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BUSINESS AND HUMAN RIGHTS

IN DEPTH

National Action Plans

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Despite some notable recent efforts to put political distance between them, the USA and Germany still have much in common. One is that, in December 2016, both countries launched their first national action plans (NAPs) on business and human rights, making them respectively the twelfth and thirteenth countries worldwide to do so since the first NAP was published in 2013. States that have already released such plans include the United Kingdom, the Netherlands, Denmark, Norway and Sweden, Italy, Colombia and Switzerland. According to the UN, the development of NAPs by governments in twenty other countries around the world – in Africa, Asia, Latin America, as well as Europe – is currently underway[1]. This wave of activity follows upon calls on states to develop NAPs by a number of bodies, including the UN Human Rights Council (2014), Council of Europe (2014) and European Union (2011).

All published national action plans take a point of departure in the UN Guiding Principles on Business and Human Rights (UNGPs), along with other standards comprising a business and human rights dimension, such as the OECD Guidelines on Multinational Enterprises, and state obligations arising under international human rights conventions. In each case, the NAP affirms the government's commitment to the three norms, respectively, that states have a duty to protect against business-related human rights abuses; that corporations must respect human rights; and that accessible and effective remedies should be available to victims. Each NAP then attempts, more or less systematically, to give an account of the laws, policies or institutional measures that are either already in place at the national level, or which are planned, to give effect to these human rights and business commitments.

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Beyond this common core, NAPs vary considerably. For instance, in terms of which UNGPs they select to address within the area of “Pillar I”, the state duty to protect against business-related abuses, most NAPs touch in some way on the topic of public procurement (UNGP 6), whereas few discuss privatisation of public services (UNGP 5). Naturally, NAPs also differ in terms of their thematic priorities, influenced by local contexts. Italy’s NAP, for example, addresses irregular working arrangements and exploitation in the agricultural sector, whereas Colombia’s examines challenges specific to a post-conflict transitional environment.

Another important axis of variation between countries’ approaches to NAPs relates to the processes by which governments arrive at “the finished product”. In some cases (for example, Chile, Germany and Scotland) they have commissioned independent bodies to undertake baseline studies that examine, systematically and from a position of neutrality, the degree to which a country’s laws and policies are in line with the UNGPs. In others, workshops or interviews have been conducted with selected stakeholders from business and civil society and experts to gather information and solicit their insights (Norway, Netherlands, UK and Ireland). Others again have formally requested inputs from pre-existing multi-stakeholder bodies with relevant mandates. The French government, for instance, has sought recommendations from the French Platform on CSR. In addition, a number of governments have established inter-departmental steering committees as a way of securing inputs and promoting institutional investment in the NAP across government and beyond whichever ministry has been tasked to lead the NAP process.

Just a few short years after the emergence of the UNGPs, such a boom in national implementation activity, even if far from universal, might still be thought a success, both for the “protect, respect, remedy” framework and for the NAP as a new human

rights governance modality. After all, human rights treaties such as the International Convention on Civil and Political Rights and International Convention on Economic, Social and Cultural Rights took ten years to secure sufficient ratifications even to enter into force. Meaningful efforts by states to monitor and report on their implementation efforts under these instruments, moreover, in many cases lagged far behind.

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One of the chief virtues, then, of the UNGPs and NAPs, may be that they lower the “barriers to entry” on business and human rights: they permit governments to embark on integrating the UNGPs into relevant laws, policies and programmes unencumbered by any expectation that all aspects should be met in advance. Another is that NAPs processes can establish a free-ranging and dynamic multi-stakeholder dialogue as a form of accountability, and as a catalyst for implementation, from the outset, whereas in the context of more formalised human rights oversight processes, even limited involvement of civil society actors took years, sometimes decades, to evolve.

Yet, on another view, the inherent flexibility of the NAPs approach is also a weakness. So far, few NAPs have provoked legislative commitments: on corporate human rights due diligence, for instance – the central plank of the UNGPs’ – most prefer to promote awareness-raising, tools and capacity building for business, than to institute new legal obligations for companies. Indeed, some NAPs appear to avoid promising new initiatives at all, preferring instead to reflect on past actions that can be linked ex post facto to the UNGPs than to formulating a proactive implementation agenda. Equally, substantial engagement with some important topics, such as enhancing access to legal remedies for victims, has tended to be omitted almost entirely.

If such deficiencies give cause for concern, do they warrant abandoning the UNGPs, and NAPs, altogether? With the apparent prospect of a business and human rights treaty on

the horizon, some may be tempted to draw that conclusion.

By contrast, however, here it is suggested that such an assessment is premature. Albeit their impact has not been optimal, NAPs have already delivered significant results, as measured against the typical historical trajectories of state human rights implementation efforts under binding instruments already alluded to above.

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Rather, then, NAPs’ current shortcomings call for a redoubling of pressure to demand their strengthening, in countries where they have already been developed, as well as early and strategic interventions to define, in advance, minimum acceptable parameters for their process and content, in countries yet to initiate a NAP project.

The possibility of establishing a human rights and business peer dialogue or peer review mechanism, amongst states, but actively involving stakeholders, at regional or international level, is also one deserving of further consideration. Deliberative and transnational governance studies indicate that, by promoting the sharing and evaluation of information amongst States, for instance, on the basis of a common framework, benchmarks, or indicators, and by harnessing reputational and competitive dynamics, such processes have potential to promote convergence in national practices where consensus on the need for legal obligations, or what their content should be, is lacking, or where universally-applicable solutions to complex problems are hard to find.

Interestingly, the Council of Europe has, through a Recommendation adopted in 2016, which calls for the sharing of information by states on NAPs, provided a window of opportunity for the launching of just such a process in the European setting[2]. In a

regional political context where human rights are increasingly often embattled, and opportunities to pioneer new approaches and engage new actors in the support of human rights seem to come few and far between, this opportunity is one which would profitably be seized.

1. For further information see here

2. For further information see here

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