

The Spanish National Action Plan on Business and Human Rights

An appraisal and imminent challenges

N. 17 · JULY 2018

ISSN: 2014-2765

Antoni PIGRAU SOLÉ

Concern about the adverse impacts of business activities on human rights began to grow in the second half of the twentieth century parallel to the configuration of large multi-national companies as groups of inter-related companies under more or less one centralized management operating simultaneously across multiple jurisdictions linked to different states. The enormous increase in the size of some of these corporations in different sectors of the economy, in a context of progressive concentration of economic power, and their correlative influence in the shaping of national policies and international regulations, has made this into a central issue on the international agenda in the twenty-first century. The role of purely voluntary approaches and the need to combine these with mandatory standards for companies has been and continues to be central to the debate on this subject. This policy paper offers a critical reflection and focuses the debate on the strategies put forward in the Spanish National Action Plan on Business and Human Rights, endorsed by the Council of Ministers on 28 July 2017. In particular, it questions whether these strategies lay down specific measures and obligations based on preventing, mitigating and dealing with potential abuses by Spanish business enterprises under international human rights law, and the challenges and opportunities that the current situation may present for the Plan.

Context

Following the failed attempt by the UN to adopt mandatory standards for business in 2003, a new process was started which culminated in 16 June 2011 with Resolution 17/4 of the Human Rights Council on "Guiding Principles on Business and Human Rights" (hereinafter, the Guiding Principles), and the setting up of a Working Group consisting of five independent experts for monitoring purposes. The Human Rights Council also adopted Resolution 26/9, 25 June 2014, on the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", by which it decided to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. This document refers to the first of these two processes.

The Guiding Principles are grounded in three mainstays (or pillars), namely, recognition of the obligation of States to protect human rights; the responsibility of business enterprises to respect human rights; and access to appropriate and effective remedies, both judicial and non-judicial, in the State of origin of the activity as well as in the receiving State. The operative logic of the Guiding Principles is based on the idea that, on the one hand, States adopt the necessary measures to protect human rights and safeguard access to effective remedy and, on the other,

that business enterprises assert their commitment to respect human rights and set in place systems of due diligence.

In spite of existing constraints, as a result of their endorsement by the European Union, the Council of Europe, the European Group of National Human Rights Institutions, the World Bank and the OECD, the Guiding Principles have become a frame of reference and a large number of States would appear to have adopted a course of action focused on drawing up national action plans (NAP) on business and human rights.

Almost seven years after the adoption of the Guiding Principles, a number of national plans have been approved¹ and many others are in the process of being drawn up. The National Action Plan on Business and Human Rights for Spain was endorsed by the Council of Ministers on 28 July 2017 and published in the Official State Gazette (BOE) on 14 September 2017.

Analysis

The Human Rights Office of the Ministry of Foreign Affairs and Cooperation was responsible for instigating the drawing up of the Plan combined with a participatory process open to various actors. A first draft of the Plan was released on 17 June 2013, which was followed by a second draft on 26 June 2014 that was to be approved by the Council of Ministers. Civil society organisations disassociated themselves from the proposed second draft because their contributions were ignored, in particular because of the fact that the requirements for effectively controlling the practices of transnational companies in relation to human rights had been relaxed, and there was an absence of transparency and real participation on the part of the social actors throughout the process. It finally took the Council of Ministers three years to approve a new text, which was very different from the second draft and much shorter.

In order to make a succinct appraisal of the Plan, certain questions need to be asked:

Is there real political willingness on the part of the Government of Spain to address the impacts of business on human rights?

The text approved by the Council of Ministers states "Spain's commitment to protect human rights, ... (and) against human rights violations or abuses committed by third parties, including business, ... (and) in providing victims with effective remedy." Nevertheless, it then immediately qualifies the scope of the commitment by pointing out that the Plan "... aims to support companies that have already integrated the Guiding Principles into their business strategy while also enhancing the awareness of companies that have not yet completed this process. It is therefore presented as a Business and Human Rights Plan with the objective of raising awareness and promoting human rights among public and private business actors." It would therefore appear that the premise of the Plan is to promote a proactive framework while maintaining the current system, i.e. any ambitiousness in the Plan being conditioned by the scope of voluntary commitment by business enterprises.

The premise of the Plan is to promote a proactive framework while maintaining the current system, i.e. any ambitiousness in the Plan being conditioned by the scope of voluntary commitment by business enterprises

Is there a budget?

The version of the Action Plan that was finally approved starts with a "common provision" that the Government has often used in different plans and programmes recently and which is sufficiently indicative of the level of priority that the Spanish Government attaches to the Plan: "All commitments arising from the application of the measures of this Plan are subject to budgetary availability and the objectives of budgetary stability set by the Government and shall not involve any increase in expenditure for staff in the service of the Administration."

Has an overall diagnosis been made, or will one be made, of the underlying situation?

The Plan was not preceded by, nor provides for, a general diagnosis or baseline study, as has been the case in other countries. It does however refer to certain partial studies to be drawn up by the "Monitoring Commission" and other bodies. The studies referred to above are as follows:

- Legal mechanisms, civil liability and business enterprises.
- Non-judicial access to remedy: analysis shall be made of the current regulatory framework, non-judicial grievance and mediation-based mechanisms and the potential needs of the parties.
- Implementation of the measures set forth in the Plan: the Monitoring Commission shall annually review and present a report on the implementation of the measures, together with proposals for updating the Plan.
- The alignment of legislation and regulations regarding respect for human rights: these shall be periodically assessed by the Monitoring Commission, in cooperation with the State Council for Corporate Social Responsibility (CERSE).
- A specific action plan, developed by a Working Group, on the coherence of support policies for business internationalisation and their alignment with the Guiding Principles.

What type of instruments are provided for in the National Action Plan?

The first thing that stands out is the disappearance, in the text that was finally approved, of any reference to the second mainstay of the Guiding Principles in the Plan, i.e. the responsibility of business enterprises to respect human rights.

With regard to the first mainstay, concerning the obligation of States to protect human rights, the measures envisaged in the Plan provide for: awareness-raising campaigns; measures to provide

N. 17 · July 2018

information to business enterprises, especially SMEs and the social economy; dissemination of tools and action guidelines; training for civil servants and public officials; staff training for the Foreign Service; the promotion of self-regulatory codes and training by business enterprises; promotion for the application of the OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas; the “establishment of channels” for the promotion of due diligence; adoption of a system of incentives (economic, commercial, presence, visibility and image, and others) for business enterprises that develop procedures of due diligence; development of the capabilities of other States; application of EU standards; the National Contact Point for the OECD Guidelines for Multinational Enterprises as the focal point; promotion in public enterprises of the principles of Socially Responsible Investment; supervision of the possible impact on human rights when contracting business enterprises to provide services, both within and outside of Spanish territory; the application of criteria that are aligned with the Guiding Principles in public sector contracts in the areas of defence and security; inclusion of clauses upholding the respect for human rights in the procurement of military services and private security; ensure strict respect for human rights by companies in business transactions with other companies; and the inclusion of information in the Universal Periodic Review on efforts and activities on the subject of business and human rights. As can be seen, there are no State measures regarding the regulation of business behaviour.

With regard to the third mainstay, regarding access to remediation mechanisms, the Plan announces reports and studies on civil responsibility and non-judicial grievance mechanisms. It notes the existence of the National Contact Point, the Office of the Ombudsman, and the Labour and Social Security Inspectorate, together with their respective responsibilities. It underlines the ideas of disseminating available remediation mechanisms; information to citizens with a chart of available resources, together with the drafting of practical guides and compilation of best practices for business enterprises to establish grievance mechanisms. It also mentions support for the efforts of third states to strengthen the independence of the judiciary and specific training for judges and prosecutors in business and human rights. No mention is made, however, of any new specific mechanisms.

What resources for monitoring are provided for in the Plan?

The Plan has a duration of three years from the time it was endorsed by the Council of Ministers. A Monitoring Commission for the NAP is provided for, consisting of ministerial representatives from the Ministry of the Presidency; the Ministry of Foreign

Affairs and Cooperation; the Ministry of Employment and Social Security; the Ministry of Energy, Tourism and the Digital Agenda; the Ministry of Economy, Industry and Competitiveness; the Ministry of the Treasury and State Administration; the Ministry of Justice; and the Ministry of Health, Social Services and Equality. The outstanding absence here is the Ministry responsible for the environment.

The Commission is meant to meet once every six months and adopt its decisions by consensus. It may invite, in an advisory capacity, the Office of the Ombudsman and recognised experts from the public sector, academia, the business sector, business enterprises, labour, social and professional organisations in the protection and defense of human rights. It must issue an annual review report on the implementation of the measures set out in the Plan and include proposed updates for these measures, in the form of monitoring reports, and submit an annual report on the application of the Plan to the Spanish Parliament. It must also issue an assessment report on the impact of the Plan in relation to the prevention, mitigation and remedy of the negative effects of business activities on human rights within two years. It must also prepare an updated version of the Plan for the third year.

It has been nearly a year since the Plan was approved and, although the Monitoring Commission was apparently formed in February, no information is available on its work plan or if use has been made of the option to invite outside experts. It would therefore seem difficult for the Commission to be able to perform the tasks assigned to it for the first year.

What participatory mechanisms are envisaged?

The Plan states that the Monitoring Commission shall take into account the opinions of the different social actors covered by the scope of application of the Plan (non-governmental organisations, labour unions, business enterprises, business associations, universities). The Monitoring Commission shall convene a meeting with civil society, interested companies and business associations at least once a year, together with other sectoral meetings. There will also be an annual meeting with the Standing Committee of the State Council for Corporate Social Responsibility. Channels shall also be established for the various stakeholders – representatives of civil society, companies, labour unions, universities, etc. – to participate and contribute to the process of impact assessment, within two years. The participation of companies and non-governmental organisations in dissemination activities is also planned.

For the time being, however, nothing more is known about any specific implementation of these provisions. In any event, the dissatisfaction of human rights

organisations with the approved Plan has been made clear in many different forums and opportunities for participation need to be created as soon as possible in order for these to have a real influence on the process and determine what measures can be taken in the future.

What loopholes have been identified in the National Action Plan?

Firstly, there has been no comprehensive assessment made, nor is one envisaged, of whether Spanish legislation is compatible with the duties of the State to protect human rights and regarding the sufficiency and alignment of judicial and non-judicial remedy. Although this was partially addressed in the draft versions of the Plan, it was eliminated from the final version.

There has been no comprehensive assessment made of whether Spanish legislation is compatible with the duties of the State to protect human rights and regarding the sufficiency and alignment of judicial and non-judicial remedy

In relation to the first mainstay of the Guiding Principles, there is no direct mention of any regulation of business behaviour to ensure compliance and thereby protect people's rights. As stated above, awareness-raising, information, training and promotion are the only measures envisaged. Despite the clear need for regulation, this would imply business enterprises do not need to budge an inch from a purely voluntary approach to respect human rights, which is an approach that has been repeatedly proven to be insufficient. Furthermore, no reference is made to the connection between environmental damage and human rights abuses.

The Plan totally disregards the second mainstay (the responsibility of business enterprises to respect human rights). There is not even any clear commitment for public enterprises to set in place due diligence procedures in accordance with the Guiding Principles.

As far as the third mainstay (access to remediation mechanisms) is concerned, there is no mention of any prescribed measures to eliminate barriers to access for victims of human rights abuses by business enterprises. Legal barriers that can prevent civil and criminal cases from being addressed have been clearly identified in different recent studies. Barriers in the case of civil law include:

- Limitations to the recognition of the legal standing and material scope of collective action;
- The impossibility of directly prosecuting a foreign subsidiary of a Spanish company unless there is justification to "pierce the corporate veil²";
- A prescription period (statute of limitations) that is too short concerning liability for non-contractual damage;
- The scope of legal aid.

Barriers in the case of criminal law include:

- The catalogue of criminal offences that can be attributed to legal persons is limited and human rights offences are not included;
- The reform of the criminal liability of legal persons tends towards exclusion from liability if a company can justify compliance³;
- Where a de facto director and the parent company are not liable for the company;
- Current regulations make the application of universal jurisdiction very difficult in relation to companies.

It is important to point out that the term "extraterritorial" is completely absent from the National Action Plan, meaning that there are no measures at all dealing with the impact overseas of companies either registered in or that have their headquarters or main economic activity in Spain.

Proposals on many of these aspects that were in the draft versions of the Plan have disappeared.

What is the current situation?

Spain is a party to the majority of international human rights treaties and this is a good starting point.

Most small and medium-sized Spanish companies are totally unaware that their activities may have a negative impact on human rights, meaning that awareness building, information and training are essential.

It is necessary to develop and coordinate a strategy with a broad range of instruments, including regulatory instruments, and broad-based government action that includes the participation of stakeholders and the necessary human and economic resources.

The 2017 National Action Plan does not come close to what is the required strategy, although it may be a first step towards achieving it. For this to happen, the pace and consistency of the process during the first three years are fundamental, although judging by the lack of progress in implementing the Plan it seems unlikely that the envisaged schedules will be met.

The recent change of government in Spain raises numerous questions regarding the direction that implementation of the National Action Plan will now take, i.e. if it will be basically maintained or if there is a reappraisal. Likewise, the ministerial reshuffle that is

N. 17 · July 2018

taking place may facilitate a review of the composition of the Monitoring Commission and the inclusion of the new Ministry responsible for the environment and sustainability. It is to be hoped that the commitment to address business respect and human rights issues will be strengthened under the new government and that the ambitiousness of the initial draft versions of the Plan will be rekindled.

Spain is a party to the majority of international human rights treaties and this is a good starting point

Recommendations

1. Articulate a strategy with the fullest possible participation of the stakeholders and the necessary human and budgetary resources for it to be carried out and incorporated into an indispensable revision of the National Action Plan.
2. Carry out a complete diagnosis of the adequacy of Spanish legislation with regard to the duties of the State to protect human rights and the sufficiency and alignment of judicial and non-judicial remedy.
3. Make a clear commitment to the implementation by public enterprises of due diligence processes in accordance with the Guiding Principles.
4. Establish the obligation of companies, in a way that is proportional to their size and according to the nature of their activities, to activate procedures of due diligence in accordance with the Guiding Principles that include due diligence obligations for their supply lines. In this regard, establish by legal means the necessary sanctions to ensure accountability.
5. Amend, in line with the recommendation above, Royal Decree Law 18/2017, 24 November, which amended the Code of Commerce, the recast text of the Law on Corporations endorsed by Royal Legislative Decree 1/2010, 2 July, and Act 22/2015, 20 July, concerning the audit of accounts, with regard to non-financial information and diversity⁴.
6. Adopt measures to eliminate the barriers to access to remedy for victims of human rights abuses by business through reform of the Civil Code, the Criminal Code and the Organic Law of the Judiciary. With regard to civil actions, in particular: broaden the scope of class actions; extend the prescription period of responsibility for non-contractual damages; establish the jurisdiction of the Spanish courts over inter-

connected claims when one of various defendants is domiciled in Spain; give as wide an acceptance as is possible to *forum necessitatis*; ensure that free legal aid covers all costs associated with the procedure. With regard to criminal actions: align criminal offences applicable to legal persons with the [Council of Europe's Recommendation on Human Rights and Business](#); set up a special prosecutor's office dealing with corporate crimes against human rights and the environment overseas; reassess the reform of the criminal liability of legal persons; reverse the reform of universal jurisdiction to prioritise the prosecution of more serious international crimes and include more serious environmental offences; articulate free legal aid for alleged victims in third countries.

7. Review the structure of the National Contact Point, which is currently poorly adapted to meeting the needs of a real mediation body, so that it fulfils the criteria of the Guiding Principles for non-judicial mechanisms of access to remedy.

Recommended strategic guidelines for the ICIP

- Continue efforts to monitor the national action plans.
- Follow up the implementation and revision of the Spanish National Action Plan.
- Establish a forum for debate and proposals with civil society organisations and academic stakeholders.

NOTES

¹ United Kingdom, Netherlands, Denmark, Finland, Lithuania, Norway, Sweden, Switzerland, Italy, Germany, Colombia, United States, Poland, Belgium, France, Indonesia, Chile, Spain, the Czech Republic, and Ireland.

² In certain situations, courts can ignore the status of a company as a separate legal entity and the liability for decisions adopted by a company falls on the partners (or administrators).

³ Compliance means the establishment of adequate policies and procedures to ensure that a company complies with the applicable regulatory framework; in the case at hand, the establishment of an adequate due diligence procedure to prevent human rights abuses.

⁴ [Official State Gazette \(BOE\) no. 287, 25 November 2017](#)

ABOUT THE AUTOR

ANTONI PIGRAU SOLÉ. Professor of Public International Law at Universitat Rovira i Virgili. Director of the ICIP programme, Business, conflicts and human rights. Coordinator of Territory, Citizenship and Sustainability, a consolidated research group recognised by the Government of Catalonia (2017 SGR 781). Member of the Advisory Board of the Network on Business, Conflict and Human Rights. Member of the Permanent Peoples' Tribunal.

DISCLAIMER

The opinions expressed in this publication do not necessarily reflect those of the ICIP.

International Catalan Institute for Peace (ICIP)

The International Catalan Institute for Peace (ICIP) is an independent public institution, the main aim of which is to promote a culture of peace and facilitate the peaceful settlement and transformation of conflicts. The activities of the ICIP revolve around four core action programmes, for which seminars, conferences and other events, publications, exhibitions and audio-visual materials are organised, together with different initiatives to raise awareness and promote the culture of peace. The four programmes are:

- Peacebuilding and the articulation of strategies for co-existence after violence
- Violence outside the context of war
- Peace and security in public policies
- Business, conflicts and human rights

Research is central to the work of the ICIP, which has a particular interest in fostering original research that throws new light on both conceptual and theoretical aspects, as well as the practical application of solutions. It is in this context that the ICIP publishes this series of Policy Papers.

www.icip.cat / icip@gencat.cat