

PRELIMINARY ESSAY ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS AND RECOMMENDATIONS TO BRAZIL



The Business and Human Right Group (GDHeE, in Portuguese) of the São Paulo Law School of Fundação Getulio Vargas is an interdisciplinary group created to promote and to qualify the debate on business impacts on human rights and dedicated to applied research.

This document was produced with the support of the British Embassy in Brazil and was written by Flávia Scabin, Malak Poppovic, Julia Mello Neiva, Tamara Brezighello Hojaj, Martina Bergues, Julia Cruz and Daniela Jerez.

INTRODUCTION

The current international grammar of human rights emerged as a reaction to the atrocities of the World War II¹. It establishes States' obligations to respect, protect and fulfil human rights. This means that States should refrain from interfering with the enjoyment of those rights, protect individuals and groups against human rights abuses and take positive action to facilitate the enjoyment of human rights².

With the growing globalization process, companies assumed an ever-increasing role in the world economy. The legal frameworks for social and environmental protection were not able to keep up with the advances in global trade practices. More than ever, States need to fulfil their responsibility to protect human rights by preventing human rights abuses by third parties, such as business enterprises³. New commitments and visions were necessary to respond to the growing governance gaps.

¹ VIEIRA, OSCAR V. **A gramática dos direitos humanos**. B. Cient. ESMPU, Brasília, a. I, n° 4, p. 13-33, Jul./Set. 2002.

² UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. **What are human rights?** Available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

³ COMISSÃO INTERNACIONAL DE JURISTAS. **Acesso à justiça: violações de direitos humanos por empresas**. Geneva, 2011. Available at <http://www.conectas.org/arquivos/editor/files/Brasil-ViolaesEmpresas-August2011.pdf>



In June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights (UNGPs). The UNGPs are the results of a thorough consultative process led by the Special Representative of the UN Secretary General, John Ruggie, among States, businesses and civil society and offer a ‘powerful joint commitment to address human rights impacts of business enterprises’⁴

The UNGPs set a framework based on three pillars that detail the duties of States and business enterprises:

- Pillar I spells out States’ legal duty to protect third parties from adverse corporate human rights impacts.
- Pillar II identifies the responsibilities of business enterprises to respect human rights.
- Pillar III stresses the need for rights and obligations to be matched by appropriate and effective remedies when breached.

The main challenge faced by States is how to incorporate the new UNGPs framework into national priorities in order to insure their effective implementation.

In 2013, the UN Working Group on Business and Human Rights (UNWG) called upon States “to consider elaborating a National Action Plan (NAP) in order to define responsibilities at the national level, identify resource requirements and mobilize relevant actors, building on lessons learned from such experiences in other countries.” It defined the NAPs on Business and Human Rights as: “an evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in the UNGPs on Business and Human Rights”⁵.

According to the UNWG, the adoption of NAPs offer a range of potential benefits such as: promote greater coordination and coherence within government; encourage a participative process to identify national priorities; uphold the demand of different stakeholders for transparency; boost a platform

⁴ UNWG. **Guidance on National Action Plans on Business and Human Rights. Version 2.0.** Geneva, November 2015.

⁵ Ibid.



of on-going multi-stakeholder dialogue and a flexible yet common format that facilitates cooperation between States⁶.

In 2014, the UNWG published its draft guidance on the subject and recently updated it⁷. Alongside, the European Union (EU) also has been calling upon its Member States to develop NAPs⁸.

When the data for this paper was collected, only nine States (United Kingdom, The Netherlands, Italy, Denmark, Spain, Finland, Lithuania, Sweden and Norway) had launched their NAPs on business and human rights. Yet, several governments have already begun the process of developing NAPs or publicly committed to do so⁹. The newcomers can benefit from best practices and lessons learned from the first set of countries. Brazil is presently in the preparatory phase of the designing and elaboration of its NAP, under the coordination of the National Human Rights Secretariat.

The United Kingdom was the first country to draw up its NAP “Good Business – Implementing the UN Guiding Principles”, on 4th September 2013 with the purpose of providing a clear message of the government expectations about business behaviour, both in the UK and overseas¹⁰. The UK NAP review will be published shortly and will reflect the broad range of activity related to business and human rights already taking place across Government, including tackling modern slavery.

On what regards the 9 published NAPs, three major preliminary considerations must be made:

- The traditional language of human rights, present in international treaties, is little used and this could facilitate coherence between the Plans and the international documents related to human rights signed by the countries;

⁶ Ibid.

⁷ Ibid.

⁸ Soon after the endorsement of the UNGPs by States, in 2011, the European Commission published a Communication inviting Member States to develop NAPs [COM(2011) 681 final].

⁹ ECCJ and ICAR. **Assessment of Existing National Action Plans (NAPs) on Business and Human Rights**. November 2015 update.

¹⁰ UNITED KINGDOM. **National Action Plan “Good Business – Implementing the UN Guiding Principles”**. September 2013. Ministerial Foreword.



- The named roles and responsibilities of States and companies are neither clear nor precise in relation to human rights violations and many documents seem to confuse business responsibility to respect human rights with corporate social responsibility, that is, with voluntary actions taken by companies.
- As a consequence of the lack of clarity of the roles and responsibilities of States and companies, it is hard to monitor the implementation of the NAP and the documents do not provide for indicators that could guide the adoption of further policies and practices for the implementation of the UN Guiding Principles.

These considerations are relevant because NAPs are expected to move forward the protection of human rights, orientating governments and business on how to effectively protect and respect human rights.

In addition, transparency and participation during the elaboration of the NAP as well as the provision of clear instruments to implement and to monitor the implementation are conditions for achieving this expectation.

Using the traditional human rights language is a key element for the effectiveness of the human rights and businesses agenda, since it makes it possible to establish a common ground between the demands of the affected people, which commonly use the human rights grammar, and the actions taken by States and by companies.

At a glance, a comparative analysis of the nine existing NAPs highlights the relevance of transparency on the elaboration proceedings, especially when it comes to consultation and participation: *firstly*, a NAP elaborated without proper consultation does not consider the views and demands of all stakeholders and, therefore, may not relate to the human rights reality of the country; and, *secondly*, a NAP which does not have legitimacy amongst relevant stakeholders faces the risk of not being implemented.

This background enhances the necessity of analysis of existing NAPs, and, in particular, of their elaboration processes. Therefore, this essay aims at looking into the challenges and lessons learned from the UK NAP, taking into account



preliminary results and the current updating process. It also looks into the experience of other countries in elaborating their NAPs. As part of a larger study on the process of creating NAPs, the objective of this essay is to give a glimpse in some vital areas that must be given attention to in the drafting of the Brazilian NAP, rather than an exhaustive or representative overview on the subject.

We have based this essay on: (a) interviews with experts involved in the UK NAP¹¹; (b) interviews with representatives from other countries¹² participating to the I Seminar Brazil–European Union on Business and Human Rights held in Brasilia¹³; (c) submissions made by civil society organisations to the review process of the British NAP¹⁴; (d) comparative analysis of the existing NAPs and (e) desk-based research related to the issue.

The information collected from the interviews with NAP experts has allowed us to identify several challenges related to the process of drafting, implementing and reviewing a NAP. Considering that in the elaboration of a NAP, the process is as important as the results of the final document, we focused this report in three main challenges of the NAPs' process:

- The cross-government engagement;
- The identification of priorities associated with the implementations of the UNGPs in the national context; and
- The engagement of all relevant stakeholders during the development and the implementation processes.

¹¹ Interviews were made with three members from the FCO team involved in this updating stage: Mr Stephen Lowe, head of the Human Rights and Democracy Department; Mrs Hannah Clayton, Human Rights Adviser; and Mrs Shahida Khan, Business and Human Rights Policy Officer.

¹² Interviews were made with experts involved in the Dutch and the Finnish NAPs, respectively, Mr Gilles Goedhart, Senior Human Rights Policy Officer at the Dutch Ministry of Foreign Affairs, and Mrs Linda Piirto, Senior Advisor in Corporate Social Responsibility at the Finnish Ministry of Employment and Economy.

¹³ The I Seminar Brazil-European Union on Business and Human Rights was held in Brasília on 15 and 16 September 2015 and organized in cooperation with the Brazilian National Confederation of Industries.

¹⁴ The submissions related to the review process of the UK NAP are available at <http://business-humanrights.org/en/submissions-uk-natl-action-plan-review-process-2015>.



In the last section, the main lessons learned from this preliminary study are summarized to serve to the Brazilian Government on the process of developing its own NAP on Business and Human Rights.

It is worth highlighting that by the time the research was made no country in Latin America had concluded and published its NAP. This document is, therefore, based in European NAPs, which undeniably deal with a different reality from the Brazilian one.

Despite contextual differences, the process for elaborating and implementing a NAP has similar features that must be present in any country and, in this sense, the European experience can enlighten challenges and solutions that may be similar in Brazil. However, it is essential for Brazil to get involved in regional debates on the issue.

1. CROSS-GOVERNMENT ENGAGEMENT

One of the fundamental issues that need to be taken into account for the elaboration and implementation of a NAP is the importance of creating cross-governmental commitment. In this sense, the UNWG¹⁵ recommends that countries elaborating a NAP create a format for cross-departmental collaboration and designate leadership within the Government. Similarly, the European Coalition for Corporate Justice (ECCJ) and the International Corporate Accountability Roundtable (ICAR) sees as a successful major trend the fact that all existing NAPs included various government entities and clearly identified a given entity responsible for oversight in the drafting and implementation process¹⁶.

In the UK case, the NAP is jointly led by the Foreign and Commonwealth Office (FCO) and the Business, Innovation and Skills Department (BIS), in

¹⁵ UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS. **Guidance on National Action Plans on Business and Human Rights**. November 2015

¹⁶ ECCJ and ICAR. **Assessment of existing National Action Plans (NAPS) on Business and Human Rights**. November 2014



collaboration with a Steering Group made up of key government departments¹⁷ and a smaller Core Group consisting of FCO, BIS, UK Trade and Industry (UKTI) and the Department for International Development (DIFD)¹⁸.

The collaboration within the government departments can be considered as a strength of the UK NAP and can serve as inspiration for other countries in the process of developing their plan of action. However, it should be stressed that the task is not always an easy one to carry out or maintain as a long-term policy. The coordination of a cross-governmental approach is complex and costly in terms of time and of monetary resources. For instance, it might be quite difficult to introduce business and human rights issues to government departments that are not directly involved with the thematic and to effectively engage them. Even when this first step is successfully taken, the challenge persists regarding how to keep the cross-governmental cooperation functioning during the whole implementation of the NAP.

According to the expert interviewees, the updating of the UK NAP holds a potential for improving cross-governmental integration, by reviewing the *modus operandi* of how to keep the various departments engaged for specific purposes.

Besides, it is interesting to note that in several submissions to the UK NAP review, a recurrent request is that it is relevant to have a transparent cross-governmental setting, publicizing who is responsible for what in each department, as well as within the Steering and Core Groups. In other words, the criticism vouched is that the NAP provides little information about the roles and responsibilities of the government departments involved and, because of that, it is not being seen as an operational working document (with timetables, for example)¹⁹. Moreover, among civil society organisations, there is a belief that the NAP is very much an “FCO document”, with little indication of how it will be rolled out across government in a strategic way. Consequently, the updated

¹⁷ UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS. **Questionnaire for States: National Action Plans on Business and Human Rights. UK response.** Available at: <http://www.ohchr.org/EN/Issues/Business/Pages/ImplementationGP.aspx>

¹⁸ BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (BHRR). **Action Platform. United Kingdom.** Available at: <http://business-humanrights.org/en/united-kingdom>

¹⁹ THE CORPORATE RESPONSIBILITY COALITION - CORE. **Good Business? Analysis of the UK NAP on Business and Human Rights.** July 2015.



version of UK NAP will need to clarify the responsibilities of each department involved to improve the accountability and monitoring of the implementation process and of the document itself.

2. IDENTIFICATION OF PRIORITIES ASSOCIATED WITH THE UNGPs IN THE NATIONAL CONTEXT

Once settled the cross-governmental cooperation, the actors driving the NAP process should identify the priorities and the gaps related to the implementation of the UNGPs in the national context²⁰. The ICAR and the Danish Institute for Human Rights (DIHR) jointly developed an instrument for this purpose as part of their NAPs toolkit: the National Baseline Assessment (NBA) template²¹.

A baseline assessment is a study conducted at the beginning of the intervention to take stock of the prevailing human rights conditions. The NBA template developed by ICAR and the DIHR aims at evaluating a country's current implementation of the UNGPs and other relevant business and human rights frameworks²². Its results can be used as a benchmark to compare future conditions with the initial status after the intervention has taken place.

The UNWG recommends that stakeholders involved in NAP processes consider using the template for addressing existing gaps in the business and human rights field²³. However, no NAP published so far has conducted a NBA as such²⁴. The Netherlands did an internal mapping of the government policies, legislation and other measures; while Finland issued an internal memorandum

²⁰ UNWG. **Guidance on National Action Plans on Business and Human Rights. Version 2.0.** Geneva, November 2015.

²¹ ICAR and DIHR. **National Action Plans on Business and Human Rights. A Toolkit for the Development, Implementation and Review of State Commitments to Business and Human Rights Frameworks.** June 2014.

²² Ibid.

²³ UNWG. **Guidance on National Action Plans on Business and Human Rights. Version 2.0.** Geneva, November 2015.

²⁴ Claire METHVEN O'BRIEN, Amol MEHRA, Sara BLACKWELL and Catherine Bloch POULSEN- HANSEN (2016). **National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool.** Business and Human Rights Journal, 1.



asking relevant ministries to review their responsibilities related to the business and human rights agenda. Nonetheless, both States did not publicize the outcomes of those activities and did not raise it to the NBA template level of specificity²⁵.

Being the first country to launch a NAP, the UK started from scratch. There was no guidance on how to develop a NAP at the time. However, the fact that it did not conduct a National Baseline Assessment (NBA) meant that in the updating of the NAP there was a lack of evidence on national progress made in the implementation of the UNGPs²⁶. Indeed, during the workshops held in June 2015 to inform the revision of the NAP, several stakeholders stressed that the document should be based on a NBA, carried out independently and following the specifications of the ICAR and DIHR's template²⁷.

In this respect, the question is how far can the revised document go without the initial parameters. According to one of the interviewees linked to the revision process, this may be an opportunity to undertake a "NBA in reverse", identifying UK's current priorities and gaps related to the UNGPs after the initial implementation phase of the NAP.

3. STAKEHOLDERS INVOLVEMENT

There is a general consensus that stakeholder engagement is a key element in the elaboration of NAPs. However, in this respect, a vital consideration is how the stakeholder engagement is being conducted in terms of inclusiveness and transparency. Considering the multiples possibilities for engaging relevant stakeholders, we have also looked into other countries experiences.

²⁵ ECCJ and ICAR. **Assessment of Existing National Action Plans (NAPs) on Business and Human Rights**. November 2015 update.

²⁶ ECCJ and ICAR. **Assessment of Existing National Action Plans (NAPs) on Business and Human Rights**. November 2015 update.

²⁷ BHRRC. **Updating the UK National Action Plan on Business and Human Rights. Headline Messages from Workshops held in w/c 29 June**. Available at <http://business-humanrights.org/sites/default/files/documents/UK%20National%20Action%20Plan%20-%20feedback%20from%20action%20plan%20update%20workshops%20June-July%202015.pdf>



The UK NAP was developed through consultations with business and civil society organisations. The Government started the consultations with big companies and then expanded the scope to smaller companies and civil society organisations. Affected communities were not consulted directly, as according to government information, the reason is that they are mainly outside the UK territory. Instead, non-governmental organisations that operate abroad were accessed.

The UK Government also made consultations during the updating stage of the NAP. A launch event was held in March 2015 to mark the beginning of the consultation process and 80 people attended it from government, civil society organisations, business and academia. Also, 8 workshops were held in June and July and were attended by a wide range of organizations²⁸. For the review process, in addition to direct consultations, it was established an online channel for new contributions..

The Dutch government used a different strategy for its consultation process, divided in two subsequent moments. First, before undertaking larger consultation, fifty individual interviews with key stakeholders were conducted by an external expert. Then, three separate consultation meetings with different stakeholders' groups - business enterprises, civil society and academics - were held to present the outcomes of the individual interviews and the propositions for the NAP. The Finnish process was also organised in two stages, but the strategy adopted was different. In the first stage, Finland did separate consultations with civil society and business. Then, after blending the results, Finland held a consultation with all stakeholders together.

Regarding the strategies used to engage and to involve the stakeholders during the NAP elaboration, the main difference was that in the UK and Dutch cases, stakeholders were consulted separately, whereas in the Finnish drafting process all stakeholders were brought together. Considering this, the Dutch

²⁸ Information extracted from the document "Updating the UK National Action Plan on Business and Human Rights. Headline message from workshops held in w/c 29 June", which contains the list of people that attended to the workshops held in June and July and is available at <http://business-humanrights.org/sites/default/files/documents/UK%20National%20Action%20Plan%20-%20feedback%20from%20action%20plan%20update%20workshops%20June-July%202015.pdf>

NAP expert interviewed considered that, looking back in time, it would have been useful to have consultations with all groups together. However, this approach also carried its own difficulties. The Finnish NAP expert recognized that one of the main challenges was precisely to manage the polarized views between civil society organisations and business enterprises.

On the particular issue of stakeholders' engagement, the possibility of bringing together the different protagonists seems to be a more satisfactory option than limiting the process to separate consultations.

Considering the complexity of engaging different stakeholders during all phases of the NAP development, another important element to consider is the quality of the communication process, as pointed out by one of the UK NAP experts. The difficulty lies in publicizing across different sectors what the government is doing in relation to the NAP, so as to open the circle and not limit the dialogue among a small group of stakeholders.

As for other topics, the review of the UK NAP offers an opportunity for the Government to make the process more inclusive. The most important aspect is not necessarily the launching of a revised document, but how the revision process is being conducted, so as to include businesses, civil society organisations, affected communities and human rights experts in both the drafting and reviewing phases.

In this respect, some of the submissions to the UK NAP review recommended the creation of a more enabling environment for civil society organisations and the promotion of a more meaningful participation of Human Rights defenders in all areas of decision-making processes on Business and Human Rights.

Stakeholder's engagement is a complex but essential part of the process of drawing and reviewing a NAP. Its complexity goes from organizing the consultations per se to publicizing who attended and how their demands were considered to be included in the document or not. On what regards publicizing, in fact, it is relevant to notice that none of the launched NAPs provide information of which stakeholders were involved or how their requests were considered to be embodied or not.



4. LESSONS LEARNED AND RECOMMENDATIONS FOR THE BRAZILIAN NAP PROCESS

First of all, it is important to stress that each State must look at its national circumstances in order to develop its own NAP. For this reason, there is no one-size-fits-all formula and every NAP is going to be different. However, other countries experiences with cross-government engagement, identification of priorities and gaps and stakeholder involvement can benefit the Brazilian NAP process. For each of these topics, we have looked into the relevant lesson learned.

- Regarding the cross-governmental approach, NAPs need to focus on the 1st Pillar of the UNGPs concerning the State's obligations by setting up a well-integrated inter-ministerial group that will participate in the drafting and implementation process, as a premise for its success. It is essential for Brazil to form such a working group based on inter-ministerial cooperation, with periodic meetings and a clear timetable in order to keep awareness within the government about the theme during the whole process.
- As regards the identification of priorities and gaps relates to the UNGPs, there seem to be consensus that a NBA can be a useful instrument for the task, allowing States to identify and select measures for the NAP in a transparent and accountable manner and to set clear expectations about business respect to human rights, including about business operations overseas. Hence, in order to make its NAP accountable to the different stakeholders and to the government itself, it is important that Brazil undertakes a NBA in the initial stages of the development of the document.
- With reference to the stakeholders' participation, the main lesson is that the whole process of the NAP - drafting, implementing and reviewing - must be very open and based on a broad consultative approach. The way in which stakeholders are involved during the NAP process is as important as the results of the final document. Bearing in mind the



previous experiences, it is important to hold a consultation, meeting or event where different groups (civil society, business and academics) can discuss the NAP together. In the initial stages of the process, it may also be interesting to hold consultations separately in order to identify the human rights violations by business and the challenges for each actor. In this sense, transparency and stakeholders' engagement are key elements in every NAP process. For that purpose, the Government must work with business and civil society as partners, always communicating what it is doing in relation to the NAP in order to engage all stakeholders. Considering that in the case of Brazil, business impacts are not limited to their operations abroad, but are mainly on its national territory, consultations and engagement of potentially affected communities is very important for the process' inclusiveness. In addition, is important to publicize who attended and how their demands were considered to be included in the document or not.

