations are communicated (e.g. through dialogue with state-owned enterprises), there are no mechanisms to assess the due diligence undertaken by such the relevant businesses.

11. Policy documents do not clearly explain which standards companies are expected to respect. Mention of the relevant human rights standards – e.g. the UN Guiding Principles, the ILO Conventions, and the revised OECD Guidelines – are to be found in some documents, but often in an undifferentiated way, making it unclear how a business is to comply. The exceptions to this rule are the tools developed by GIEK (export credit agency), the Ethical

Council of the Pension Fund – Global, the NCP, and Difi, all of which refer specifically to due diligence as a part of their policy framework.

12. There is an absence of guidelines and procedures for how public officials should respond to actual or potential infringements of human rights when they encounter these in various situations (e.g. dialogue with state-owned enterprises, trade delegations, service in embassy's abroad, public procurement).

13. There is disagreement between different state organs (Norges Bank Investment Management and the NCP) over the nature of investor responsibility for infringement of human rights.⁶

Public procurement and privatization

Generally it does not seem that outsourcing of state functions, such as through privatization, is conditioned on a respect for human rights or an assessment of the external provider's ability to respect human rights. There are certain gaps in legislation and administration, especially with regard to public procurement:

14. Privatization processes do not appear to include consideration of the impact privatization might have on human rights

15. The law on public procurement and the relevant regulations do not refer to minimum standards of human rights beyond reference to wage and working conditions.

16. There is no clear policy statement or regulation requiring that public purchasers (state or municipal) incorporate human rights in procurement procedures. With very few exceptions, public procurement agencies do not implement responsible management of supply chains with respect to human rights, i.e. by requiring that suppliers manage their international supply chains so that human rights abuses can be prevented or mitigated.

17. There is a significant lack of capacity to follow up existing requirements for procurement, and even more so for the responsible management of supply chains.

Conflict Areas

Until recently, states have generally not advised or regulated Norwegian companies with regard to their connection to human rights abuses in wars or oppressive regimes. This is now in the process of changing. However, there are a number of gaps in legislation and administration in this area:

18. Guidelines for the licensing of weapons exports do not require that the exporting companies demonstrate to the authorities that they have conducted a due diligence review of human rights with regard to their customers or with regard to weapons transfers by the end user.

⁶ "Etikk - Norges Forskningsråd," mai 2013, <http://www.forskningsradet.no/no/Etikk/1186753739968>; "Klagesak Vedrørende Investering i Det Sørkoreanske Stålselskapet POSCO - NBIM," accessed June 2, 2013, <http://www.nbim.no/no/media-og-publikasjoner/nyheter/2013/klagesak-vedroende-investering-i-det-sorkoreanske-stalselskapet-posco/>.

19. The licensing regime for arms exports has no policy for early involvement in the process. This is particularly important for export licensing as the application for a license will only come after much work on business development has already been completed.

20. Norway does not convey expectations to businesses, or take up in some other way, the risks of human rights violations involved in operations in conflict areas. Norway has no established policy or practice to inform or advise businesses about the increased risk of human rights violations inherent in operating in or using suppliers from conflict areas.

21. Information about Norwegian policy on sanctions or similar measures is not easy to find. Norway implements UN sanctions in their legislation and has at times advised businesses to avoid specific countries or territories, but this information is not readily available.

22. Norway has no policy or practice of excluding uncooperative companies involved in serious violations of human rights from various forms of government support, such as procurement contracts, development aid contracts, export credit or general support to businesses through embassies abroad.

23. There is no declared policy or practice of prosecuting companies registered in Norway for involvement in serious human rights abuses overseas. No legal measures - neither criminal nor civil – have been used to date.

Judicial Remedies

The Norwegian legal framework seems to open to litigation - both civil and criminal – against companies involved in certain acts committed abroad which are analogous to human rights violations (e.g. complicity in war crimes). However, legal action against companies for human rights violations which occur abroad has yet to take place.

24. There is no stated policy or practice of permitting the prosecution of Norwegian companies for involvement in serious violations overseas.

25. There is insufficient practice of investigating, prosecuting and punishing companies involved in international crimes. However, this is not the case in the fight against corruption and international crime involving natural persons. Being a legal person should not create a form of impunity.

26. There is no strategy to remove barriers to access to the Norwegian courts for victims of business-related human rights violations that have taken place overseas.

27. There is a lack of policy and practice with regard to assistance to victims of business-related violations that want to pursue the matter through the Norwegian courts.

Non-Judicial Remedies

Norway's National Contact Point for the OECD Guidelines is open to victims of business-related human rights abuses overseas. In addition, there a number of government and industry-based complaints mechanisms.

28. Norwegian complaints procedures do not appear to have jurisdiction to hear complaints against the activities of companies in Norway which have consequences for human rights abroad, for example through business partners such as suppliers, partnerships or supply chains.

29. Market-based and other non-governmental complaints mechanisms do not treat human rights specifically, but are mainly concerned with consumer issues.