

27 August 2014

**IOE INPUT TO THE OPEN CONSULTATION ON SUBSTANTIVE ELEMENTS TO BE INCLUDED IN
GUIDANCE ON NATIONAL ACTION PLANS (NAPs) TO IMPLEMENT THE UN GUIDING PRINCIPLES ON
BUSINESS AND HUMAN RIGHTS**

The UN Guiding Principles on Business and Human Rights are a matter of high priority for the International Organisation of Employers (IOE) and its more than 150 member federations around the world. National IOE member federations are very committed to working with their national governments, as well as with all other stakeholders, to advance the dissemination and implementation of the UN Guiding Principles.

The IOE appreciates the consultative process of the UN Working Group on Business and Human Rights to establish the substantive elements to be included in guidance on National Action Plans (NAPs). Based on the preliminary comments, the IOE wishes to respond as follows to the open consultation:

I. General Remarks

- The IOE shares the view of the UN Working Group that national action plans are a practical and powerful vehicle for States to effectively implement the UN Guiding Principles. At the moment, mainly European countries have adopted NAPs or are in the process of doing so. The IOE therefore hopes that the guidance of the UN Working Group on NAPs might inspire and encourage more countries to develop NAPs. Ultimately, NAPs are also an indication that countries seriously assume the responsibility to genuinely implement the UN Guiding Principles.
- There is no “standard” NAP. The IOE welcomes the statement in the consultation document which articulates that there is “no one-size-fits-all” approach. In some instances, legal measures may be required and, in others, none may be needed, but the NAP can focus on political initiatives and support measures. The flexibility of governments to use the most suitable policy instruments to address the specific situation in their countries through the NAP should not be restricted through provisions made by the UN Working Group or international organisations. The consultation document further states that NAPs should include “*some substantive elements that apply to all countries irrespective of their size and geography.*” However, the proposed substantive elements are much too prescriptive to be included in all NAPs in all countries. It should be made clear that the guidance given by the UN Working Group is intended to inspire governments and stakeholders; it does not constitute a check-list of “need-to-be implemented” actions.
- NAPs must focus on the implementation of the UN Guiding Principles and should not move beyond that. NAPs should be consistent in this respect so that businesses and other stakeholders have clarity and stability with regard to their role and responsibilities, and the expectations of them.

- NAPs should take a “think small first” approach. SMEs are the essential backbone of all economies around the world and, moreover, many small and medium-sized enterprises are active on a global scale. SMEs have different challenges and resources, but also possibilities when it comes to the implementation of the UN Guiding Principles. The recommendations and provisions in the NAPs must take the challenges, limitations and needs of SMEs into account because the NAP should address *all* companies, not only MNEs.
- Companies are the source of employment, growth and poverty reduction. Moreover, they are part of the solution to human rights challenges. The development and the content of the NAPs should reflect this. What is already being done by companies must be supported/promoted and not threatened.

II. Comments regarding the development of NAPs

The IOE takes note of the fact that the consultation document focuses on the content of national action plans and not on their development. Nevertheless, the IOE wishes to make some key requirements with regard to the process:

- The involvement of business in the development of NAPs is key. NAPs must be developed in close coordination with the business community as it is the main target group. Business must be consulted through its representative organisations. While, the feedback of individual companies in the development of a NAP is important in gaining direct insight from practitioners, only representative business organisations have the mandate to speak on behalf of the business community as a whole and are able to give a comprehensive perspective on the national state of play. Moreover, through these representative organisations, SMEs are given a voice in the process.
- All provisions in a draft NAP should undergo a specific impact assessment, including legal contradictions/dilemmas and a cost-benefit assessment to avoid unintended consequences and bureaucracy. The central questions to be asked are: *what will the impact on the ground be? How large will this impact be? What is the effect on businesses? What are the costs involved?*
- The NAP process does not stop with the adoption of the NAP. NAPs should have clear timelines for evaluation procedures which should include asking the following questions: *did the NAP lead to changes on the ground? What are the lessons learned and where are the gaps?*

III. Comments on the possible content of NAPs

- NAPs should provide a coherent framework on the State duty to protect and the responsibility of all actors in society to respect human rights. The NAPs need to provide a clear and well-understood differentiation between the objectives and responsibilities of governments as the primary duty-bearers under international law, and those of non-State actors, including businesses – i.e. State duty to protect vs. corporate responsibility to respect human rights.

- NAPs should avoid a “one-size-fits-all” approach. Companies’ contributions to the respect of human rights are made in many different ways. NAPs should not restrict this diversity. There is no single solution for strengthening the corporate responsibility to respect human rights.
- NAPs should take a positive, constructive and practice-oriented approach and should focus on support for business. As the third UN Guiding Principle states, governments should “*ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights*”. Moreover, according to the third UN Guiding Principle, States should “*provide effective guidance to business enterprises on how to respect human rights throughout their operations*”. Thus, governments should:
 - Consider providing companies with guidance to national law and human rights obligations. This is especially relevant in countries with a high informal or a grey sector in which enforcement of the law is weak, as well as in countries where law has been developed through legal proceedings.
 - Consider supporting companies with information. Companies are required to analyse the impacts of their business activity with regard to human rights through a due diligence process. Companies often find it difficult to meet the first requirement, which is collecting accurate and relevant information on the target regions of their investments. Governments - possibly through international organisations - should consider setting up a helpdesk which provides companies with information on country-specific risks. Moreover, embassies should be instructed to work closely with companies – especially if companies are considering doing business in so-called weak governance zones.
 - Make an assessment of the biggest obstacles for companies to fulfil their responsibility to respect human rights in the country of operation, and whether state legislation is in line with international human rights instruments and actually enforced.
 - Access to remedy and justice at local level needs to be a key issue for the NAPs. Governments should use the NAP process to assess their civil and criminal judicial systems, identify gaps and improve their systems by addressing these gaps. They should do so by involving civil society, setting clear timelines and reporting on the targets achieved, as well as persisting challenges in a transparent manner. Moreover, countries should look at the barriers which potential human rights victims might face in their countries of origin when they attempt to obtain remedies; for instance with regard to the costs of litigation, language barriers, geographical access, etc. Finally, countries should create or enhance non-judicial grievance mechanisms, such as the National Contact Points of the OECD Guidelines or other mediation procedures which can include human rights commissions that can work more speedily and effectively.
 - Governments should create clear responsibilities with regard to CSR and human rights in the national administration. It should be clear for business and all other stakeholders which department has the authority within the government on these issues.

- Governments should also consider how to support the promotion of the UN Guiding Principles at international level. Governments might, for instance, commit to fund the activities of the UN Working Group for Business and Human Rights in their NAPs. Governments may also wish to consider committing to technical cooperation and development aid. Governments should additionally share their experience and practice concerning the implementation of the UN Guiding Principles. The response rate of the last government survey conducted by the UN Working group on the implementation of the UN Guiding Principles was disappointingly low.

IV. Specific Comments on the consultation document

On Chapter 1, General principles:

The IOE supports the implementation of the UN Guiding Principles in a non-discriminatory manner, with particular attention to the rights and needs of vulnerable groups. The guidance given under 1.2 on indigenous peoples, and 1.3 on children is, however, not practicable or feasible.

- With regard to point 1.2, the consultation document focuses on the concept of “free, prior and informed consent” (FPIC), based on the provision of the Declaration on the Rights of Indigenous Peoples, thereby ignoring the approach of ILO Convention 169 on the State obligation to consult. The right to be consulted and to participate in decision-making constitute the cornerstone of Convention No. 169 and the basis for applying the broader set of rights enshrined in the Convention. However, Convention No. 169 does not imply a right to veto, nor is the outcome of the consultations necessarily the reaching of agreement or consent. It is of particular concern that the consultation document demands free, prior and informed consent before the “adoption of legislation or administrative policies that affect indigenous peoples”. Much legislation affects all people in a country – both indigenous and non- indigenous people. At the end of the day, it is the task of governments to balance the rights of different groups and people in their territory.
- With regard to 1.3, the IOE fully shares the statement that “*States must have adequate legal and institutional frameworks to respect, protect and fulfil children’s rights, and to provide remedies in case of violations in the context of business activities and operations*”. Employers also agree that project planning needs to look at the impact of a project on children in affected communities. However, the IOE questions the feasibility of especially consulting children. Proper consultation of affected communities is a complex issue, influenced by legislation, customary laws, traditions and practices as well as general principles. To select children as a special group to be consulted does not do justice to the complexity of the issue and raises questions concerning their capacity to contribute meaningfully to the discussion.

On chapter 2, State approach:

- A key challenge in many countries with regard to the State's "duty to protect" is not the absence of legislation, but insufficient enforcement of existing legislation. This key challenge is briefly addressed in the consultation paper under chapter 4, but should also be addressed (much more prominently) here. Countries should use the NAPs to start processes to identify enforcement gaps and the reason for these gaps (such as insufficient labour inspection, corrupt police forces, etc) and take action to address and correct these situations.
- In many cases, State actors are directly involved in, or are even the cause of, the human rights challenges which business faces, such as secret services which demand information on telecommunication data, violating the privacy of ICT companies' customers; insufficiently trained security forces, which may violate the human rights of protesters; State agencies which sell land to companies without taking into account the rights of the informal settlers on this land, etc. A key aspect of any NAP should be for States to identify the areas where they themselves are involved in human rights violations and remedy them.

On chapter 4, State regulatory and policy functions:

- With regard to point 4.1: It is not the ratification status of all ILO conventions, but only the 1998 Declaration on Fundamental Principles and Rights at Work which matters. Moreover, the task is not only to identify gaps in legislation, but even more importantly in some countries, to understand the extent to which national legislation contradicts international human rights obligations.
- With regard to point 4.2: UN Guiding Principle 3.b speaks of an enabling environment for business to respect human rights. However, the guidance given in the consultation document only speaks about requirements for companies; thereby overturning the spirit of UN Guiding Principle 3.b. The focus must once again be on identifying laws which would constrain business in respecting human rights; and on policies such as awareness raising campaigns, etc.
- With regard to point 4.4: UN Guiding Principles 3.d asks governments to "*encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts*". In the consultation document however, the focus is not on encouraging business, but only on legal requirements, which once again undermines the underlying spirit of UN Guiding Principles 3.d. Moreover, the suggestion made in the consultation document to create mechanisms to ensure adequate company reporting is not covered by the UN Guiding Principles. It should be realised that the vast majority of businesses in all countries are SMEs, which would be overburdened with such demands.

On chapter 6, Privatisation & public procurement:

- With regard to the demand for “*adequate, independent monitoring and accountability mechanisms for the activities of business enterprises employed to provide services for the State*”, it is necessary to specify what is meant by “high risk sectors”. In fact, many governments probably procure from hundreds of thousands of companies – cleaning services in hospitals, catering in administration agencies, cars, computers, pencils, papers, ITC services, etc. Monitoring all these companies is not only unfeasible, but also unnecessary and inappropriate.
- Moreover, the private sector has decades-long experience with responsible procurement. Governments should learn from and exchange experience with the private sector in this regard. Part of responsible supply chain management is not only monitoring, but also capacity building of the supply chain. The latter aspect, however, is missing in the consultation document.
- The focus in the chapter is yet again on legislation, which becomes very clear in the last provision on “*Assess how the corporate responsibility to respect human rights can be addressed in legislative measures or terms of public procurement contracts*”. This approach is too narrow. Other policy approaches, such as awareness raising campaigns, capacity building, etc. are not considered.

On chapter 8, Policy coherence:

- Stronger bilateral capacity building and technical cooperation with regard to the State duty to protect human rights and access to remedy should be included in NAPs. In this regard, countries should commit to increase and re-focus their aid spending.
- With regard to the suggestion to “*identify ways for home States to ensure that companies based in its territory do not sign investment agreements with host States that can result in negative human rights impacts on employees or local communities*”, the term “can” is not only vague, but also does not clearly explain what is meant by this provision. Is there already some experience in this regard which could be shared?

The IOE appreciates the opportunity to provide input to this consultation and looks forward to cooperating closely with the UN Working Group on this matter.
