

Developing National Action Plans on Business and Human Rights

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Developing National Action Plans
on Business and Human Rights:
Lessons from European States

<u>Executive Summary</u>	03
1. <u>Introduction</u>	06
2. <u>Overview and Current State of the Process</u>	08
3. <u>Process Characteristics</u>	11
4. <u>Success Factors and Recommendations</u>	19
5. <u>Conclusion</u>	24
<u>About the Author</u>	25
<u>About swisspeace</u>	26

This report assesses the processes towards developing National Action Plans (NAP) on Business and Human Rights in the United Kingdom (UK), the Netherlands, Spain and Norway and identifies lessons learnt for other countries. The push to develop NAPs is a consequence of the UN Guiding Principles on Business and Human Rights (UNGPs) which were endorsed by the UN Human Rights Council in June 2011. The report focuses exclusively on procedural aspects and does not deal with content issues.

The UK, the Netherlands, Spain and Norway are among the European states that are the most advanced in terms of the status of their NAP processes. In general, the processes can be separated into three consecutive phases: the consultation and/or mapping phase, the drafting phase and the final phase of political deliberation and re-drafting. The UK has published its strategy in September 2013. In the Netherlands the plan, as of early November 2013, is in the final phase of political deliberation and shall be published shortly. In Spain, a first draft was published in June 2013 and it has been announced that the final version of the NAP is to be finalized by the end of 2013. The Norwegian government, as of early November 2013, is starting the drafting phase and has not yet decided on a date for the NAP publication.

The characteristics of the processes vary with respect to the form of cooperation within the administration, the inclusion of stakeholders as well as external experts. Looking into the details of how the processes were shaped, six factors for success can be identified: (1) the inclusion of all relevant parts of government early on and throughout the process; (2) the investment of time and energy to create a common understanding within the government on the issues and policies at stake; (3) the strategic inclusion of non-governmental stakeholders; (4) the inclusion of academic support to

accompany the process; (5) effective but flexible management of the process; and (6) continuity of multi-stakeholder collaboration and periodic review.

The following twelve recommendations are seen to be crucial for efficient and legitimate NAP processes:

1. An inter-ministerial working group with all relevant government agencies should be established early in the process.
2. The members of the working group should formally agree on structure, competences and working procedures of the group.
3. A lead agency should be agreed upon at the very beginning of the process. It should be given the necessary competences and financial means to convene meetings, lead the internal and external consultations, and coordinate the drafting process.
4. In a first phase, the inter-ministerial working group should engage in an internal mapping of government activities that relate to the implementation of the UNGP as well as existing shortcomings in this regard.
5. An external consultant should be mandated to conduct an independent analysis of the gaps in existing implementation of the UNGP.
6. The inter-ministerial working group should, in parallel with the mapping, start a process of extensive stakeholder consultation. This should be done by conducting in-depth interviews, by requesting written input, or a combination of both.
7. The specific questions that are put to the stakeholders should be predefined by the members of the inter-ministerial working group.
8. As a result of the mapping, the gap analysis and the stakeholder consultations, the members of the working group should jointly agree on a catalogue of policy areas that are to be addressed in the NAP drafting phase.

9. The inter-ministerial working group should collaborate with one or more respected academics. They could be given the tasks of managing the stakeholder consultations, providing input for the internal mapping, and providing feedback during the drafting process.
10. Enough time should be taken to develop the NAP. While an initial time plan should be developed and agreed upon, it should be handled with flexibility throughout the process.
11. The inter-ministerial working group should be maintained after the publication of the first version of the NAP, to coordinate its implementation and develop periodic updates of the plan.
12. Non-governmental stakeholders and external consultants should play an important role in reviewing government implementation of the plan, and should be involved in the development of its updates.

1. Introduction

In June 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPR). The document was based on six years of intensive research and multi-stakeholder consultations by the Secretary-General's Special Representative on Human Rights and Transnational Corporations and other Business Enterprises, Professor John Ruggie, and his research and support team of legal, business and policy experts. The UNGP rest on three pillars: the state's duty to protect against human rights violations by third parties including business, corporate responsibility to respect human rights, and the need for greater access for victims to effective remedies, provided by both states and companies.

The Guiding Principles state that governments should take "appropriate steps to prevent, investigate, punish and redress [human rights] abuse through effective policies, legislation, regulations and adjudication." As a response, an increasing number of governments¹ have engaged in processes of developing national strategies on business and human rights, mostly under the label of national action plans (NAP). A catalyst for this development was the 2011 CSR strategy of the European Commission, which asked member states to come up with NAPs.²

Some European states have, in recent years and months, taken the lead in developing NAPs on business and human rights. Chief among them is the United Kingdom (UK), which published its strategy in September 2013. The Netherlands and Spain have announced publication of their plans by the end of 2013, while Norway, as of early November 2013, is starting the drafting process. This report looks at the processes of NAP development in these four countries, and identifies lessons that could support efficient and legitimate NAP processes in other contexts.

¹ According to the UN Working Group on Business and Human Rights, approximately 30 states had engaged in the development of NAPs by the end of 2012. It is very likely that the number has increased since.

² European Commission, A renewed EU strategy 2011-14 for Corporate Social Responsibility, (Brussels, 25 October 2011) COM (2011) 681 final.

The main criterion for the selection of the cases was the status of the process, with the four countries that were seen as most advanced being included in the study.³ This report is based primarily on approximately 25 expert interviews with government and civil society representatives in the four countries, conducted between April and October 2013. Moreover, a limited number of written documents inform the analysis. The report concentrates exclusively on procedural issues and does not look into the content of the NAPs.

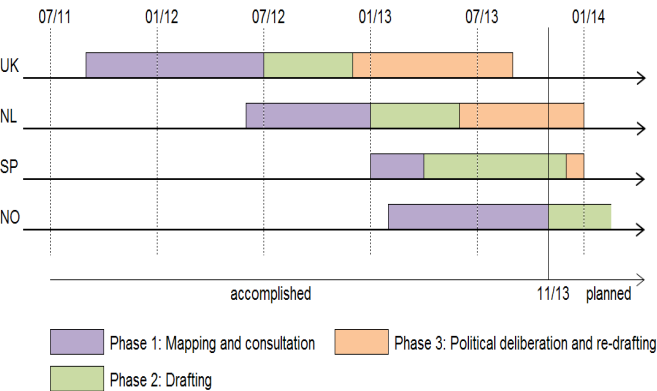
The report is structured as follows: first, a brief overview on the general features and the current status of the strategy processes in the UK, Netherlands, Spain and Norway is provided. Second, the report highlights three key process characteristics. Finally, factors for success as well as corresponding recommendations for government agencies involved in NAP processes are identified.

3 While Norway was amongst the frontrunners in spring 2013, when the cases were selected, it has been surpassed by other countries (e.g. Denmark) in the meantime, mainly due to a change of the Norwegian government.

2. Overview and Current State of the Process

This section includes a brief overview of the NAP processes in the four countries of interest. It shall provide the background for the following sections. All four processes are broadly structured in (1) an initial phase of stakeholder consultations and/or mapping of government activities related to business and human rights, (2) a drafting phase and (3) a phase of political deliberation and re-drafting (see Figure 1).

Figure 1: Overview of NAP processes in the United Kingdom (UK), the Netherlands (NL), Spain (SP), Norway (NO)



United Kingdom

Shortly after the UN Human Rights Council endorsed the UNGP in June 2011, the British government called for the development of a NAP. In September 2011, a steering group drawn from different ministries was created to this end. The group initiated a workshop process of about half a year in which different stakeholders were

asked to provide their input. The drafting phase started in June 2012 and, after extensive internal consultations, ended in summer 2013. On September 4, 2013, the UK became the first country to publish its NAP.

Netherlands

The inter-governmental working group in charge of developing the Dutch NAP was established in June 2012. After a parallel process of stakeholder consultation and internal mapping of government activities related to business and human rights between October and December 2012, the drafting process started in early 2013. As of early November 2013, the plan is being debated at the government level. It has been announced that publication is planned before the end of the year.

Spain

In early 2013, the Office for Human Rights of the Spanish Ministry of Foreign Affairs commissioned two external experts to assist them with the development of a draft NAP and the corresponding consultation process. Following consultations with various stakeholders including multiple government ministries, a first draft of the plan was presented to governmental and non-governmental stakeholders in June 2013. As a consequence of fierce internal and external opposition to the document, in September 2013 the Office for Human Rights decided to halt the drafting process and to intensify consultations. The NAP is planned to be published by the end of 2013.

Norway

The Norwegian government started the process for a national action plan in early 2013. The task has been taken up by the pre-existing inter-ministerial working group that had previously been responsible for the Norwegian CSR white paper of 2009. Between April and June 2013, an external consultant conducted a mapping

and gap analysis of government involvement in business and human rights. The drafting phase starts in November 2013. The government has not yet decided on a provisional date for the NAP's finalization.

3. Process Characteristics

Process Characteristics

Throughout the phases outlined in the previous section, the four processes show variations with respect to three key characteristics: the cooperation within the administration, the inclusion of non-governmental stakeholders, and the role of external consultants. In the following, the four processes are further described with regard to these characteristics.

3.1. Cooperation within the Administration

The NAPs are government strategies on the specific issue of business and human rights. Hence, they are developed primarily by the administration. Since the issue touches upon responsibilities that are covered by a variety of different ministries and government agencies, cross-ministerial and cross-agency cooperation is a key feature of the NAP processes. In the following, the cooperation within the administration in the four cases is described in some more detail.

Who has the lead in the process?

In all four cases, the lead lies within the Ministry of Foreign Affairs. In the UK, the Netherlands and Spain, government agencies related to human rights are managing the NAP development on their own.⁴ In Norway, the Section for Human Rights and Democracy has a co-lead with the Corporate Social Responsibility branch of the Ministry of Foreign Affairs.

What structures of inter-ministerial and inter-agency cooperation have been created?

In the UK, the Netherlands and Norway, the NAP is developed by inter-ministerial working groups involving a broad range of government agencies with a stake in the process. The groups were newly set up in the UK and the Netherlands. The Norwegian government was in a position to reactivate the inter-ministerial working group that was responsible for the government's CSR white paper in 2009. In the Spanish case, no formal working group was set up to develop the NAP. The Office for

Human Rights has subsequently held repeated written and face-to-face consultations with representatives of other government agencies.

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What are/were the key activities of these structures of inter-ministerial and inter-agency cooperation?

The general mandate of the inter-ministerial working groups in the UK, the Netherlands and Norway is to lead the development of the NAPs. This means that they define the work plan, are responsible for stakeholder consultations, conduct the drafting process, and at the end decide when the plan is ripe to be transferred to the government for political deliberations and final decisions. The Dutch working group, on top of these activities, engaged in internal mapping of government laws, regulations, policies and activities related to business and human rights which (together with the report of the stakeholder consultations, see 3.2) provided the basis for the drafting phase. A similar yet less far-reaching internal mapping has been conducted by the steering group in the UK. The Norwegian working group limits its activities to the drafting of the plan and has transferred the task of conducting a gap analysis of its performance with respect to business and human rights to an external consultant (see 3.3).

⁴ The specific names of the relevant agencies are: Human Rights and Democracy Department in the UK, Department for Multilateral Organizations and Human Rights in the Netherlands, Office for Human Rights in Spain. In the Dutch case, the Department took the lead in September 2012 after a government reorganization.

How is/was the drafting process organized?

The drafting of the British and Dutch NAPs was carried out by the inter-ministerial working groups. In the UK, the document was drafted by the Human Rights and Democracy Department. It has undergone several rounds of consultation with the other members of the

In the Netherlands, the different members of the working group were assigned to draft the elements of the plan that link most directly to their areas of competence.

internal steering group and additional government agencies. In December 2012, a preliminary version of the plan was sent to approximately 40 government agencies. The feedback to this version has generated significant adaptations to the plan and has led to the publication being postponed several times. Informally, the draft of the plan was also shared with non-state stakeholders. In the Netherlands, the different members of the working group were assigned to draft the elements of the plan that link most directly to their areas of competence. The process was based on the report from stakeholder consultations (see 3.2) as well as the internal mapping that was conducted by the working group. Where the members of the group failed to hand in their drafts in time, or where the drafts were of inadequate quality, the Department for Multilateral Organizations and Human Rights which is leading the process made its own suggestions and required feedback from the respective agencies. The different contributions were then merged into one document which went

through several rounds of internal consultations. An external consultant occasionally gave advice to the working group throughout the drafting process (see 3.3). In Spain, the first draft was established by an external expert with an academic background (see 3.3). On the government side, the Office for Human Rights in the Ministry of Foreign Affairs provided support and made suggestions regarding the document. A first draft was shared with the stakeholders in June 2013. The drafting was put on hold in September 2013 in order to intensify consultations with internal and external stakeholders. In Norway, the drafting process starts in November 2013. It will be carried out by the government working group.

3.2. Inclusion of Non-Governmental Stakeholders

Since the substance of the NAP directly affects rights holders as well as businesses, governments, in view of later implementation of the plan, have an interest in consulting stakeholders. Moreover, in all four cases, business and human rights is a much politicised issue, where multiple stakeholders aspire to have their voices heard in the process. As a consequence, various non-governmental stakeholders were/are included in the processes. In the following, the form of these contributions to the NAP processes is described in more detail.

What structures were created to include different non-governmental stakeholders?

There are no standing structures for stakeholder inclusion in the British, Dutch and Spanish NAP processes. In Norway, the Norwegian 'Kompakt'⁵, a network of stakeholders which has figured as a consultative group for the government on CSR issues since 1998, plays an important role. In 2012, its recommendations were a key determinant of the government's decision to engage in the development of an NAP, and it is the key forum for stakeholder consultations. The

5 The Norwegian 'Kompakt' is distinct from the UN Global Compact Network.

Kompakt includes representatives from businesses, business associations, NGOs and trade unions. In order to render the collaboration more efficient, the number of members of the Kompakt was restricted to 33 in 2011.

In the UK, the Netherlands and Spain, broad-based stakeholder consultations were conducted before the start of the drafting process.

How and at what stage were/are non-governmental stakeholders included in the process?

In the UK, the Netherlands and Spain, broad-based stakeholder consultations were conducted before the start of the drafting process. In the first half of 2012, the British steering group hosted a series of workshops with interested non-governmental stakeholders. Separate workshops were held for multinational companies, small and medium-sized businesses, and civil society groups including NGOs and trade unions. At the end of the process, a workshop with representatives from all three stakeholder groups was convened. Moreover, at a Wilton Park Conference in June 2012, international expert groups from other governments, inter-government organizations, civil society groups and the UN Working Group on Business and Human Rights were invited to share their comments. This consultation process brought a number of recommendations for action that fed into the drafting of the NAP. All the workshops were facilitated by academics (see 3.3). During the drafting phase, no further formal consultations with stakeholders were conducted. Informally, the draft was shared with some of the most influential external stakeholders. In the Netherlands, the stakeholder consultations were carried out mostly by an external consultant (see 3.3) with the inter-governmental working

group providing input on an interview protocol and the selection of interviewees. The consultant conducted a total of 27 interviews with more than 50 people representing all stakeholder groups. A summary of his analysis was then discussed in three separate meetings with the main stakeholder groups of NGOs, experts and academics, businesses and business associations, and state-linked agencies, hosted by the inter-ministerial working group. During the drafting phase, the stakeholders have not been consulted. The Spanish process does not strictly separate a stakeholder consultation phase from a drafting phase. The Office for Human Rights in collaboration with external experts conducted early consultation meetings with different non-governmental stakeholder groups, which informed the initial drafting of the plan. In June 2013, a first version of the NAP draft was presented to the stakeholders for comments. The feedback from the stakeholders was such that the Office decided to halt the drafting process in September 2013 and invest additional time in stakeholder consultations. In Norway, there was no broad-based government outreach for consultation with non-governmental stakeholders. The Kompakt however has been a crucial sounding board and forum for consultation. The mapping and gap analysis which was conducted by an external consultant (see 3.3) was for instance discussed with the Kompakt members. It is not planned that non-governmental stakeholders in Norway will play an important role during the drafting phase.

3.3. Inclusion of External Consultants

In all four cases, the government has delegated some tasks to external consultants. In the following, the role and background of these external consultants are further outlined.

What is the role of external consultants?

The inter-ministerial working group in the UK has convened a group of academics which accompanied the process. They were in charge of facilitating the stakeholder workshops (see 3.2) and provided selective input during the

drafting phase. In the Netherlands, an external consultant was hired to conduct extensive stakeholder consultations and write a report based on these insights (see 3.2). The consultant continues to provide occasional input during the drafting phase. A much greater role was assigned to external assistance in the Spanish case. The two consultants, supported by the Office for Human Rights, defined the work process, carried out consultations with governmental and non-governmental stakeholders and established the draft document. Moreover, in order to garner additional academic support, the consultants have formed an ad hoc group of approximately 20 academics from the fields of law, economics, political science and development studies. The members of the group give advice on specific parts of the plan which relate to their fields of expertise. In Norway, a consultant was hired to conduct a mapping and gap analysis, assessing the different government policies in the light of the UNGP.

In Norway, a consultant was hired to conduct a mapping and gap analysis, assessing the different government policies in the light of the UNGP.

Who are these external consultants?

In the UK, the consultants are a group of academics from the Arts and Humanities Research Council, led by Professor Sheldon Leader of the University of Essex. He is a professor of law and leads the Essex Business and Human Rights Project. The Dutch consultant is David Vermijs. He is currently with Shift, a non-profit centre for business and human rights practice and was

previously a member of Professor Ruggie's team. He conducted the assignment for the Dutch NAP in his personal capacity. In Spain, the process is managed by Maria Prandi and Isabel Roser. Maria Prandi is a widely published academic and a consultant in the field of business and human rights and teaches at ESADE in Barcelona. Isabel Roser was previously responsible for the CSR programme at the Fundación Carolina. The Norwegian government has hired Mark Taylor from the FAFO Institute for Applied International Studies to conduct the gap analysis. He is a prominent scholar and consultant in the field of business and human rights and the role of businesses in conflict-affected areas.

4. Success Factors and Recommendations

Governments aim to plan and implement NAP processes in an efficient and legitimate manner. This requires the collaboration of various government agencies and the inclusion of non-governmental stakeholders as well as external experts. Drawing from the experiences in the UK, the Netherlands, Spain and Norway, the following six key factors for success and corresponding recommendations can be identified.

4.1 Inclusion of all Relevant Parts of Government Early on and Throughout the Process

Crucial to the successes of the UK, the Netherlands and Norway in moving forward with the NAPs was the fact that most of the relevant departments of government were included in the process from the very beginning. This in many regards created ownership among the agencies concerned with the issues touched upon by the plan. It is also seen as indispensable for successful implementation of the newly defined policies once the NAP is published. The situation in Spain, where the Office for Human Rights in the Ministry of Foreign Affairs manages the process on its own, further underlines the importance of broad government inclusion. Despite having conducted repeated consultations with other government stakeholders, the Office did not manage to gain the necessary support of all the relevant ministries.

Recommendations:

1. An inter-ministerial working group with all relevant government agencies should be established early in the process.
2. The members of the working group should formally agree on structure, competences and working procedures of the group.
3. A lead agency should be agreed upon at the very beginning of the process. It should be given the necessary competences and financial means to convene meetings, lead the internal and external consultations, and coordinate the drafting process.

Success Factors and Recommendations

4.2 Investment of Time and Energy to Create a Common

Understanding within the Government Agencies Involved with regard to the Issues and Policies at Stake
Investing time and energy in creating a common understanding among the members of the working group about the task ahead seems to be essential for the success of the NAP processes. Looking at the four cases, four elements seem to be crucial in this regard: (1) reaching - where this is not yet the case - a general agreement among the relevant governmental stakeholders that a NAP is necessary; (2) establishing basic knowledge about the content and scope of the UNGP and recent developments in the business and human rights agenda; (3) creating awareness among the various actors about the link between their activities and the UNGP; and (4) identifying key gaps with regard to the government's performance in terms of its duties in the area of business and human rights. Various instruments have been successful in achieving some of these goals. In the UK and the Netherlands, internal mapping was carried out by the inter-governmental working groups to raise awareness of and knowledge about the UNGP and existing gaps internally. This has forced all members of the working group to engage in learning and thought processes that significantly helped to develop common ground. The Norwegian government hired an external expert with the mandate to identify gaps in the Norwegian government's implementation of the duty to protect. The interviews conducted by the consultant as well as the resulting report helped to enhance awareness of the different actors with respect to the issues at stake and any existing shortcomings. Moreover, in all four cases, consultations with non-governmental stakeholders were beneficial to this same end (see 4.3).

Recommendations:

4. In a first phase, the inter-ministerial working group should engage in an internal mapping of government activities that relate to the

implementation of the UNGP as well as existing shortcomings in this regard.

5. An external consultant should be mandated to conduct an independent analysis of the gaps in existing implementation of the UNGP.

4.3 Strategic Inclusion of Non-Governmental Stakeholders

In order to avoid obstructionism by non-governmental stakeholders throughout the process and during the implementation phase, as well as to capitalize on their expert knowledge, the inclusion of non-governmental stakeholders has proved to be central in the four processes analysed. In all four cases, the results of the stakeholder consultations crucially informed the drafting process. In the British and Dutch cases, where the consultations were most extensive, the different stakeholder groups were consulted separately (while in Spain they organized joint consultations with separate meetings). The separate consultations made it possible to dig deeper into the substance of the matter and to avoid the stakeholders being caught up in disputes. The stakeholder consultations also allow the different government agencies to become better aware of the issues and policies at stake.

Recommendations:

6. The inter-ministerial working group should, in parallel with the mapping, start a process of extensive stakeholder consultation. This should be done by conducting in-depth interviews, by requesting written input, or a combination of both.
7. The specific questions that are put to the stakeholders should be predefined by the members of the inter-ministerial working group in collaboration with the academic support group (see 4.4).
8. As a result of the mapping, the gap analysis and the stakeholder consultations, the members of the

working group should jointly agree on a catalogue of policy areas that are to be addressed in the NAP drafting phase.

4.4 Inclusion of an Academic Support Group

All four processes are supported in some form by an external consultant. An approach with a single respected academic expert or a small group of academics who accompany the process has proved to be successful in several cases. These experts have been beneficial in leading stakeholder consultations, assisting with specific content knowledge during the drafting phase and providing additional legitimacy to the NAP process and content.

Recommendation:

9. The inter-ministerial working group should collaborate with one or more respected academics. They could be given the tasks of managing the stakeholder consultations, providing input for the internal mapping, and providing feedback during the drafting process.

4.5 Effective but flexible Management of the Process

None of the processes analysed has followed the initial time plans exactly. Given the many unknowns, for instance in terms of commitment of different government agencies or the extent of disagreements over content, the process needs to be led with a certain degree of flexibility. At the same time, the examples of the UK, Netherlands, Spain and Norway show that the efficiency of the process benefits from a committed lead agency or person. Its key tasks are to hold the group together, to ensure broad participation in the meetings and to insist on the deadlines being met (see 4,1).

Recommendation:

10. Enough time should be taken to develop the NAP. While an initial time plan should be developed and agreed upon, it should be handled with flexibility throughout the process.

4.6 Continuity in Multi-Stakeholder Collaboration and Periodic Review

The publication of the first version of a NAP is a milestone, yet not the end of the process. Both the British NAP and the Spanish draft include provisions relating to the plan's implementation, review and update. To ensure the effective implementation of the commitments made in the plan and a periodic update of the strategy itself, continuity in multi-stakeholder collaboration within and beyond the government is seen as crucial.

Recommendations:

11. The inter-ministerial working group should be maintained after the publication of the first version of the NAP, to coordinate its implementation and develop periodic updates of the plan.
12. Non-governmental stakeholders and external consultants should play an important role in reviewing government implementation of the plan, and should be involved in the development of its updates.

5. Conclusion

In this report, recommendations for governments engaging in the development of National Action Plans on Business and Human Rights have been identified. The recommendations are based on experience from the UK, the Netherlands, Spain and Norway, these countries being among the most advanced in terms of developing their NAPs. While the four processes follow a similar three-phase structure, they differ significantly in terms of the cooperation within the administration, the inclusion of non-governmental stakeholders, as well as the contribution of external consultants.

The six key factors for success derived from these cases are: (1) the inclusion of all relevant parts of government early on and throughout the process; (2) the investment of time and energy to create a common understanding within the government on the issues and policies at stake; (3) the strategic inclusion of non-governmental stakeholders; (4) the inclusion of academic support to accompany the process; (5) effective but flexible management of the process; and (6) continuity of multi-stakeholder collaboration and periodic review.

A growing number of countries is engaging in the development of National Action Plans on Business and Human Rights. It remains to be seen in a few years' time to what extent the plans will effectively contribute to enhancing the protection of rights holders from corporate-related human rights harm. The twelve recommendations formulated in this report should contribute to the implementation of the state duty to protect as outlined in the UNGP by helping government agencies to manage the NAP processes in an efficient and legitimate manner.

About the Author

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About swisspeace

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