



Good Business?

Analysis of the UK Government Action Plan on Business & Human Rights

December 2013

About CORE

CORE is an authoritative and influential network of NGOs, academics, trade unions and legal experts which brings together the widest range of experience and expertise on UK corporate accountability in relation to international development, the environment and human rights. Our aim is to reduce business-related human rights and environmental abuses by making sure companies can be held to account for their impacts both at home and abroad, and that access to justice is guaranteed for people adversely affected by corporate activity.

For more information, please see www.corporate-responsibility.org or email coordinator@corporate-responsibility.org

Executive Summary

The UK broke new ground in becoming the first State to produce a National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights.

Prime Minister David Cameron committed the UK to implementing the UN Guiding Principles in November 2011. The launch of the Action Plan on 4 September 2013 by two Secretaries of State – Business and Foreign Affairs - signalled a strong intent from the Government to take the Guiding Principles seriously, to develop a cross-departmental approach to addressing business impacts on human rights, and to work with other States and multilateral bodies towards the global application of the Guiding Principles.

The Secretary of State for Foreign Affairs and the Business Secretary hold the view that the UK can both lead on business and human rights and continue with the success of British companies. This is underpinned by the government's assertion that respect for human rights brings business benefits in various ways.¹ From CORE's perspective, the process of developing the action plan was a positive one, involving a number of different consultations with representatives of small and medium-sized businesses, multinationals and civil society groups, including trade unions and NGOs.

However the early signs of the government's willingness to address some of the implementation challenges are not positive. The proposed UK-Colombia Bilateral Investment Treaty will make it more difficult for those harmed by the operations of UK companies in Colombia to obtain a remedy. Within the EU, the UK is actively trying to dilute a proposed Reporting Directive, which would require Member States to raise the bar for company reporting on respect for human rights. The recently amended UK Companies Act now refers to human rights for the first time, but the draft Guidance accompanying it makes no reference to the UN Guiding Principles. These inconsistencies need to be ironed out before they become a pattern.

Overall there are many positive proposals in the UK's action plan that, if properly implemented, would lead to real improvements in business impacts on human rights. What is lacking is any sense of how these will work on the ground, and whether the political will exists to make them happen. Until we have a much more detailed set of proposals and evidence of implementation, the government's national implementation plan for the UN Guiding Principles is no more than a set of aspirational statements that are being simultaneously undermined by some of the government's actual policies.

¹ H M Government: Good Business - Implementing the UN Guiding Principles on Business and Human Rights, September 2013

CORE's recommendations for effective UK implementation of the UNGPs

As priority actions, the UK government should:

- devise clear goals and success criteria for each of the commitments/proposed actions set out in the current action plan, to provide a means by which progress can be tracked, measured and verified;
- commit to a timetable for completion of each of the action points and monitor progress;
- in consultation with civil society organisations, urgently review UK compliance with the UNGP provisions on access to remedy and identify actions needed to address any gaps or deficiencies;
- carry out the review of state-owned controlled or supported enterprises and contractors referred to at paragraph 11(iv) of the action plan and publish findings;
- begin a dialogue at senior level between UK government departments (including and beyond the Foreign & Commonwealth Office and the Department for Business, Innovations and Skills relating to the content of the UNGPs and the need for “policy coherence”, and identify priorities for each department for inclusion in the next UK action plan. This next iteration should be a genuinely cross-departmental strategy on business and human rights;
- consult with the Equalities and Human Rights Commission regarding that institution’s role in the implementation of the UNGPs both within the UK and overseas;
- assess the most appropriate way of maintaining oversight of company grievance mechanisms;
- set out the actions it will take to ensure that all of the Department for International Development’s policies relating to the private sector or to the role of international financial institutions in supporting business are developed in accordance with the UNGPs.

1. Background and process

In June 2011, following a process of five years, the UN Human Rights Council unanimously endorsed a set of Guiding Principles on Business and Human Rights. These Guiding Principles (the UNGPs) are addressed to States and business enterprises. They both restate existing legal obligations and include a series of additional policy recommendations designed to help the UN Protect, Respect and Remedy Framework become reality for citizens and companies.

As with any international guidance of this kind, the effectiveness of the UNGPs in terms of reducing corporate abuses of human rights depends on their proper implementation at national level. In October 2011, the European Commission, in its communication on '*A renewed EU strategy 2011-14 for Corporate Social Responsibility*'² called on all EU Member States to develop action plans for the implementation of the UNGPs. Members of CORE were able to participate in the consultation process led by the Foreign and Commonwealth Office (FCO) which included meetings with business representatives and civil society, and the opportunity to comment during the drafting process.

The UK government launched its action plan on 4 September 2013. This document sets out CORE's analysis and response to the UK plan and makes recommendations for future action by the UK government.

2. Overall assessment: structure and approach of the action plan

While the UK's action plan for the implementation of the UNGPs reflects some welcome changes in stance towards the role and responsibilities of States and companies, and contains a number of policy commitments which have the potential to improve and invigorate the UK's regulatory response (see below), there are weaknesses and gaps in the UK's approach which must be addressed if the UNGPs are to be properly implemented.

The plan focusses on actions that have been or are to be taken by the FCO, the department sponsoring the plan. It is important that this is built on with a more strategic, cross-departmental approach to business and human rights. The document provides little information regarding the roles and responsibilities of other government departments such as the Department for Business, Innovation and Skills (BIS), the Treasury, the Department for International Development (DFID) and the Ministry of Justice (MoJ), or agencies (the Equalities and Human Rights Commission (EHRC) receives only one mention). Given the role of these departments in providing support to business, and the calls from UK companies (noted in the action plan) for "policy coherence and clear and consistent policy messaging", there must be clarity on how these departments will work together to achieve policy coherence and proper implementation across government of the UNGPs.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>

During the investigation of the UN Special Representative on Business and Human Rights, John Ruggie, this lack of policy coherence between government departments and agencies emerged as a concern sufficient to warrant a specific set of provisions in the UNGPs, with GP 8 calling on States to “ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates ...”. The UK government has not addressed this point adequately in its action plan. In order to be effective and also prevent policies from other government departments undermining the UK implementation of the Guiding Principles (as happened in 2012 with the MoJ’s Legal Aid, Sentencing and Punishment of Offenders Act), the action plan should be developed into a cross-government strategy. The next iteration in 2015 should be a genuinely strategic document which sets out clearly the UK government’s analysis of the problem and its vision and agreed approach to reducing and preventing human rights abuses by business.

The division of the plan according to the three pillars of the UN framework is a somewhat arbitrary classification which risks contributing to a piecemeal approach that misses opportunities to capitalise on regulatory opportunities. As the Introduction to the UNGPs puts it, “each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures”. Understanding and recognising the linkages that exist between the different pillars enables the “smart mix” of regulation and incentives needed to improve the human rights performance of companies depends.

There are a number of significant omissions from the plan (see section 4 below) and often it simply restates the principle in the UNGPs, rather than providing a commitment to concrete action. The language of the document is vague, with a lack of detail around implementation of commitments. For example, CORE strongly welcomes the commitment to support human rights defenders working on issues related to business and human rights but this needs to be fleshed out. Out of the twenty or so planned new actions, only two appear with a timetable for implementation.

This points to a concern that CORE has with the UK approach as a whole – the need for effective analysis and evaluation to understand better how businesses can affect human rights and whether existing policies are effective.

The UNGPs call on States to keep laws and policies under review to make sure that laws “provide the necessary coverage in light of evolving circumstances” and that together, they “provide an environment conducive to business respect for human rights”. It is important that the government responds to this, treating the action plan as a working document and continuing to develop and improve its approach to business and human rights.

3. Initial analysis of key themes for effective UK implementation

3.1 Towards a “smarter mix” of regulatory measures?

The UK government’s approach to business and human rights has thus far been heavily skewed towards self-regulation. While this remains the case, there is a suggestion in the UK action plan that the UK government may play a more proactive role in future. The introduction to the UK action plan refers to “further work to ... *support, motivate and incentivise UK businesses* to meet their responsibility to respect human rights throughout their operations both at home and abroad” (para 2, emphasis added). This is an acknowledgment of the types of actions needed to meet the challenge to States laid down in the UNGPs, i.e.:

“States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights” (UNGP 3, Commentary).

What is needed now is much more detail on the different ways that the UK government will indeed “support, motivate and incentivise” UK businesses in relation to their human rights performance, how this will work in practice, and the consequences of poor performance.

3.2 Extraterritorial aspects of the State duty to protect

The comments on the extraterritoriality of human rights obligations in the action plan reflect a more flexible approach than that adopted in previous pronouncements, which tended to reject the idea that the UK had any legal responsibilities for the human rights impacts of UK companies abroad. The UK position on extraterritoriality appears to have softened to acknowledge the possibility that home state regulatory responsibilities may extend beyond territorial boundaries under UN treaty regimes, as recognised in the UNGPs. The UK’s action plan also acknowledges the reality that States can and do opt to regulate foreign corporate conduct in specific instances.

While this is a significant concession in principle, it remains to be seen what legal and administrative measures the government takes to hold UK companies accountable for the harm they do in other countries.

3.3 Supply chains and the corporate responsibility to respect

The UK action plan recognises that UK-based companies should consider and address the human rights impacts arising in the context of their business relationships, particularly the supply chain, as set out in GP13. While the action plan refers to several initiatives designed to respond to the recommendations of the UNGPs regarding the importance of companies being proactive in creating more responsible supply chains, the majority of these are

voluntary initiatives or involve providing guidance to companies. Past experience shows that such initiatives have not been effective in addressing human rights abuses in the supply chain and we urge the UK government to examine the possibilities for raising supply chain standards by incentivising and penalising companies, for instance through linking government procurement to a requirement that companies conduct due diligence throughout their supply chains, and ensuring that supply chains are specifically mentioned in the forthcoming EU non-financial reporting requirements.

3.4 Investment agreements

The UK government's new commitments in relation to international investment agreements are potentially significant. These are designed to give effect to the UNGPs' call for States to do more to "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises ..." (UNGP 9). The UK action plan includes a commitment that it will henceforth "ensure that agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights and do not undermine the host country's ability to meet its international human rights obligations ..." (para. 11 (vii), emphasis added).

This is best achieved through the better balancing of rights and obligations of foreign investors by introducing human rights obligations on investors and restricting some of their current excessive rights as granted by these agreements. In particular, increasing evidence of investor claims around the world points to the need of curtailing the right to use the investor-to-State dispute settlement in order to ensure that investors do not challenge environmental or social legislation in host country.

This commitment requires clarification with regard to its application to the UK's Bilateral Investment Treaties with other States, and to the EU's Economic Partnership Agreements. The term 'henceforth' implies that only new agreements will come under scrutiny. This leaves it open for companies to continue to invoke clauses in existing Bilateral Investment Treaties and Economic Partnership Agreements in a way that undermines the host country's policy space to protect human rights and to meet its international obligations.

3.5 Export finance

The lack of human rights screening of certain categories of applications for UK export credit support has long been of concern to civil society organisations and some parliamentarians. While screening of social impacts (including human rights impacts) is envisaged for certain exports and projects under the OECD 2012 Common Approaches, many transactions have not undergone any human rights assessment. The UK's approach to human rights screening has fallen behind the best practice of some other States and is out of step with the requirements of the UNGPs which call on States to take additional steps to protect against

human rights abuses by business enterprises that “receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies” (UNGP 4).

The commitment in the UK action plan to “review the degree to which the activities of UK State-owned, controlled or supported enterprises ... are executed with respect to human rights”, and to “make recommendations to ensure compliance with the UNGPs” is therefore an important first step towards bringing the UK’s approach to export finance in line with the UNGPs.

3.6 Lack of substantive commitments on remedy

There is an unevenness in treatment of the three pillars of the UN Framework within the action plan, with the most detailed attention being given to the ‘State duty to respect’, followed by the ‘corporate responsibility to respect’, and then, finally, ‘access to remedy’, which is the poor relation of the trio.

The government makes no commitments to develop State-based grievance mechanisms and to reduce barriers to remedy within the UK for the overseas victims of UK companies. This is despite the fact that access to remedy is a key aspect of both the State’s duty to protect (see, for instance, UNGP 1) and the corporate responsibility to respect. It is of particular concern given the restrictions placed on access to remedy following the U.S. Supreme Court’s decision in the *Kiobel* case, and the legislative provisions introduced in 2012 as part of the Legal Aid, Sentencing and Punishment of Offenders Act which have made it harder for overseas victims to bring cases before the UK courts.

3.7 Proposed UKTI involvement in company grievance mechanisms

In point 20(ii) of the action plan, the government states that it will “task UK Trade and Investment (UKTI) teams to advise UK companies on establishing or participating in grievance mechanisms for those potentially affected by their activities...” Given that UKTI’s role is to work with UK-based companies to ensure their success in international markets,³ it is unclear why it has been identified as the most appropriate agency to provide advice to companies on grievance mechanisms.

We recommend that UKTI should not be given this role unless they use specialists with experience of implementing rights-compatible grievance mechanisms. This is an especially sensitive issue in countries and contexts where communities affected by investment projects and victims of corporate abuse who speak out may find themselves at risk of harassment, intimidation and, in some cases, of fabricated criminal charges.

³ <http://www.ukti.gov.uk/uktihome/aboutukti.html>

3.8 No scrutiny of the Department for International Development's support for the private sector

Of particular concern is the absence of any mention in the action plan of the role of the DfID with regard to its work with the private sector or though its decision-making capacity within international financial institutions, such as the World Bank.

DfID has a wide range of functions and policy objectives that interface with the business and human rights agenda. Their World Bank Team and their Executive Director to the World Bank help to shape the Performance Standards that are applicable to the companies that the World Bank lends to through its private sector lending arm, the International Finance Corporation. DfID's policy objectives include helping developing countries remove barriers to trade and investment; stimulating private sector investment in developing countries; enabling businesses to improve poor people directly; and supporting voluntary codes and standards.⁴ The Secretary of State for International Development has often spoken of her aim to put the private sector at the heart of development policy. Therefore we urge the UK government to set out the actions it will take to ensure that these important activities are carried out in accordance with the UNGPs.

3.9 Risk of complacency regarding within-territory human rights impacts

Discussions about business and human rights have tended to be dominated by concerns about human rights impacts in poorer or conflict-affected countries, where governance is weak, and the chances of accessing an effective remedy are slim. While this is understandable (and, many would argue, an appropriate prioritisation of effort), national action plans should not overlook the fact that the UNGPs are addressed to within-territory as well as extraterritorial impacts. Indeed, the most strongly worded provisions of the UNGPs (which reflect existing legal obligations of states) relate to States' regulatory and remedial responsibilities in relation to within-territory impacts.

As the Morecambe Bay cockle pickers and phone hacking scandals show, serious abuses in the business context take place in the UK, including modern day slavery. While the UK may be able to boast more robust systems of regulation and legal protection than in many other States, the UK government should not be complacent about the human rights performance of companies within the UK. This complacency can be seen, for instance, in proposals to "encourage companies" to extend site-level or sectoral grievance mechanisms to overseas operations (see para 20(iii)) without any consideration as to whether the domestic mechanisms are themselves operating in a rights-compatible manner as they should.

⁴ <https://www.gov.uk/government/policies/helping-developing-countries-economies-to-grow>

It is important to note that the importance of core labour rights such as rights of freedom of association and collective bargaining is highlighted within the Guiding Principles. In addition, the Commentary explicitly states that company grievance mechanisms “should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.”⁵

The UK action plan lists a number of existing measures that are designed to improve human rights protection within the UK. However, the vast majority of future planned actions relate to overseas (i.e. non-UK) impacts. The relevance of the UNGPs to human rights impacts within the UK, going forward, is largely overlooked.

4. Missing items which should be included in the next iteration

While the UK Government should be congratulated on being the first State to actually publish its promised national action plan, this plan clearly represents a beginning and will need to be developed further to represent a good practice example. There are a number of key aspects of the UNGPs that currently are either not covered, or only superficially covered, in the UK action plan. These include responsibilities to:-

- “ensure that ... laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable respect for human rights” (UNGP 3);
- “provide effective guidance to business enterprises on how to respect human rights throughout their operations” (UNGP 3);
- “encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts” (UNGP 3);
- engage “at the earliest possible stage” with business enterprises working in conflict-affected areas, to “help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships”, to provide adequate assistance and to deny access to public support to any business enterprise involved in gross human rights abuses that “refuses to cooperate in addressing the situation” (UNGP 7);
- ensure policy coherence in overall government strategy (see comments above), (UNGP 8);
- promote rights respecting approaches in the context of dealings with multilateral institutions (UNGP 10);

⁵ UN Guiding Principle 29

- *ensure* that “when ... [human rights] abuses occur within their territory and/or jurisdiction those affected have access to effective remedy” (UNGP 25, emphasis added);
- “consider ways to reduce legal, practical or other relevant barriers that could lead to a denial of access to remedy” (UNGP 26);
- provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse” (UNGP 27).

The government’s commitment to “refresh and update” the action plan (para. 22) is welcome and should provide the opportunity to review how the above elements of the UNGPs can be incorporated more explicitly. However CORE emphasises that there are a number of areas where urgent actions are needed now, rather than waiting until 2015, so that important opportunities are not lost. For example the EU proposals on non-financial reporting are expected to be finalised by March 2014. The UK should ensure that the position it takes within the European Council, and in relation to the guidance for companies currently being prepared in the UK, reflects the approach to human rights due diligence, supply chains and impacts and risks set out in UN Guiding Principles.

Likewise following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the UK urgently needs to look at practical and legal barriers to justice for overseas victims in those cases where abuses of human rights by UK-based companies do occur. This is too important to wait until 2015.

5. CORE’s recommendations for effective implementation

As priority actions, the UK government should:

- devise clear goals and success criteria for each of the commitments/proposed actions set out in the current action plan to provide a means by which progress can be tracked, measured and verified;
- commit to a timetable for completion of each of the action points and monitor progress;
- in consultation with civil society organisations, urgently review UK compliance with the UNGP provisions on “access to remedy” and identify actions needed to address any gaps or deficiencies;
- carry out the review of State-owned controlled or supported enterprises and contractors referred to at paragraph 11(iv) of the action plan and publish findings;

- begin a dialogue at senior level between UK government departments (including and beyond the FCO and DBIS) relating to the content of the UNGPs and the need for “policy coherence” and identify priorities for each department for inclusion in the next UK action plan; ideally this next iteration should be a genuine cross-departmental strategy on business and human rights;
- consult with the EHRC regarding that institution’s role in the implementation of the UNGPs both within the UK and overseas;
- assess the most appropriate way of maintaining oversight of company grievance mechanisms;
- set out the actions it will take to ensure that all of DfID’s policies relating to the private sector or to the role of international financial institutions in supporting business are developed in accordance with the UNGPs.

For more information, please contact Marilyn Croser
coordinator@corporate-responsibility.org

