

Submission to the Joint Committee on Human Rights' inquiry into human rights and business – June 2016

Introduction

CORE is the UK civil society coalition on corporate accountability. We work with our partner organisations to advance the protection of human rights and the environment with regard to the global operations of UK companies, by promoting a stronger regulatory framework, higher standards of conduct, compliance with the law, and improved access to remedy for those harmed by the activities of UK companies.¹

We welcome this inquiry and the opportunity to submit evidence.

National Action Plan

What is your assessment of the UK National Action Plan (Good Business: Implementing the UN Guiding Principles on Business and Human Rights) updated in May 2016?

The publication of the updated plan demonstrates that the UK remains engaged with the business and human rights agenda and related international commitments. The Plan describes how the UK's current legal and policy framework relates to business and human rights, outlines relevant international agreements and summarises steps that the UNGPs recommend that States take. The Plan clearly reasserts the government's expectation that businesses adopt the UNGPs. Despite this, it is difficult to discern from the Plan a unifying vision or coherent strategy, and the listed actions and examples reflect a piecemeal approach. A baseline assessment carried out in accordance with international best practice would have helped to identify the areas where action is required and place those actions within the wider policy context.²

When it comes to detail, there are a few notable statements on supporting human rights defenders and instructing diplomatic missions '...to raise with local authorities our concerns in situations where companies have problems implementing their human rights responsibilities because local law is incompatible with international human rights law.' In general, much of the text of the updated Plan

¹ Partner organisations include ActionAid, Amnesty International UK, CAFOD, Christian Aid, Oxfam, Save the Children, Traidcraft and Unicef UK. For full list, see <http://corporate-responsibility.org/about-core/our-network/>

²See <http://icar.ngo/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>

is identical to the September 2013 version, is largely descriptive, relates to actions taken and is thin on new commitments.

The biggest gap in the plan is on remedy; only three commitments and none of them new or substantive. The plan offers very little to people who are denied justice after being harmed by the international operations of UK companies.

**Does it demonstrate significant progress has been made on business and human rights since 2013?
Is it ambitious enough in the commitments it makes for the future?**

Though the plan includes several case studies of particular initiatives, it does not provide a systematic assessment of progress made. This could be achieved with an independent evaluation of the government's work on business and human rights, which should include at least one detailed case study of projects in Myanmar/Burma or Colombia, priority countries for the UK's business and human rights work.

It is not clear if the commitment to "review the degree to which the activities of UK State-owned, controlled or supported enterprises, and of State contracting and purchasing of goods and services, are executed with respect for human rights, and make recommendations to ensure compliance with the UNGPs" took place.

Expectations, commitments and specific initiatives are not expressed in terms of targets and goals, resulting in an inevitably limited level of ambition for business and government.

What more could the Government and businesses be doing to improve human rights in the sphere of business?

The government should set long-term goals and identify specific, shorter-term milestones towards their achievement. Goals and milestones should be well-defined with an identified lead department and a timeline for delivery. Actions should reflect a 'smart mix' of measures with the emphasis on effectiveness and the added value of the UK government in addressing corporate abuses of human rights and the need for business to comply with recognised standards. Consideration should be given to how commitments apply to investors, including the UK government as an investor.

UNGP 15 sets out that in order to meet their responsibility to respect human rights, businesses should put in a place a human rights due diligence (HRDD) process, yet to date very few companies have done so. Government could use its significant leverage as a purchaser (government awards £45 billion worth of contracts to businesses each year, around three per cent of the UK's GDP) to improve corporate uptake of HRDD by making it a requirement for companies awarded public sector contracts and significant state support such as export credits.

Given the additional severity for women of adverse human rights impacts, efforts should be made to align policy objectives on gender equality and women's economic empowerment with the implementation of the UNGPs. Actions to support and maintain space for civil society, including Human Rights Defenders and affected communities in 'host' countries should be thorough and strategic. Actions to promote adherence to labour rights standards should be accorded higher priority.

Government engagement with business and human rights

To what extent are different Government departments engaged with the business and human rights agenda and the National Action Plan?

In addition to the Foreign and Commonwealth Office and the Department for Business, Innovation and Skills, key departments and government agencies on business and human rights are the Department for International Development, the Ministry of Justice, UK Trade & Investment, UK Export Finance, the Home Office and the Cabinet Office, and other agencies, public bodies and independent entities owned or mandated by government (such as CDC Group and the Financial Reporting Council).

Government's work on business and human rights is led by the Human Rights and Democracy Department in the Foreign & Commonwealth Office. The Department for International Development is also implementing its 'Responsible, Accountable and Transparent Enterprise' program, providing '...£21.8m from July 2014 to March 2019 to help multinational and local businesses manage the social and environmental implications of their actions, and be accountable for the consequences for poor workers and communities who may be affected by them.'³ The Departments may be working together (several DFID actions are cited in the National Action Plan) but at present, it is not clear if and how this is happening.

BIS officials were closely involved in the review of the National Action Plan, however following the 2015 election a key post was deleted and BIS engagement has, on the surface, reduced.

The Home Office has led on the development and implementation of the new transparency in supply chain (TISC) reporting requirement in the Modern Slavery Act 2015.

The Ministry of Justice which is central in delivering access to remedy has been largely invisible in government work on business and human rights.

How effective is the cross-Whitehall Steering Group which monitors the Action Plan?

The group has the potential to play a vital role, but assessing its current effectiveness is difficult as there is limited transparency around its proceedings and membership.

What more could be done to ensure consistent commitment from all Government departments?

The government should set out a genuinely strategic, cross-departmental approach to fulfilling the commitment to implement the UNGPs. Senior officials should participate in the cross-Whitehall Steering group and the group should publish its work plan and targets, and engage consistently with external stakeholders from business and civil society. We recommend that a senior official in the Cabinet Office should be tasked with ensuring more consistent and effective implementation across Departments.

³ See <https://devtracker.dfid.gov.uk/projects/GB-1-203448>

What is the level of ministerial buy-in and commitment to the business and human rights agenda and National Action Plan?

The 2013 National Action Plan included a Ministerial Foreword from the then Secretaries of State for Foreign Affairs and Business, Innovation and Skills, and was launched by the two Ministers at the Institute of Directors. A junior BIS Minister attended the UN Business and Human Rights Forum in 2014. This visible, high-level political endorsement sends a powerful signal to business, investors and other governments, so it is disappointing that no similar Ministerial Foreword is included in the updated Plan.

Since the 2015 election, civil society organisations have had the opportunity to discuss business and human rights with Baroness Anker and Baroness Neville Rolfe. Home Office Minister Karen Bradley has championed the TISC requirement and the Home Secretary has made it clear that it is not acceptable for businesses to ignore the issue of slavery in supply chains.⁴

The Foreign Secretary and the Secretary of State for Business should build on this by seeking an opportunity to make a joint statement with business leaders, investors and civil society reiterating the UK's commitment to the UNGPs. A Minister of Justice should set out how the Department is involved in implementing the commitment.

A Minister should report annually to Parliament on the government's progress in delivering the National Action Plan.

Ministers should do more to articulate the case for ensuring that UK companies respect human rights across their global operations and holding them accountable when they fail to do so.

How effective are current rules in ensuring that human rights-related matters are reflected in the procurement of public goods, works and services?

The original NAP committed to 'ensuring that in UK Government procurement human rights related matters are reflected appropriately when purchasing goods, works and services.' The updated NAP claims that the Government will, 'Continue to ensure that UK Government procurement rules allow for human rights-related matters to be reflected in the procurement of public goods, works and services.'

In any event, public bodies are only required to have due regard for equality-related issues in their procurement activity. Bids for a contract may be excluded if evidence of grave misconduct by a company is found. Although this might include breaches of human rights, this falls short of the Government's responsibility to assess and address any negative human rights impacts in its own supply chain. The updated NAP fails to clarify what actions the Government is taking to 'allow' for human rights to be reflected in public procurement.

The government appears to be sending conflicting signals regarding purchasing by public bodies. The rhetoric of ministers discouraging 'boycotts' could be construed by public authorities as preventing them from not entering into contracts with companies on human rights grounds.

⁴ Home Secretary Foreword, Transparency in Supply Chains etc. A practical guide

Procedural guidance and case studies of integrating human rights into procurement policy are needed to give public bodies the confidence to go down this route and to allay their fears that they may be faced with legal action.

Establishing a requirement for enterprises bidding for large public sector contracts to disclose the steps that they are taking to ensure that their activities and those in their supply chain do not negatively affect human rights would help level the playing field for business and respond to growing business support; almost a quarter of respondents to an Economist survey of CEOs said that provision of incentives based on human rights performance (e.g., preferential treatment in procurement process) would enable companies to better fulfil their corporate responsibility to respect human rights. There is already established precedent on this internationally: the United States Government prohibits contractors and subcontractors from supporting or engaging in human trafficking. For projects of a certain size, the US government also requires that contracting businesses prepare compliance plans detailing due diligence procedures to assess, prevent, mitigate and remediate any suspected involvement.

Monitoring transparency and compliance

Has significant progress been made in monitoring compliance with the National Action Plan since 2013?

It is difficult to make a meaningful assessment of compliance as much of the Plan describes voluntary measures. Levels of engagement with the UNGPs globally are growing steadily. In 2014 Business and Human Rights Resource Centre found that 34 of the world's largest companies had a human rights policy.⁵ Eight States have published National Action Plans and another 27 are in the process of developing them.⁶ In this context, the UK should clarify the process for evaluating and reviewing the Action Plan to ensure that our international leadership is maintained. Failure to do so risks falling out of step with the views of investors and leading companies.

How effective is the new reporting requirement introduced by the Modern Slavery Act for holding businesses to account?

240 companies had published statements under the new requirement by 5 May. An analysis of the first 75 statements, published by CORE and Business & Human Rights Resource Centre revealed that only 9 were signed by a director, available from a link on the homepage of the company's website and reported on all six areas listed in the legislation.⁷ Ergon Associates' assessment of all 240 statements found that most are based around policy commitments and broad indications of processes, particularly auditing, but tend to be light in terms of descriptions of more innovative due diligence processes and actions taken.⁸

⁵ See https://business-humanrights.org/sites/default/files/Action_Platform_Final.pdf

⁶ See <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>

⁷ See <http://corporate-responsibility.org/wp-content/uploads/2016/03/CORE-BHRRRC-press-release-modern-slavery-statements-160307.pdf>

⁸ http://www.ergonassociates.net/?p=1273&option=com_wordpress&Itemid=161

As Ergon noted, civil society oversight is crucial to promote improvement. As present, this is seriously hampered by government's reluctance to put in place the systems necessary to monitor compliance and ultimately, to enforce the Act. There is no publicly available list of companies that are required to report so it is impossible to know which businesses are required to comply (and consequently to know which have failed to do so). During the legislative process, the government declined to accept an amendment which would have required companies to upload statements to an online public registry. This has created a compliance vacuum and risks undermining the legislation.

What more could be done to protect against slavery and exploitation?

While the TISC requirement under the Modern Slavery Act requires companies to report on the due diligence they are undertaking with respect to slavery in their supply chains, it does not require companies to actually undertake due diligence. Such a requirement would be a more effective way of ensuring slavery and exploitation in supply chains were addressed. Guidance by the CORE Coalition sets out how companies can more effectively address the risk of slavery in their supply chains.⁹

Access to remedy

How effective is the current system in ensuring victims have access to remedy? Are remedies available to victims sufficient, and if not, what more could be done? What more could be done to enable victims to access remedies when their human rights have been breached by a UK business?

Victims harmed by the activities of UK linked companies in developing countries can struggle to access remedy domestically due to lack of funds to pay lawyers, poorly functioning judicial systems and corruption. In certain circumstances, some victims can sue UK controlling companies for harms arising from the activities of their subsidiaries. Cases have been brought in relation to mercury poisoning and asbestosis in South Africa, oil spills in the Niger Delta, shootings at a mine in Tanzania, and the torture of environmental protestors in Peru. Such actions have the potential to provide monetary compensation to people who would have otherwise struggled to access remedy in their own countries.

Victims can also bring complaints to the non-judicial National Contact Point for OECD Guidelines on Multinational Enterprises based in BIS. Since 2011, complaints have been raised about the following sectors: extractives, IT, telecommunication, security, insurance, sporting events, finance, and tourism.¹⁰

Despite this, considerable barriers remain for victims to accessing both the courts and the NCP. Court cases against controlling companies of multinational enterprises for harms caused by their subsidiaries are intrinsically complex and often highly technical, making them incredibly expensive to run. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced a more stringent

⁹ http://corporate-responsibility.org/wp-content/uploads/2016/03/CSO_TISC_guidance_final_digitalversion_16.03.16.pdf

¹⁰ Amnesty International UK (2016), Obstacle Course: How the UK's National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises. p. 19

proportionality test which requires that the expense incurred in running a case should be proportionate to its value. While the proportionality test is more easily met in mass tort claims (where the level of damages is likely to be high), in cases involving a relatively small number of claimants, the costs will often exceed the value of the claim. Victims of harm in company supply chains have to date been unable to pursue such claims, due to the difficulty in meeting the requirement to show that a UK company is in control of operations in the supply chain.

In a recent report, Amnesty International UK has criticized the UK NCP for its complaints handling, finding that cases are often rejected at initial assessment stage, the objectives of claimants are ignored, evidence thresholds are inappropriately high and future impacts of current business activities are downplayed.¹¹

To address barriers to the courts, the UK government should:

- Clarify in law when the actions or omissions of one business entity can be considered complicit with rights abuses committed by another entity, and determine the corresponding liabilities of all entities involved.
- Explicitly allow and enable victims to bring cases in the UK courts where other available forums do not offer effective remedies.

The UK NCP's functioning could be improved by:

- reconstituting it to incorporate a panel of experts composed of a roster of independent experts;
- reconstitute the Steering Board to enable it to exercise effective oversight of the NCP;
- ensure the NCP has sufficient staffing and financial resources to handle complaints through all stages of the process;
- reform the review procedure so that requests for review are dealt with by the Steering Board;
- ensure complaints are assessed and examined on merit;
- introduce consequences for companies found to be in breach of the Guidelines.

Would creating more criminal sanctions improve compliance?

At present, there is a culture of impunity for serious harms to people and the environment in developing countries.¹² This could be addressed by enforcing existing laws and creating new criminal sanctions to fill gaps, by developing and adopting into law a consistent and coherent concept of corporate criminal liability that would enable authorities to investigate and prosecute UK companies involved in serious crime overseas related to human rights abuse whether through their subsidiaries, associates or otherwise. One option to consider is the 'failure to prevent' model for serious crimes

¹¹ See Amnesty International UK (2016), Obstacle Course: How the UK's National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises.

https://www.amnesty.org.uk/sites/default/files/uk_ncp_complaints_handling_full_report_lores_0.pdf

¹² See <https://www.amnesty.org.uk/press-releases/government-refuses-investigate-commodities-giant-trafigura>

committed in the context of a company's global operations with a due diligence (adequate procedures) defence, similar to section 7 of the UK Bribery Act 2010.

Using this model overcomes the problem of the identification principle because the offence is 'failure to prevent', which has been identified by both the CPS and the SFO in relation to the difficulty of bringing successful prosecutions against companies in cases ranging from phone hacking to LIBOR exchange rate setting. An additional benefit of this model is that the crime of 'failing to prevent' happens in the UK and the evidence needed to prove that management failing can be collected in the UK.

Earlier this year the government announced that it would be including the failure to prevent model in legislation expected this autumn on corporate tax evasion. The Prime Minister also announced on 12 May 2016 that there would be a consultation on using the 'failure to prevent' model for possible legislation on corporate economic crimes.¹³

However while the identification principle affects prosecutions on economic crimes, it equally affects prosecutions for human rights abuses which would be criminal offences under existing UK law. These include serious crimes such as bodily harm, trafficking offences, sexual exploitation and child labour. To address this, the proposed consultation on corporate economic crime should look at how the 'failure to prevent' model could be used in other cases where there is good evidence of corporate crime, including human rights abuses by companies.

Review other legislative vehicles to deal with the worst corporate crimes committed abroad. These include deaths caused by corporate negligence or mismanagement of security providers. A review of the Corporate Manslaughter and Corporate Homicide Act and of the applicability of relevant health and safety legislation could look at how these could best be extended to cover corporate crimes abroad.

Other issues

The UK government's role in the UN process to develop an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises

The UK voted against a resolution in the Human Rights Council to begin work towards a 'business and human rights treaty'¹⁴ and did not participate in the first session of the Open-Ended Working Group, held in October 2015. Ministers have justified this approach by stating that the UK government believes that the best approach to business and human rights is to implement the UNGPs. This position represents a misunderstanding about the way that a potential new international instrument could interact with the UNGPs. Indeed, Professor John Ruggie architect of the UNGPs has written that 'Further international legalisation in business and human rights is inevitable as well as being desirable in order to close global governance gaps.'¹⁵ We urge the

¹³ <https://www.gov.uk/government/news/new-plans-to-tackle-corporate-fraud>

¹⁴ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement>

¹⁵ <https://business-humanrights.org/en/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty>

Committee to recommend that the UK participate constructively in the next meeting of the treaty working group which takes place in October.

A treaty would create a level playing field internationally and provide a means to integrate human rights into multilateral agreements on trade and investment. A treaty could reinforce the will of States to hold companies accountable, but it could also improve the integration of the UNGPs into multilateral instruments and institutions, including WTO, World Bank, OECD.

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