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INTRODUCTION

The UN Guiding Principles on Business and Human Rights (UNGPs) have been endorsed unanimously by the UNHRC, thereby establishing them as the “authoritative global reference point for the business and human rights agenda”.¹ They comprise three individual but interdependent pillars. Pillar I identifies the State’s legal obligations to protect human rights. Pillar II defines the corporate responsibility to respect human rights as grounded in societal expectations.² Finally, Pillar III outlines obligations to provide access to remedy. The principles are voluntary in nature, though some principles are founded upon existing legal obligations. They have been welcomed by States, businesses and civil society, but the challenge of implementing them remains.³

The object of this essay will be the use of National Action Plans (NAPs) by States and to assess whether they have any real value in the implementation of the UNGPs. The first section of this essay will discuss the purpose of NAPs and the potential they have for implementing the UNGPs. The second section will look at the process of drafting a NAP, and some of the criteria necessary for ensuring the final document realises its potential. The third section of this essay will look in more detail at the content of NAPs to assess whether States are committing to

undertaking meaningful actions, or whether NAPs are merely declaratory in nature. Finally, this essay will look at the process of monitoring the implementation of the NAP in order to further assess whether there is value in developing NAPs.

I. NATIONAL ACTION PLANS

NAPs have been defined as an “evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the [UNGPs] …”.

There are multiple purposes for creating a NAP. Firstly, they provide for greater coordination and coherence in Government policy regarding business and human rights. This can be achieved by the bringing together of different Governmental departments in order to create a uniform strategy. Secondly, they can provide for an inclusive process to identify national priorities and commit to policy measures and actions in respect of them. NAPs allow States to outline the actions that they are going to take to address particular issues within their jurisdiction. Finally, they can provide for a process of continuous monitoring, measuring and evaluation of a State’s implementation of the UNGPs. The commitments set out in a NAP can provide a benchmark for third parties to identify failures by the State to implement the UNGPs. For these reasons, there has been encouragement at international and regional levels for the use of NAPs to implement the UNGPs. For example, the UNHRC encouraged States to develop NAPs or other such frameworks. Prior to this, the EU invited its Member States to develop NAPs by the end of 2012, followed by an extension until the end of 2013. However, only the United Kingdom and the Netherlands met this deadline. As of December 2015, only 9 NAPs have been published.

The potential merits of creating a NAP can only be fulfilled if States draft one that effectively addresses human rights issues within their jurisdiction. On this note, it has been acknowledged that there is no uniform approach to drafting NAPs, although four essential criteria have been established. Firstly, it is

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5 ibid [1].
6 ibid.
7 ibid.
11 ibid.
12 UNWG (n 4) 2.
imperative that the NAP is founded upon the UNGPs. To disregard this requirement would eliminate most, if not all, of the value of the NAP. Secondly, the NAP must be context-specific. The commitments must address actual and potential business-related human rights abuses, otherwise, the NAP will have little value in implementing the UNGPs. Thirdly, the drafting process must be inclusive and transparent. This is vital for ensuring that the NAP addresses a broad range of issues and that disempowered stakeholders have the opportunity to take part in the process. Finally, the NAP must be regularly reviewed and updated. As the definition states, NAPs are an evolving strategy so must, therefore, be amended in order to address new and unanticipated issues and governance gaps that arise in the future. The implementation of the UNGPs is a continuous process so the NAP must reflect that, rather than being used as a single measure.

II. THE DRAFTING PROCESS

One of the primary aims of NAPs is to identify gaps in human rights protection within a State and commit to taking steps to address these problems. Therefore, States must undertake an extensive drafting process which enables them to effectively identify these gaps and design a NAP which is able to address them. Certain criteria have been observed as being essential during this process.

A. Multistakeholder Consultations

It has been observed that NAPs provide an entry point for civil society to engage with the business and human rights agenda, and therefore the drafting process should include multistakeholder engagement. This not only aids in identifying gaps in protection but also makes the process inclusive and increases the NAP's credibility. It also empowers rights-holders and generates dialogue and mutual undertakings between the various stakeholders. Furthermore, it has the potential to overcome the power and access imbalances between certain stakeholders, particularly those negatively affected by business activity.

13 ibid [3].
14 ibid [4].
15 ibid.
16 ibid.
17 UNWG (n 4) 4.
The overall value that this brings to the NAP is that it enables States to properly assess gaps in protection and influences the actions that the State will commit to in the NAP. Without an inclusive process, NAPs risk ignoring many gaps in protection that they should be addressing and therefore miss opportunities to implement the UNGPs in these areas. Furthermore, inclusivity broadens the range of interests that influence the NAP and enables it to reflect the viewpoints of more than just a handful of stakeholders. However, this raises the challenge of balancing the competing interests of stakeholders. States should not favour certain stakeholders over others and allow for adequate consultations with all groups. If a balance is not met, then the scope of the NAP may be skewed to favour certain groups’ interests. This may result in certain issues being ignored in the NAP or actions to implement the UNGPs being weakened, thereby reducing the overall value of the NAP.

The lack of multistakeholder engagement in the drafting process has been identified as one of the key shortcomings in the published NAPs. States have failed to directly engage with relevant stakeholders, particularly those working in at-risk sectors within the national jurisdiction, and those living in local communities where companies carry out extraterritorial activities. Instead, States generally consulted only with national interest groups, with an almost complete absence of direct engagement with rights-holders. For example, Denmark only consulted with select members of the Danish Council for CSR, ignoring other important stakeholders completely. The Netherlands held consultations with only 50 external stakeholders but failed to hold any public consultations. These narrow consultations risk ignoring the some of the most serious human rights violations within a State and fail to take account of the unique views and experiences of certain stakeholders; such as indigenous persons or other persons affected by corporate human rights violations. The Finnish process illustrates a broader process which included two public hearings, which enabled civil society members to be included in the process. Written consultations were also permitted, enabling a much broader range of stakeholders to engage with the NAP. In addition to this, the process was discussed in the Committee for Corporate Social Responsibility, a multistakeholder body acting under the Minister of Employment and the Economy. This multistakeholder process provides the NAP with a

21 ibid.
23 ibid [11]-[12].
24 ibid [17].
25 ibid.
26 ibid.
broader range of opinions to balance, and has the potential to effectively identify the gaps in the implementation of the UNGPs.

B. National Baseline Assessments

States can also conduct National Baseline Assessments (NBAs) in order to assess the nature and scale of adverse business-related human rights impacts, independent of and in addition to stakeholder consultations. NBAs can also identify gaps in State and business implementation of the UNGPs. The value that they provide for the implementation of the UNGPs is similar to that of multistakeholder consultation, namely that they allow States to properly assess the problems that need addressing and the actions that are required to remedy them.

However, States that have published NAPs have failed to carry out NBAs during the drafting process. The UK, Netherlands, Denmark and Finland all failed to do so. The Netherlands and Finland conducted ‘internal mapping’ of their respective laws and policies, but not to the standard that an NBA would provide. The failure of States to undertake NBAs risks creating gaps in their NAP’s implementation of the UNGPs, either in the issues addressed or actions identified, much in the same way that failing to engage in multistakeholder consultations has.

However, many of the States that are currently drafting NAPs are beginning to utilise the value of NBAs. France’s NHRI and Italian and Swiss academics have undertaken NBAs for their respective countries. However, these NBAs ignored Pillar II of the UNGPs, and therefore risk limiting the value of the NAP. On the other hand, Germany’s NHRI conducted an NBA which has addressed all three pillars and provides a much better approach to drafting a NAP, and which has the potential to fulfil the purposes of a NAP for the UNGPs.

III. CONTENT

The content of a NAP is the crucial indicator in assessing its value in implementing the UNGPs. It is essential that they express a firm commitment to support and implement the UNGPs, and that States expect businesses to respect human rights throughout their operations. Furthermore, there are three vital components that should be reflected in the content of NAPs.

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27 UNWG (n 4) 7.
28 ICAR and ECCJ (n 22) 7, 11, 15 and 17.
29 ibid [11] and [17]-[18].
30 Felice (n 20) 54.
31 ibid.
33 UNWG (n 4) 11.
A. Structure

Firstly, NAPs should outline the key challenges faced by a State regarding business and human rights. This should be country-specific and contain a sufficient level of detail regarding the issues.\textsuperscript{34} This will enable States to identify the specific actions that need to be taken to address the issues and implement the UNGPs. If the outline is too general, then States will not be able to ascertain the actions that are required. Furthermore, it is imperative that the NAP outlines the challenges faced under all three pillars of the UNGPs. Many of the published NAPs have been structured around the three pillars, which helps to ensure that the NAP addresses all three areas.\textsuperscript{35} However, there has been a failure to strike an adequate balance between each pillar, with NAPs instead focusing on Pillars I and II more than Pillar III.\textsuperscript{36} The implementation of Pillar III will specifically be considered in more detail below. The UK and Danish NAPs contain sections dedicated to each individual pillar. Denmark’s includes a general summary of each principle in that pillar and descriptions of past actions that have been taken.\textsuperscript{37} However, the UK failed to outline any past actions taken to implement Pillar III. It also contains only four future actions for Pillar III, compared to eleven actions identified under Pillar I.\textsuperscript{38} Conversely, the Danish NAP provides a schematic overview of Denmark’s implementation of the UNGPs principle by principle.\textsuperscript{39} This ensures that the NAP includes all three pillars, but is limited only to past actions and not future actions. These examples illustrate the imbalance of the NAPs which limits the value they have in implementing the UNGPs as they largely ignore one of the pillars. NAPs are not fulfilling their potential to implement the UNGPs unless they address all three of the pillars.

B. Commitments

NAPs should identify future actions to be taken to implement all three pillars of the UNGPs. This section should achieve two things. Firstly, it should discuss the current and planned activities of the State regarding the implementation of the UNGPs.\textsuperscript{40} Secondly, it should outline the modalities of implementing each activity, including the entity responsible for it, a timeframe for completion and indicators for evaluating its success.\textsuperscript{41} The most effective NAPs for implementing

\begin{itemize}
\item \textsuperscript{34} ibid \textsuperscript{[4].}
\item \textsuperscript{35} ICAR and ECCJ (n 22) 4.
\item \textsuperscript{36} ibid \textsuperscript{[4]-[5].}
\item \textsuperscript{37} ibid \textsuperscript{[15-6].}
\item \textsuperscript{38} Foreign & Commonwealth Office, \textit{Good Business: Implementing the UN Guiding Principles on Business and Human Rights} (Cmd 8695, 2013) c 3.
\item \textsuperscript{39} Government of Denmark, ‘Danish National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights’ (Government of Denmark 2014) app 1.
\item \textsuperscript{40} UNWG (n 4) 8.
\item \textsuperscript{41} ibid.
\end{itemize}
the UNGPs will contain clear and precise commitments with finite deadlines.42 This can provide a sound basis for holding governments to account for their failure to implement the UNGPs.43

There are four aims that commitments should strive to meet. Firstly, they should be directed at preventing, mitigating and remediating current and potential adverse impacts.44 Secondly, the UNGPs should inform the actions to be taken.45 Thirdly, the actions should include a combination of both mandatory and voluntary, international and national measures.46 Finally, commitments should account for the differential impacts on men and women, and ensure that the NAP effectively prevents, mitigates and remediates in respect of such differences.47

The commitments contained in published NAPs have failed to fulfil these four essential criteria. Firstly, they are considered to be largely declaratory in nature, as they identify existing measures but fail to commit to taking specific actions.48 For example, the UK proposes to “encourage” companies to extend domestic grievance mechanisms to overseas operations.49 This action stops short of committing the UK to undertake any specific action and indicates to business than it is a voluntary action for them. NAPs need to employ stronger language which commits the State to undertake certain actions in order for NAPs to contribute to real change and implement the UNGPs.

NAPs have focused on past actions at the expense of committing to future ones.50 The Dutch NAP is a prime example of this, with only 2 of its 44 pages being dedicated to future actions.51 The Danish NAP contains only a short list of future actions for Pillar I, with more detail given to past actions.52 While there is value in including past examples to illustrate the State’s implementation of the UNGPs, more attention should be given to identifying future actions. Only future actions are capable of remediating current and potential adverse impacts. Without these essential future actions, the value of NAPs in implementing the UNGPs is severely limited, as they are incapable of contributing to any meaningful change.

The final shortcoming to discuss is the clarity of the actions contained in NAPs. The commitments States make must be sufficiently clear and precise in order to lead to a particular action being carried out. Vague and imprecise commitments undermine State accountability for implementing the UNGPs,

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42 Felice (n 20) 44.
43 O’Brien (n 18) 8.
44 UNWG (n 4) 12.
45 ibid.
46 UNHCR (n 1) 5.
47 UNWG (n 4) 12.
48 O’Brien (n 18) 2.
49 FCO, Good Business (n 38) c 4.
50 ICAR and ECCJ (n 22) 5.
52 Denmark (n 39) 11-6.
owing to the difficulty in ascertaining whether a State has implemented a commitment or not. NAPs that contain specific actions are the most likely to be properly implemented, and thus implement the UNGPs more effectively.

Vague commitments are common throughout the published NAPs, with the UK NAP being observed as being particularly imprecise. For example, the UK commits to developing “partnerships with other countries seeking to implement the UNGPs”, without identifying what such a partnership would entail or which countries would be involved. This ambiguity renders it almost impossible to ascertain whether the UK has implemented this action or not. Vague actions are often accompanied by a lack of time frames or deadlines for implementation, leaving actions as some open-ended objective to be achieved at some point in the future. An example of a clear commitment can be found in Finland’s NAP, which proposed a specific action to indicate whether social aspects had been considered in procurement. The action outlined the modalities of the action and what it aimed to achieve. It also identified the entities responsible for implementation and set a deadline for implementation, something that accompanied most action points in the NAP. Precise actions such as this aid in holding the State accountable for failing to implement it, particularly as it has a deadline and an entity responsible for its completion. Furthermore, by outlining what exactly is to be done, it is easier for the State to carry out that action as the NAP tells them clearly what they have to do. Vague commitments may require further action by the State to turn them into an action that can be implemented. Therefore, NAPs with clear and precise commitments can be very valuable for the implementation of the UNGPs.

C. Pillar III: Access to Remedy

One of the foremost shortcomings in the content of NAPs is the blatant disregard for Pillar III. This essay has already addressed the imbalance in the attention devoted to each pillar, observing that actions for implementing Pillar III were often lacking. However, even where States have identified future actions to implement this pillar, they have not included the voluntary and mandatory measures necessary to effectively implement the access to remedy pillar. Many of the NAPs have failed to commit to establishing mandatory or regulatory measures for access to remedy, instead focusing on voluntary and non-judicial

54 FCO, Good Business (n 38) c 2.
56 ibid.
57 UNHCR (n 1) 5.
mechanisms. For example, the UK NAP focuses almost exclusively on non-judicial grievance mechanisms and contains a vague commitment to review the provision of remedies in the UK. The Dutch NAP goes further by addressing some of the barriers to judicial remedy but does little to suggest how they can be overcome. Regulatory measures are more likely to effectively and efficiently address gaps in human rights protection and thus lead to concrete changes in the future. Focusing on only voluntary measures do not fulfil the smart-mix approach highlighted in the UNGPs. NAPs have addressed how States and business can contribute to the implementation of effective non-judicial mechanisms, so they have some value in implementing the UNGPs. However, without actions to strengthen judicial remedies, the NAPs do not fulfil their potential for implementing the UNGPs.

IV. MONITORING

The potential value of NAPs for the implementation of the UNGPs will not be fulfilled if the commitments States make are not executed. Therefore, it is essential that NAPs identify a mechanism for monitoring and reviewing the implementation of the NAP. Furthermore, this should include a process for updating the NAP in the future. The UNGPs are not a one-time process. They are aimed at continuously guiding the human rights obligations of corporations. Therefore, NAPs must be updated regularly to address new gaps in human rights protection and to suggest new actions that are required. NAPs should be precise enough to identify the mechanisms for monitoring and a date for updating the NAP.

There has been a mixed inclusion of these mechanisms in NAPs. The UK and Finland committed to reviewing their NAPs, but the Netherlands and Denmark did not. For example, the UK committed to developing an updated version of their NAP by the end of 2015. A review process began in March 2015, but no updated NAP was published by the end of 2015. However, the UK also committed to reporting in an annual report by the Foreign Office. This was

58 O’Brien (n 18) 10.
59 FCO, Good Business (n 38) 17-8.
60 Netherlands (n 51) 33.
61 ICAR and ECCJ (n 22) 4-5.
62 UNHCR (n 1) 5.
63 UNWG (n 4) 9.
64 ibid.
65 DIHR and ICAR (n 18) 17.
66 FCO, Good Business (n 38) c 5.
68 FCO, Good Business (n 38) c 4.
followed up in the 2014 report which contained a chapter on business and human rights. This section noted the enactment of a new law on supply chains and the funding given to certain projects, but otherwise lacked any acknowledgement of the implementation of NAP actions. A better example of monitoring can be found in the Finnish NAP, which tasked a multistakeholder body with monitoring the implementation of the NAP as a whole. This body is able to use the responsibility and deadlines identified for each action point to hold the Finnish Government accountable for their failure to implement the NAP. Therefore, if NAPs follow the Finnish example, then they can provide a mechanism that ensures that the NAP is implemented by States and is more than just a declaratory document.

CONCLUSION

The ongoing development of NAPs by States has established them as one of the preferred mechanisms for the implementation of the UNGPs. They have a fairly unique purpose in that they can be used to apply the general principles of the UNGPs to a country-specific context. The process of drafting a NAP provides States with the opportunity to identify gaps in their implementation and commit to taking actions to address them. Furthermore, the process provides an entry point for multistakeholder engagement with the business and human rights agenda.

However, the potential value of NAPs has been limited owing to the failure to properly assess the situation within the State. States have consistently failed to include an adequate level of multistakeholder engagement in the drafting of their NAPs. This risks ignoring certain human rights challenges in the State and the different opinions on how to address them. This means States cannot properly understand the problems faced, and therefore implement the UNGPs when addressing them.

There are also many shortcomings in the content of NAPs. Most notably, they have not properly addressed all three pillars of the UNGPs. NAPs have focused on one or both of the first two pillars, with little focus on Pillar III. Furthermore, the content regarding Pillar III has often failed to address judicial remedies, thereby failing to fulfil the smart-mix of measures envisaged in the UNGPs. A major criticism of the content regarding all three pillars is that actions identified are vague and do not commit to specific actions, with a few exceptions. The imprecision in commitments undermines the purpose of NAPs in leading to concrete changes to implement the UNGPs and makes it difficult to hold a State

70 ibid.
71 Finland (n 55) 32.
accountable for failing to implement them. Therefore, NAPs only have value for implementing the UNGPs insofar as they contain clear and precise commitments for future action.

Finally, States have failed to establish adequate mechanisms for monitoring the implementation of NAPs and updating them in the future. Only a handful of States have outlined their monitoring mechanisms in their NAPs, and only a few others have committed to updating them in the future. However, the UK failed to fulfil their commitment. These mechanisms are essential for ensuring that States implement their NAPs and that they continue to identify future problems and actions so that it is not just a one-off process. The NAPs only have value insofar as they are implemented, so these mechanisms are necessary for ensuring this occurs.

To conclude, the NAPs have a lot of potential value for implementing the UNGPs, but there are certain requirements that need to be met to ensure that they can apply the general UNGPs into specific actions. With many more NAPs currently in development, there is ample opportunity for States to learn from the current NAPs’ failures and publish NAPs with greater value for implementing the UNGPs.