

ADVICE

Response to the National Action Plan on Business and Human Rights “Knowing and Showing”

SUMMARY

The Netherlands Institute for Human Rights has taken note of the National Action Plan on Business and Human Rights, which the government offered to parliament on 20 December 2013.

The Institute expresses its appreciation that the minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs, also on behalf of the Minister of Economic Affairs, have drawn up an action plan to implement the UN Guiding Principles. By doing this, they show that they attach much value to protecting and respecting human rights and offering remedies for human rights violations by companies.

Many companies have already taken steps to implement the UN Guiding Principles. According to the UN Guiding Principles however, in order to see to it that all companies do this, the government has an important role to play. In the national action plan an extensive summary is given of all initiatives the government has taken until now with regard to human rights and the business sector. In addition, new measures are mentioned that the government intends to carry out. It is important that the government deals with this issue seriously, because of the impact that companies have on human rights in the Netherlands and other countries.

In this response the Institute examines to what extent already existing policy and the intended actions are sufficiently compatible with the UN Guiding Principles. Before drawing up this response, the Institute organised a meeting for NGO's and other experts and a meeting for representatives from the business sector to hear what they think about the national action plan. Because the Institute is an independent body, it has formulated its own response.

The Institute is of the opinion that the government is on the right track, but that the content of the action plan is not sufficient to implement the UN Guiding Principles. In its response the Institute discusses a number of issues that to its opinion require further action. The most important points for the Institute are that:

- there should be a greater focus on human rights violations in the Netherlands;
- the government should do more to observe the commitments from the UN Guiding Principles in its role as market party and supporter of companies;
- there should be a greater focus on victims of human rights violations;
- there should be clarity about the follow-up of the action plan.

In its response the Institute makes a number of recommendations. They can be summarised as follows:

1. The Institute recommends to offer information to companies about human rights violations in the Netherlands and to show them how they can prevent this. In this respect it would be useful if the UN Guiding Principles would be translated into Dutch.
2. The Institute recommends to carry out a study whether investigation and inspection services are sufficiently equipped to examine and deal with complaints about

human rights violations by companies in the Netherlands and, if necessary, take appropriate measures.

3. The Institute urges to examine whether the official purchasing policy is carried out in a standard way in practice and what its effectiveness is when evaluating the application of the social conditions in the sustainable purchasing policy.
4. The Institute is of the opinion that it is important that the government offers more specific information about how municipalities, provinces and water boards are stimulated to apply these social conditions and also recommends to consider this aspect when evaluating the application of these social conditions.
5. The Institute urges to examine to what extent all aspects of due diligence (that is to say, analysing risks, taking action, monitoring its effects and being transparent about this) are considered when evaluating the application of social conditions.
6. The Institute urges to create a greater unity in the conditions stipulated with regard to government support for international activities. Moreover, the Institute advocates that companies are standard checked whether they observe the OECD guidelines and that it is clear for companies how and when they will be checked.
7. The Institute urges to see to it that frameworks for socially responsible business practices are applied when government gives support on a national level.
8. It is stated in the action plan that it will be possible for the government to ask the National Contact Point to carry out a company-transcending study in compelling situations on issues with regard to corporate social responsibility. The Institute recommends to describe the ‘compelling situations’ more specifically in the adapted regulations concerning the National Contact Point.
9. The Institute urges to take measures to remove the procedural inequality between victims of human rights violations and companies who violate human rights. In the action plan it is stated that this is being examined by the Ministry of Security and Justice. The Institute urges to provide greater clarity about this as soon as possible.
10. The Institute recommends to draw up rules with regard to the way in which administrators and supervisory directors should provide clarity in their reporting about conducted policy with regard to corporate social responsibility.
11. The Institute recommends that the Netherlands makes an active contribution to initiatives for drawing up European regulations that penalise activities by companies that are registered in the EU, but that contribute to human rights violations outside the EU.
12. The Institute urges to provide more specific information about the follow-up of the National Action Plan on Business and Human Rights.

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1 Introduction

States are primarily responsible to respect, protect and realise human rights. However, companies also have responsibilities in this field. These obligations and responsibilities have been laid down in the UN framework ‘Protect, Respect, Remedy’, which was unanimously accepted by the UN Human Rights Council, in the UN Guiding Principles and the OECD guidelines for multinational companies. Although the UN policy framework is not legally binding, it has a broad international support and is regarded as the universal standard with regard to Business and Human Rights. This framework and the OECD guidelines are important instruments to specify current human rights obligations with regard to companies and human rights. In this framework it is confirmed that states are responsible that persons are protected against the violation of their human rights by third parties, including companies (duty to protect). It also indicates that companies have the responsibility to respect human rights (duty to respect). Finally, it indicates that states and companies are jointly responsible that victims of human rights violations by companies are offered an effective remedy or complaint mechanism (access to remedy).

In October 2011 the European Commission invited the member states of the European Union to develop a plan for the national implementation of the UN Guiding Principles. Parliament also requested this.¹ After the United Kingdom the Netherlands is the second European country that introduced such a plan. With the national action plan the Netherlands commits itself to the UN Guiding Principles. The Institute expresses its appreciation about this.

An interdepartmental working group has been set up under the supervision of the Ministry of Foreign Affairs in order to implement the national action plan. The Institute is positive about the fact that various departments have been involved in drawing up the action plan. This makes it possible to create coherence in the policy with regard to human rights and the business sector, which is considered to be very important in the UN Guiding Principles (see in appendix UNGP 8). Despite this, the Institute is of the opinion that a greater policy coherence is required with regard to certain points. This is discussed in greater detail under the heading ‘government support’.

In the national action plan it is stated that the Netherlands promotes the adherence to human rights by companies. The emphasis is on preventing human rights violations by companies, not only directly, but also in production chains. Moreover, it is emphasised that companies abroad have the same human rights standards as in the Netherlands. The Institute notes that this is in agreement with the UN Guiding Principles and the OECD guidelines.

According to the UN Guiding Principles, the responsibility of companies in essence comprises the so-called human rights due diligence process (see UNGP17-21 in the appendix). In brief, this means that companies must examine the current and potential effects of their actions on human rights, take action, monitor its effects and be transparent about their approach. This applies to the own business procedures, but also to the trade chain of the company. It is a continuous process. The various aspects of due diligence are clearly described in chapter 3 of the national action plan. However, it is notable that a restricted view of due diligence is applied in the rest of the action plan. In the action plan there is a

¹ Motions Smeets/Gesthuizen (26485-119), Mulder (26485-158), Verhoeven/Sjoerdsma (26485-157) and Sjoerdsma cs. (33625-11).

great focus on assessing risks. However, there is less focus on other important aspects of due diligence (taking action and monitoring its effects). The Institute is of the opinion that these aspects of due diligence should also be highlighted sufficiently. This will be discussed in chapter 4.

The national action plan includes an extensive enumeration of all current initiatives aimed at promoting human rights by companies. In addition, it includes various measures, which have already been partly initiated. The initiatives and measures show that the Netherlands has been dealing with this issue seriously over a longer period. One of the mentioned initiatives is the sector risk analysis. This involves analysing risks of human rights violations by companies in various sectors and discussion between the government and the identified sectors to see how the situation can be improved. The Institute is very positive about this study, because structural problems can be made visible and tackled in this way.

2 Focus on the situation in the Netherlands

In recent years there has been an increasing national and international focus on the negative impact that companies have on human rights. The focus is usually on human rights violations that take place abroad. However, the impact of companies on human rights can also be negative in the Netherlands. For example, when the rights of employees are violated in companies in the Netherlands. As rights of employees also include human rights, these rights must be respected and protected by the government and companies.

The action plan also examines the agricultural and horticultural sector in the Netherlands. A study by the Institute shows that there are actually quite a few bottlenecks in this sector with regard to human rights violations.² In the action plan it is stated that the government has made arrangements about tackling abuses with regard to the terms of employment and working conditions in this sector. The Institute expresses its appreciation about this. At the same time the Institute states that human rights are also under pressure in other sectors in the Netherlands and that more attention should be paid to the responsibility of companies. Information from the Social Affairs and Employment Inspectorate shows that human rights may be at stake regarding the working conditions in the supermarket branch because of a too high work pressure, undesirable behaviour and an insufficient focus on damage to the health of employees.³ Serious human rights violations take place in the Netherlands when persons ending up in the Netherlands through human trafficking are exploited. For example, abuses that were established with the construction of the A2 and A4 motorways show the negative impact that companies may have on human rights in the Netherlands. Other forms of human rights violations include the underpayment of employees by employers through bogus schemes, for example mala fide temporary employment agencies. Furthermore, complaints that are submitted to the Institute and various studies show that discrimination by temporary employment agencies still regularly occurs on the basis of age, race and disability or chronic diseases. This also applies to discrimination of pregnant applicants and pregnant employees.

The Institute is aware that the government takes measures to tackle a number of these abuses. However, in the action plan no attention is paid to these issues and the measures that the government is taking in this context. The Institute therefore emphasises that the negative impact that companies may have on human rights in the Netherlands should be sufficiently highlighted.

In this respect it is important that the government pays sufficient attention to preventing human rights violations. The Institute therefore recommends to offer information to companies about human rights violations in the Netherlands and ways to prevent this. In this respect it would be useful if the UN Guiding Principles would be translated into Dutch. In addition, it is essential that respect of human rights by companies is sufficiently monitored. The Institute has received signals that the investigation and inspectorate services (such as the SZW Inspectorate and the Foundation for Compliance with the Collective Agreement for Temporary Employees) do not have enough capacity to monitor human rights violations in the Netherlands. Monitoring is necessary to see to it that

² Polish labour migrants in human rights perspective. Investigation by the Netherlands Institute for Human Rights, dated 18 April 2013.

³ This criticism is evident from a letter of the SZW Inspectorate, which the CNV dienstenbond has at its disposal (the Christian Trade Union for Workers Employed in the Commercial and Financial Sectors and Services). See <https://www.cnvdienstenbond.nl/nieuwsbericht/aldi-krijgt-forse-tik-van-the-arbeidsinspectie/>

companies are sufficiently aware of human rights and act accordingly. The Institute is concerned about this and therefore recommends to investigate whether these services are sufficiently equipped to investigate and deal with complaints about human rights violations and, if necessary, take appropriate measures.

3 Role of the government as a market party

The government is the largest employer in the Netherlands and is therefore in a position in which it can exert much influence on the implementation of the UN Guiding Principles by companies. The UN Guiding Principles also oblige the government to do this. In these principles it is stated that the government should see to it that the contracting companies respect human rights when concluding contracts (see UNGP 5 and 6 in the appendix).

The government has already taken a number of steps to implement this obligation. For example, it demands (as part of a sustainable purchasing policy) that companies that supply the government respect human rights. They do this by applying the so-called social conditions with invitations for tenders, which should lead to taking human rights into consideration. Various stakeholders find that there are shortcomings in the sustainable purchasing policy. Some stakeholders note that not all social conditions comply with the UN Guiding Principles. Other stakeholders state that the social conditions are not always applied.⁴ This makes the Institute wonder whether the official policy, as formulated in the action plan, is standard implemented in practice and what its effectiveness is. The Institute therefore urges to include these points when evaluating the application of the social conditions in the sustainable purchasing policy. This policy will be implemented in 2014.

In the action plan it is stated that municipalities, provinces and water boards are also stimulated to apply these social conditions. However, it is not clear how this is done or what will happen. The Institute thinks that it is important that the government provides more specific information about this and recommends to also include this point in the next evaluation of the application of the social conditions.

For the sustainable purchasing policy it is important that the EU has adopted new procurement directives on 15 January of this year. Human rights are not mentioned in these guidelines, but they offer room to consider human rights in the event of procurements. This already happens partly, because the government formulates social conditions with international invitations for tenders. The Institute points out that the focus should not only be on assessing the risks there are for companies with regard to a negative impact on human rights, but also on the other aspects of due diligence, that is to say, taking action, monitoring its effect and being transparent about the approach. The Institute urges to bear this in mind when evaluating the application of the social conditions.

⁴ See draft version of the working document on advice for sustainable purchases of VNO/NCW, MKB Nederland, MVO Nederland, NEVI and the Groene Zaak of 11 May 2011.

4 Government support

4.1 Companies that operate internationally

In the action plan it is stated that the government has already been applying frameworks for International Corporate Social Responsibility (ICSR) with regard to the risk assessment of applications for government support. The OECD guidelines (in which the UN Guiding Principles have been included) are the starting point of the ICSR framework, which implies that companies must also consider human rights. By setting conditions with regard to support, such as subsidies, the government has a powerful instrument to see to it that companies act in conformity with the UN Guiding Principles. However, it should be sufficiently clear what the conditions exactly imply, what the consequences are when the conditions are not observed, how this is tested and what the sanctions are when these are not observed.

According to the action plan various frameworks for ICSR are applied, depending on the nature and objective of the support. Stakeholders indicate that applying various frameworks makes it unclear whether and how companies are exactly tested. They also indicate that applying various frameworks means that it is not always clear for companies to what extent observing the OECD guidelines is a condition for granting a subsidy or if it concerns a best efforts obligation. The Institute thinks that there is a lack of coherence and clarity, which blocks an effective implementation of the OECD guidelines (and therefore also the UN Guiding Principles). It therefore urges to create a greater unity in the conditions formulated for government support for international activities. In addition, the Institute advocates to test as a standard whether companies observe the OECD guidelines and to see to it that companies know how and when this test will take place.

4.2 Companies that operate nationally

Stakeholders indicate that no ‘human rights conditions’ are set when granting government support to companies that operate nationally. In the action plan no attention is paid to government support to companies that are active in the Netherlands. In view of the UN Guiding Principles the conditions for receiving government support should apply to companies that operate internationally as well as to companies that operate nationally. The Institute therefore urges to see to it that frameworks for corporate social responsibility are also applied for government support on a national level.

5 Victim perspective

The Institute notes that the perspective of victims of business-related human rights violations is often absent in the action plan. This is in particular evident in chapter 5 with regard to remedy options. According to the UN Guiding Principles, states and companies must see to it that there are sufficient effective remedy options for victims of business-related human rights violations (see UNGP 25 in appendix).

5.1 Remedy options

In the national action plan the government stresses the access to non-legal mechanisms. In the action plan it is rightly stated that non-legal mechanisms may be an important addition to legal procedures that are often time-consuming and expensive. In addition, it is possible that the government can request the National Contact Point (NCP) in compelling situations to carry out a company-transcending study on issues related to corporate social responsibility. The Institute is positive about the intended extension of the powers of the NCP, because this may contribute to exposing more structural abuses. However, it wonders when the ‘compelling situations’ apply. The Institute therefore recommends to describe the ‘compelling situations’ more specifically in the adapted regulation establishing the National Contact Point.

Although non-legal mechanisms are important, legal mechanisms as stated in the UN Guiding Principles are the key to access to a remedy for victims of business-related human rights violations (see UNGP 26 in appendix). Access to an effective remedy may in particular be problematical for victims of human rights violations by companies in other countries where access to remedy is difficult or impossible.

An often mentioned solution is to increase the possibilities to hold the parent company in the country of incorporation liable for human rights violations that are committed elsewhere. In the action plan it is stated that consultations have shown that there is a difference of opinion about the question whether the Dutch legal system should be open to civil or criminal proceedings against Dutch companies in the event of alleged human rights violations by foreign subsidiary companies.

5.2 Inequality between parties

To begin with, it must be stated that the Dutch legal system is already open to civil or criminal proceedings against Dutch companies for human rights violations elsewhere. Such legal proceedings have already taken place in the civil field. However, in practice there are major obstacles for victims of business-related human rights violations, which are caused due to the inequality between parties. After all, victims are in general less wealthy than companies, so that there may be financial thresholds to take legal action. They also often do not have information about the company, which means that it is more difficult to prove the involvement in human rights violations. The UN Guiding Principles refer to the obligation of states to do something about this inequality (see UNGP 31, under b and d in appendix).

The Institute finds that in the national action plan little has been stated about improving access to a legal remedy for victims of business-related human rights violations and that it

being examined by the Ministry of Security and Justice. The Institute urges to provide more clarity about this as soon as possible.

5.3 Extraterritoriality

The national action plan also examines if it is desirable to adopt regulations with extraterritorial effect regarding human rights and companies. According to the Institute, the action plan is wrongly limited to the question whether the Netherlands should support an international treaty with extraterritorial effect with regard to international crimes. The special representative of the secretary-general distinguishes two forms of extraterritoriality: direct extraterritoriality (such as international treaties) and extraterritoriality in the sense of national rules with extraterritorial effect. The latter may include a broad range of measures, such as tendering rules (see under 4) or measures with regard to reporting on non-financial information within the company.

With regard to the latter aspect the government states that it actively stimulates social reporting. In this respect it is important that parent companies also report about the human rights policy and the impact on human rights of subsidiary companies. The government states in the action plan, among other things, that it will continue to request companies to observe the Corporate Governance Code, in which it is stated that administrators and supervisory directors take into account corporate social responsibility when performing their tasks. The government is therefore of the opinion that they should provide a greater clarity in their reporting about the conducted policy regarding corporate social responsibility. However, it is not stated in the action plan how this will be realised. The Institute thinks that this is too non-committal and therefore recommends to draw up rules. In the opinion of the Institute, these types of measures with extraterritorial implications must be applied, because this leads to a greater focus on the perspective of the victims of business-related human rights violations.

In the opinion of the Institute the government too easily rejects the necessity of rules with extraterritorial effect in the national action plan. The necessary support for rules with extraterritorial effect can be seen in the field of science and in supervisory committees of the UN human rights treaties. In this respect the Institute refers to the Maastricht Principles on Extraterritorial Obligations of States,⁵ the General Comments no. 14, 15 and 19 of the CESCR and the Concluding Observations of the Human Rights Committee with regard to Germany.⁶

In the latter case the Human Rights Committee showed concern that the measures taken by Germany were not sufficient to guarantee that German companies outside Germany respect human rights standards and that these measures did not offer sufficient options for remedies to victims of human rights violations. In brief, there is the necessary support in international literature and jurisprudence for rules that regulate the extraterritorial activities of companies.

⁵ <http://www.globalhealthrights.org/wp-content/uploads/2013/10/Maastricht-Principles-on-Extraterritorial-Obligations-of-States-in-the-area-of-Economic-Social-and-Cultural-Rights.pdf>

⁶ Concluding observations of the Human Rights Committee on the sixth periodic report of Germany, no. 16, November 2012.

In the light of competition and efficiency considerations it is advisable to seek European agreement in this field. The Institute therefore recommends that the Netherlands actively contributes to initiatives in order to implement European regulations, which penalise activities of EU-registered companies that contribute to human rights violations outside the EU.

6 The follow-up of the action plan

The Institute notes that the action plan contains no concrete information about the follow-up. It is not indicated in the plan when the plan will start, which period it exactly covers and when there will be feedback about the various measures taken. It is also not indicated when the various measures will be completed and when an update version of the action plan may be expected. In order to monitor the action plan it is important that more clarity is provided. The Institute therefore urges to provide more detailed information concerning the follow up.

The action plan states that the government intends to commit itself to keep corporate social responsibility and human rights on the European agenda in international fora. The chairmanship of the Netherlands of the Steering Committee For Human Rights of the Council of Europa is a fine example of this. The involvement of the Netherlands in developments at the Council of Europa regarding business and human rights could be used to highlight the follow-up of national action plans regarding business and human rights at a European level. For example, a system of peer review may be considered, whereby EU countries periodically report about the implementation of the UN Guiding Principles, which are discussed in the Steering Committee For Human Rights of the Council of Europe. Support for this idea by the Dutch government could promote the observance of the UN Guiding Principles at a European level.

APPENDIX

Texts of articles of the UN Guiding Principles to which the Institute refers in its response to the National Action Plan for Human Rights and Business:

UNGP 4:

States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

UNGP 5:

States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

UNGP 6:

States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

UNGP 8:

States should 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 representative mandates, including by providing them with relevant information, training and support.

UNGP 17:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

UNGP 18:

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- (a) Draw on internal and/or independent external human rights expertise;
- (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

UNGP 19:

In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the adverse impact.

UNGP 20:

In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

(a) Be based on appropriate qualitative and quantitative indicators;

(b) Draw on feedback from both internal and external sources, including affected stakeholders.

UNGP 21:

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

UNGP 25:

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

UNGP 26:

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

UNGP 31 b and d:

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.