WORKSHOP REPORT

Securing Sustainable and Accountable Business in Europe:
The role of National Action Plans on Business and Human Rights (NAPs)

Edinburgh, 5th June 2018

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Acknowledgements

1. Overview

The UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011. Since then, the European Union (EU),[1] Council of Europe,[2] and Organisation for Economic Cooperation and Development (OECD), besides the UN Working Group (UNWG), have called for the development of National Action Plans (NAPs) to promote the implementation of the UNGPs around the world. As of 5th June 2018, 20 countries have adopted business and human rights NAPs,[3] and 10 countries are currently developing business and human rights NAPs.[4]

Of the 20 countries throughout the world to have developed a NAP, 17 are Council of Europe (CoE) States. While Europe might be leading the world in terms of developing NAPs, the NAPs developed in this region exhibit considerable variety in terms of their processes of development and contents. For example, there are notable differences in the extent to which they embody transparency, and inclusion and participation of relevant duty-bearers, stakeholders and rights-holder representatives, as well as in their balance between domestic and international issues.

This provided the context for the "Securing Sustainable and Accountable Business in Europe: The role of National Action Plans" workshop. Organised by the Centre for Social and Environmental Accounting Research (CSEAR) at the University of St Andrews and the Danish Institute of Human Rights (DIHR), with financial support from the Scottish Government, the workshop sought to evaluate NAP processes across Europe and to consider how NAPs may serve as a mechanism to strengthen business governance and social accountability. To this end, the workshop brought together leading business and human rights practitioners involved in NAPs and related policy processes across Europe.

The workshop was comprised of five sessions addressing the following themes:

1) NAPs in Europe: past actions, current status and key questions
2) NAPs as a driver for action: government and business perspectives
3) Participation and democratic accountability: labour and civil society perspectives
4) Monitoring and follow-up to NAP implementation
5) Connecting with regional and international initiatives.

Each theme was introduced by one or two relevant experts before discussion was opened to the floor. The workshop proceeded under the Chatham House Rule.

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[1] A renewed EU strategy 2011–2014 for Corporate Social Responsibility, COM (2011) 681 final (Oct. 25, 2011), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:en:PDF

[2] Press Release, Council of Europe, Committee of Ministers Adopted Recommendation on Human Rights and Business (Mar. 7, 2016), https://www.coe.int/en/web/human-rights-rule-of-law/-/human-rights-and-busine-1?desktop=false; Council of Europe, Recommendation on Human Rights and Business, CM/Rec(2016)3, at 7 (Mar. 2016), https://edoc.coe.int/en/fundamentalfreedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states. html

[3] The UK has two NAPs – the 2013 original and the 2016 Update. Luxembourg adopted its NAP after this conference on the 22nd June 2018. Georgia's business and human rights NAP is a chapter within a larger human rights NAP, but is considered a NAP due to the procedural measures taken in developing it.

[4] Source https://globalnaps.org/country/

2. NAPs: General Observations

Overall, participants expressed significant optimism about the potential of NAPs and were generally positive about developments to date. Compared to other initiatives, there has been relatively swift progress on NAPs over a four-year period and participants noted that there is now ample guidance in place to support the development of NAPs – in particular, UN Working Group guidance[5] and the Danish Institute for Human Rights (DIHR)/International Corporate Accountability Roundtable (ICAR) "Toolkit".[6]

Furthermore, participants recognised the co-ordinating opportunities and positive "spill-over" effects arising in the development of some NAPs. While NAPs bring business and human rights to the national level, the multi-actor dialogues associated with NAPs have informed discussions and engagement at more local, provincial and regional levels. In this respect, NAPs have variously supported awareness raising around business and human rights, enabled capacity building and facilitated dialogue across a range of different constituencies, including business, government and civil society.

Participants highlighted that a NAP can act as an expectation-setting tool. They create a space for multi-stakeholder dialogue where civil society, business, and government can talk to one another about what they would like to see and what they are currently doing. With the state taking the lead role in NAP development, it gives the state the opportunity to signal to business and civil society where developments will occur and what they should prepare for. Participants highlighted that for business this is extremely valuable. It was also noted that business may be further advanced in some areas than the state and can encourage the state to adopt more ambitious targets.

While the general tone of the discussion was optimistic, participants nevertheless noted a number of concerns. Perhaps most notably, despite the benefits outlined above, many participants agreed that the majority of NAPs lack clearly defined commitments to action, explicit targets, monitoring processes and budgets. Very few NAPs contain all the elements of SMART targets (specific, measureable, actionable, relevant, time-bound) which some participants felt was very important. NAPs are often not well known outside of the government departments they operate in. In a number of cases, the NAP development process has "flown blindly" and not been informed by existing guidance on NAPs. Relatedly, participants also noted that a number of existing NAPs failed to "join the dots" with wider business and human rights initiatives, other human rights instruments or the 2030 Agenda for Sustainable Development.

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[5] UN Working Group on Business and Human Rights (2014) Guidance on National Action Plans on Business and Human Rights. *UN Working Group on Business and Human Rights* [online] Available at:
http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf .
[6] DIHR/ICAR (2017) National Action Plans on Business and Human Rights Toolkit (2nd edition). November. Available at:
https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5a3bd3bf9140b7ab3607ee6d/1513870272126/FINAL+NAPs+Toolkit+Update+2017.pdf.
DIHR/ICAR (2018) The National Baseline Assessment (NBA) Template. November. Available at:
https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/business/naps/annex-b-nba-template-november-2017.pdf.

The 2030 Agenda, which explicitly acknowledges the role of business in realising the human rights of all, was highlighted as an important framework which should be taken into account when drafting a NAP. SDG 17, on means of implementation (including technology), and SDG 12.7 on sustainable public procurement, provide elements NAPs can incorporate. However, it was noted that although some NAPs acknowledge the 2030 Agenda, very few unpack the 2030 Agenda in depth. It was also highlighted that the relationship between the SDGs and the UNGPs has yet to be meaningfully explored, so there is little guidance on how to integrate the 2030 Agenda with business and human rights norms.

The lack of accountability was highlighted as a major weakness in the current NAP landscape which could have long-term consequences. Participants suggested that a benchmarking initiative or an exercise to measure and compare the quality of NAPs might be a way to improve the standard of NAPs, and stimulate good practice examples. Participants suggested that if we continue to see the development of weak NAPs then their value is going to diminish and civil society will no longer support them. In terms of reflecting on how NAPs might develop going forward, a number of participants outlined their support for the development of a regional network of NAPs or even a European-level NAP. At the very least, given that a high proportion of NAPs are European, participants noted the merit of undertaking a gap analysis at the European level, which might be led, for instance, by the European Union and/or the Council of Europe.

Participants also highlighted the potential for NAPs to engage and foster collaboration with other international bodies, such as international and regional financial institutions and trade bodies. It was noted that, as a community of business and human rights practitioners, activists and scholars, there is a danger that we end up "talking to ourselves". By using the NAP process to connect more directly with transnational rule-making bodies, NAPs have the potential to drive proactive engagement with, and shape, global governance mechanisms.

In terms of the role of government in NAP development, participants noted that the more successful NAPs had a "whole of government" character. In this sense, the ultimate effectiveness of a NAP depends on inter-ministerial input. This was viewed as crucial in raising the profile of the business and human rights agenda, ensuring policy coherence and overall consistency of approach, and also in signalling the scale of ambition.

The international binding treaty process was highlighted as an ongoing discussion with potential ramifications for NAPs. Participants highlighted that a binding treaty could detail that states adopt NAPs as a means of implementation. Conversely it was also noted that some states might be discouraged from developing NAPs based on the soft-law UNGPs pending a binding treaty.

Finally, in terms of general observations about NAPs, participants emphasised that NAPs should not ignore the local context. Noting the tendency for European NAPs to be externally orientated, emphasising foreign rather than domestic abuses (or directing support and guidance externally rather than locally), participants indicated that there was greater scope for NAPs to make the local context more visible.

3. NAPs: Process

Reflecting on their own experiences, participants highlighted a range of issues and good practices to consider in the development of future NAPs. One was the importance of capacity-building (for example, training for the civil servants tasked with drafting the NAP) in the early stages of the NAP process. In many cases, NAPs were developed and managed through an inter-ministerial process. While this was generally welcomed, knowledge of the UNGPs and related standards was often patchy across government departments. Therefore, the early stages of the NAP development process required measures to strengthen government capacity and extend knowledge of the business and human rights landscape.

Participants stressed the importance of stakeholder engagement and consultation in the NAP development process. In particular, civil society, labour and business should be included at key points to strengthen a NAP's "legacy" by building constituencies to support NAP implementation in the longer term. Such constituencies should have their voices heard in shaping the content of the NAP, and have the opportunity to comment formally on a draft NAP. The constituencies should also be fully informed on the procedural steps at the beginning of the process, with a clear timeline provided, and updated as appropriate. A transparent and inclusive process should also generate a NAP and follow-up process that are better aligned with stakeholder needs and objectives.

While participants acknowledged that NAPs had rich potential as a mechanism to foster dialogue between business and NGOs, some processes failed sufficiently to engage with stakeholders. Several participants reflected that the UK NAP process would have benefited from stronger transparency and engagement measures across the UK, rather than solely in London. It was thought that, in the absence of such measures, the UK NAP lacked sufficient domestic profile and stakeholder support, and made little impact overall. This was perceived to be a missed opportunity, especially given the positive initiatives led by the UK government, for instance, in the area of modern slavery.

The value of a National Baseline Assessment (NBA) before the drafting process begins was highlighted as important. An NBA primarily assesses the current level of implementation of the UNGPs, bringing together an analysis of the legal and policy gaps which a NAP can address. An NBA also provides an opportunity to build capacity and contribute to transparency and accountability by providing a line from which SMART actions in a NAP can be judged as to whether they were effective. Some participants questioned whether the approach in Ireland of committing to an NBA in the NAP to be conducted subsequently was 'putting the cart before the horse', but others suggested that different approaches can work for different states.

Germany was recognised as designing a strong NAP process, with several ministries involved and wide stakeholder engagement across different sectors. On the other hand, participants noted, during the final stages of drafting, stakeholders lacked sufficient opportunities to comment.

It was highlighted that delays often occur in NAP processes, and that contingency should be built in for this, especially as the most common delays arise from the cross-ministerial method of working which

brings additional bureaucracy. Participants stressed that where such delays occur, they should be clearly communicated to stakeholders.

Specific terms of reference to involve vulnerable groups were also called for and clearer rationalisation was needed around decisions about which stakeholders to engage. Relatedly, NAPs should undertake and document a stakeholder mapping exercise at the outset. In European NAP processes to date, a lack of such mapping exercises meant that relevant constituencies – such as older persons, children, LGBTI, persons with disabilities, women, representatives of indigenous communities, the self-employed, and small and medium-sized businesses – had often not been adequately included.

Business engagement was generally viewed as crucial, both in terms of understanding the human rights issues faced by business as well as establishing business support for the NAP and subsequent policy measures and other initiatives. In this context it was noted, firstly, that businesses often "listen to other businesses more than they listen to human rights experts", and that establishing a peer support mechanism is very important. Businesses sometimes find it difficult to talk about issues in public fora for fear, for instance, of adverse publicity or misrepresentation. Relatedly, some businesses indicated a preference for multi-sector forums, so that they were not simply engaging with their own competitors.

Finally, in terms of NAPs processes, participants indicated that there "should be no end game for NAPs". Like the Universal Review Process (URP) or indeed human rights due diligence (HRDD), NAPs should be a continuing process of review and revision.

4. NAPs: Content

Many NAPs contain summaries of the UNGPs and measures taken at the regional level. Many NAPs also contain a substantial focus on what currently exists in a state related to the UNGPs, and prior measures they have taken around business and human rights. In some cases, it is hard to distinguish between what is already in place and what is new, and participants felt this distinction should be made much clearer. In most NAPs, this confusion often overshadows the focus given to SMART (specific, measurable, achievable, relevant, time-bound) actionable targets. Participants felt that NAPs, by their very name, should be much more focused on forward-looking actions rather than providing a summary of what has gone before.

As well as a lack of SMART targets, participants felt that forward-looking actions in NAPs often failed to commit to legislative initiatives. This was felt to be pressing in areas like corporate reporting and human rights due diligence. On the other hand, due diligence legislation such as the French Law of Vigilance[7] was highlighted as a good example of what NAPs could commit to.

Attention was drawn to the fact that while the UK had produced an updated NAP in 2016, its contents simply repeated much of the original NAP. It contained very few forward elements and provided no objectives to monitor. Participants noted that this was ironic given the good work being undertaken in the UK around modern slavery and forced labour. It was suggested that the UK could have made the update more nuanced and focused on specific salient issues such as modern slavery, and made clear their ambition to work in the area with SMART targets.

Access to remedy was considered by participants to be the weakest element of current NAPs. This weakness is often in contrast to the expectations of civil society stakeholders who want to see the NAP detail how businesses can be held account for human rights abuses, both in the state the business is operating within, but also extra-territorially. Often NAPs list what judicial measures are already available and contain very few SMART targets on how the state will improve access to remedy to victims of human rights abuses related to business.

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[7] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre

5. Implementation, enforcement and accountability

Implementation and enforcement were generally considered the weakest elements of most NAPs. Where the definition of future commitments was vague, monitoring and evaluation were generally difficult. As one participant stated, "if there is no target, how do you assess if it has been achieved?" Furthermore, many NAPs lacked a clear timeline for delivery and review.

Participants debated the merits of including conditionalities or "sanctions" amongst NAP commitments. For example, Germany's NAP includes provision for the Federal government to adopt "legislative measures" if the targets set in the NAP for the uptake of corporate human rights due diligence by businesses are not met by a certain time. In addition, Germany's NAP refers to sanctions in relation to the Partnership for Sustainable Textiles initiative, introduced by the Federal Ministry for Economic Cooperation and Development. Members of the Partnership are required to submit to a review process and if specific individual measures (road maps) are not complied with, the German NAP states that "a robust sanctions regime" will "ensure credibility and transparency".[8] While some participants favoured this approach, others cautioned that incentives-based approaches would be more likely to lead to sustained business engagement.

Participants perceived there was good potential to enhance the effectiveness of NAPs by linking them to wider human rights implementation and accountability processes, such as the Universal Periodic Review and international treaty monitoring processes, for instance, under the United Nations (UN) Convention on Economic, Social and Cultural Rights (CESCR) and the review processes associated with the 2030 Agenda. In this respect, the NAP should also be used to drive coherence and a systematic approach to implementing recommendations from regional and international supervisory mechanisms with relevance to business-related abuses.

While there are currently no standard monitoring requirements for NAPs, it was noted that NAPs which are SMART (specific, measurable, achievable, relevant, time-bound) provide greater accountability opportunities. It was also suggested that NAPs which are SMART-ER (ethical and recorded) should be encouraged as recorded information, which can be collected and published by the state, provides even further levels of accountability.

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[8] https://www.business-humanrights.org/sites/default/files/documents/NAP%20Business%20Human%20Rights_English%281%29.pdf

6. Examples of good practice and possible future directions

Participants noted the success of the ILO's Helpdesk as an example of good practice. The Helpdesk is a 'one-stop shop' for businesses to help align their operations with international labour standards by providing information, advice and resources. This was held up as a type of system that could be replicated and included in future or updated NAPs.

The Dutch government has developed "semi-voluntary" sector-based agreements related to responsible business conduct (RBC). To date, agreements have been concluded in the forestry, garments and textile, gold and banking sectors, with other sector agreements currently in development.[9] The agreements (or "covenants") are developed through negotiations between companies, NGOs, unions, government and other partners at sector level.

In France, a National CSR Platform was created by the Prime Minister in June 2013 with the aim of facilitating dialogue between businesses, employees, non-profit organisations and NGOs. The CSR Platform has a total of 50 members and, in addition to the aforementioned stakeholders, includes representation from elected members of parliament, regional authorities and administrations, academics and universities. One of the functions of the CSR platform is to make recommendations to the French government. In addition to the CSR Platform, France have also established an ambassadorial post for Bioethics and Corporate Social Responsibility. The aim of this diplomatic role is to actively participate in international negotiations around the global governance of CSR.

The Northern Ireland Human Rights Commission (NIHRC) established a business and human rights forum in 2015[10], which provides a multi-stakeholder mechanism for Government, business, and civil society to engage on business and human rights related issues. Facilitated by the NIHRC, the forum aims to be as inclusive as possible, actively encouraging local business to engage with, and share best practice around the management of, business and human rights issues. To date, the forum has established a Guide for Businesses in Northern Ireland on Business and Human Rights[11] as well as submitting evidence to the Joint Committee on Human Rights' Human Rights and Business Inquiry in July 2016. In addition to the forum, the NIHRC has also been active in raising awareness around business and human rights by organising 'moots' in local universities and facilitating roundtable discussions.

As part of the development of a Scottish NAP, consultations were undertaken with Year of Young People Ambassadors and The Children and Young People's Commissioner Scotland in order to ensure that the role of children and young people are reflected in Scotland's NAP.

In November 2017, the Danish Institute for Human Rights launched www.globalnaps.org as an online "one stop shop" for information regarding National Action Plans (NAPs) on Business and Human Rights. It

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[9] https://www.imvoconvenanten.nl/agreements?sc_lang=en
[10] http://www.nihrc.org/business-human-rights-forum
[11] http://www.nihrc.org/uploads/general/Guide_to_Business_and_Human_Rights_in_NI.pdf

details how each NAP was developed, including the level of stakeholder participation, and breaks down each NAP by 41 issues and by each Guiding Principle.[12]

Workshop participants highlighted the need for peer-to-peer dialogue to share good practice and learnings, along similar lines to the Partners for Review on the 2030 Agenda. This could be between EU and the CoE member states, building on the strategy and recommendations they have adopted. Such dialogue and engagement could also be at the international level, and involve engagement with other regional or international human rights bodies.

Some participants raised the question of whether financial bodies such as the IMF, WTO, World Bank should be engaged in dialogues around business and human rights NAPs as it is important to involve both actors who are already convinced of the value of NAPs, as well as engaging those who have not necessarily engaged with the topic previously.

Business and human rights at a de-centralised level was also highlighted with a number of local action plan initiatives in Scotland, Catalonia and Northern Ireland. The value of such local action plans was highlighted as an alternative approach which may bear fruit. The approach at city level was also highlighted as an interesting development with certain cities, for example in Korea, adopting their own approaches to business and human rights.

The use of technology to facilitate NAP processes was discussed and the idea of a 'NAP app' was suggested as a potential tool which states could use, for example, to facilitate stakeholder engagement and keep them informed of training opportunities, and developments, especially for younger people.

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[12] See further, DIHR (D. Morris et al), *National Action Plans on Business and Human Rights: An analysis of Plans from 2013-2018* (Copenhagen: DIHR, 2018)*,* available at: https://www.humanrights.dk/news/does-your-government-have-plan-prevent-business-related-human-rights-abuses .

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