Scholarly Articles

National Action Plans on Business and Human Rights: Progress or Mirage?

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Abstract

As of October 2018, 21 states have adopted National Action Plans on Business and Human Rights (NAPs), with several more in different phases of development. This is an important political step to raise awareness of the importance of intragovernmental policy coherence and of the need to move forward to prevent human rights abuses linked to business activity. However, despite the global intergovernmental support to such policy strategies, the actual effectiveness of NAPs needs to be called into question: do they represent progress, or are they a mirage to block possible avenues of development? Currently existing NAPs have done little (yet) to ensure more effective protection in key policy areas, including trade and investment, state-owned enterprises, and particularly in relation to legislative developments and access to remedy. This contribution seeks to analyse the merits of developing NAPs, the importance of ensuring they become only the very first step towards a more effective protection of human rights, and to question whether their importance needs to be adjusted to what they really are: policy tools with limited effects and with a politically linked time frame.

Keywords: business and human rights, implementation, National Action Plans, public policy, United Nations Guiding Principles

I. Introduction

Seven years after the unanimous[1] endorsement of the United Nations Guiding Principles on Business and Human Rights[2] (UNGPs) by the Human Rights Council, it is possible to observe an important global alignment around its three pillars, which has given rise to the development of an international *ecosystem* or *constellation* of corporate responsibility. The impact of corporate activities on human rights or the environment (including climate change) is frequently discussed, along with different ways to measure and prevent

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[1] Human Rights Council, 'Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/RES/17/4 (16 June 2011).

[2] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

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it;[3] this has even been acknowledged in the sustainable development agenda,[4] and a global negotiation to elaborate a legally binding international instrument on corporate responsibility in the field of human rights is currently underway.[5] This same discussion is taking place at the regional[6] and domestic levels, through the elaboration of public policies and legislation in this area to address corporate behaviour and impacts on human rights.[7] Furthermore, the paradigm shift that the UNGPs represent has had an important impact in other scenarios and international organizations, such as in the Organisation for Economic Co-operation and Development (OECD)[8] or the International Labour Organization (ILO).[9]

In that regard, a global movement to 'walk the talk' in the governmental and business spheres is equally underway, although at varying lengths. In the latter case, business and non-governmental organization (NGO) initiatives have appeared to measure corporate performance in the development and adoption of instruments and policies that may contribute to prevent and/or mitigate human rights impacts, in an effort to foster a 'race to the top' in favour of human rights.[10] On the other hand, governments have centred most

[3] Framework Convention on Climate Change, 'Adoption of the Paris Agreement', FCCC/CP/2015/L.9/Rev.1 (12 December 2015), para 134; Annex, Art 6.8.b); Human Rights Council, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment', A/HRC/31/52 (1 February 2016), paras 57, 66.

[4] General Assembly, 'Transforming our World: The 2030 Agenda for Sustainable Development', A/RES/70/1 (25 September 2015), para 67.

[5] Humberto Cantú Rivera, '¿Hacia un tratado internacional sobre la responsabilidad de las empresas en el ámbito de los derechos humanos? Reflexiones sobre la primera sesión del Grupo de Trabajo intergubernamental de composición abierta' (2016) *XVI Anuario Mexicano de Derecho Internacional* 425; Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1:1 *Business and Human Rights Journal* 41; Carlos López and Ben Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session' (2016) 1:1 *Business and Human Rights Journal* 111; Carlos López, 'Struggling to Take Off? The Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights' (2017) 2:2 *Business and Human Rights Journal* 365; Marco Fasciglione, 'Towards a Human Rights Treaty on Transnational Corporations and Other Business Enterprises: The First Session of the UN Open-ended Intergovernmental Working Group' (2015) 3 *Diritti umani e diritto internazionale* 673; David Bilchitz, 'The Necessity for a Business and Human Rights Treaty' (2016) 1:2 *Business and Human Rights Journal* 203.

[6] Humberto Cantú Rivera, 'Regional Approaches in the Business and Human Rights Field' (2013) 35 *L'Observateur des Nations-Unies* 53.

[7] Such is the case of France, Switzerland, Germany and the United States in different areas, although particularly centred on corporate human rights due diligence.

[8] The OECD Guidelines for Multinational Enterprises, adopted in 1976, were updated in 2011 to add a chapter on human rights, in order to accurately reflect the outcome document produced by the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, the UN Guiding Principles on Business and Human Rights.

[9] In a recent International Labour Conference, one of the most important topics was precisely the issue of supply chains and labour rights violations; International Labour Organization, *Resolution Concerning Decent Work in Global Supply Chains* (Geneva: ILO, 2016). In addition, the ILO Tripartite Declaration was updated in 2017 to include explicit references to the central role of the UNGPs in ensuring business respect for human rights; International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 5th edition, 2017.

[10] There are numerous examples of this: from one of the first initiatives that appeared in the early 2000s (*Business Leaders Initiative on Human Rights*) to test the effectiveness of the Norms proposed by the UN Sub-Commission on the Promotion and Protection of Human Rights, to the companies that worked with John Ruggie to test in practice the elements of the second pillar of the UNGPs, on the corporate responsibility to respect human rights through the use of due diligence and impact assessments (such as Cerrejón in Colombia or Sakhalin Energy in Russia), the increase in sustainability and human rights-oriented practices by companies is significant. On the other hand, some NGOs and other actors have equally started to work with and demand companies to respect human rights, including through the use of performance indicators (such as the *Corporate Human Rights Benchmark*) or the development of uniform reporting methodologies on the actions to identify, assess, prevent and/or mitigate risks of impacts on human rights (as is the case with the *UNGP Reporting Framework*).

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of the discussion on one single indicator: the development and adoption of National Action Plans on business and human rights (NAPs). The interest on this tool (and the support received from different stakeholders, especially the European Union) has been such that practically any progress or delay that a state may have in this field can be measured by the level of development of a public policy on business and human rights.

This is a rather interesting and novel approach, given that public policies (such as NAPs) have not traditionally been considered as the main tools for the implementation of international law, a situation that raises important questions regarding their potential effectiveness *vis-à-vis* more 'traditional' forms of state action to that end. Especially in the human rights domain, the visibility of public policies as instruments for the implementation of international law in the domestic sphere has been limited, due in part to the general focus on the adoption of legislation and judicial interpretation as *the* measures that are more likely to bring effective results to ensure the protection of human rights.[11] This approach has led several organizations to design methodological recommendations to develop these action plans, with the aim of generating projects with relatively homogeneous foundations.[12] Thus, small steps to develop corporate and governmental standards and practices to ensure the effective respect and protection of human rights are being taken, backed up by a large effort from civil society organizations.

However, taking into consideration the multi-cultural focus of human rights and the flexibility that states have to implement their international obligations at the domestic level, it is rather singular that most of the focus has revolved almost exclusively around one single measure at the state level, and especially one that is different to the main 'tools' used to comply with international human rights obligations. Thus, this article will explore and argue why NAPs may not necessarily be sufficiently adequate tools to generate change to state practice and legislation, that could result in more effective protection of human rights and access to remedy *vis-à-vis* business activities; quite the contrary, it will posit that NAPs may be effective tools to ensure awareness-raising and horizontal coherence that *could* eventually translate into vertical coherence, depending on the level of commitment from each state to ensure an effective implementation of their international obligations, but which will depend necessarily on the national political will to achieve this transformation.

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[11] Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edn (Oxford: Oxford University Press, 2014), p 175: 'In general, it can be said that effectiveness is best ensured if a human rights treaty is made part of national law. Only if human rights guarantees can be relied upon by the parties concerned, if the judicial body called upon to adjudicate an ensuing dispute must take account of and apply such guarantees, and if as a consequence a body of national decisions progressively builds up, will the relevant provisions shape the public conscience of the country concerned.' Recent regional human rights case law highlights a growing interest on this approach: I/A Court H.R., *Case of Human Rights Defender et al v Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgement of 28 August 2014. Series C no 283, para 263, stipulating the different requirements a public policy for the protection of human rights defenders must include. On the other hand, international environmental law could be an interesting exception, where the use of certain types of instruments for the domestic implementation of international obligations of the state is occasionally defined. For an analysis, see Richard B Stewart, 'Instrument Choice' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 147, 168–172.

[12] The most significant example to date is the (updated) toolkit developed jointly by the International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights: ICAR/DIHR, *National Action Plans on Business and Human Rights Toolkit*, 2017 edition. The UN Working Group's guidance on this issue would seem to also suggest the convenience of a uniform structural approach to NAPs, although allowing enough margin to states to address issues that may be relevant to their national context.

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In that regard, this article will start with a short analysis on how NAPs came to be at the forefront of the business and human rights discussion, before reviewing what public policies are, as well as their purpose, potential and challenges. This last point is relevant for understanding the way in which NAPs, as public policies, can help to shape the discussion and evolution of the business and human rights agenda at the domestic level, especially in relation to pillars I and III of the UNGPs. A second part then turns to analyse the 'theory' that has been developed by the UN Working Group on business and human rights through different documents and positions, to compare it with a sample of the actual state practice that has been developed (mostly) in Europe and Latin America. The resulting analysis reveals the potential advantages and (even more clearly) the practical limitations that NAPs may have to foster responsible business conduct and effective state action to curb business-related human rights abuses, finishing with a question that needs to be addressed: are NAPs effective instruments to implement the UNGPs, or are they collaborative mirages that avoid engaging in a serious conversation on the type of changes that are actually required to ensure state and business action for the protection and respect of human rights?

II. Public Policies and National Action Plans

While public policies are an essential part of governmental functions that are required to ensure appropriate implementation of legal obligations (whether international, constitutional or local), they have been largely overshadowed in the human rights field by legislative measures and judicial interpretation, which are commonly identified as the most appropriate measures to give effect to legal provisions. However, public policies can have a large role to play in ensuring collective administrative action towards a specific policy goal (section B), which may contribute to implement an international legal obligation; this aspect is especially relevant in the business and human rights field, with the emergence of NAPs as the 'recommended' first step that states must take to implement the UNGPs (section A). However, the purpose of this policy instrument needs to be assessed against its potential benefits and challenges, in order to gauge its possible effects as a mechanism to generate effective change for the protection of human rights in the context of business activities (section C).

A. The Appearance of NAPs on Business and Human Rights

The use of NAPs as tools for states to fulfil their international obligations and put them into practice is not something that appeared originally in the context of the discussion on corporate responsibility in the field of human rights. Quite the opposite: this practice goes at least as far back as 1993, when the Vienna Declaration and Programme of Action[13] resulting from the World Conference on Human Rights stipulated that states should adopt action plans to reinforce the promotion and protection of human rights.[14]

In the context of corporate responsibility in the field of human rights, the call to develop action plans appeared in 2011, when the European Commission urged states to

[13] World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (25 June 1993), para 71.

[14] General Assembly, 'World Conference on Human Rights', A/RES/48/121 (20 December 1993).

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adopt NAPs to implement the UNGPs in its Communication 681, entitled *A Renewed EU Atrategy 2011–14 for Corporate Social Responsibility*.[15] While the document has a particular focus on corporate social responsibility – a concept that has been criticized and understood separately from the discussion surrounding business and human rights[16] – the fact that a proposal to develop action plans was included as a regional policy objective was an important contribution to setting clear guidelines for state action, at that time still largely undefined. This measure by the European Commission was eventually supported by the Council of the European Union, which included them in the *EU Strategic Framework and Action Plan on Human Rights and Democracy*,[17] setting a timeline for European states to develop their implementation strategies throughout 2013. However, by that deadline, only the United Kingdom and the Netherlands had published their respective action plans. At the time of writing, that number has importantly increased, totalling already 17 national business and human rights policies by European states,[18] around half of EU member states (including a revision of the original UK and Dutch action plans).

In the follow-up projects to both the Communication 681 and the Strategic Framework and Action Plan, both organs have reiterated the necessity to continue working the issue of business and human rights, notably through the development and adoption of NAPs. The European Commission included in its *Action Plan on Human Rights and Democracy* (*2015–2019*) a call to its member states to develop and implement action plans in relation to the UNGPs by 2017,[19] while the Council of the European Union made a double call, to its member states and partners in other regions, to continue developing public policies in this field.[20]

The proactivity of the European region certainly had an impact in the activity of the UN Working Group on business and human rights,[21] which stated its support to the development of national plans for the implementation of the UNGPs in its 2012 report,[22] while devoting its 2014 report to the UN General Assembly to analysing NAPs and its constitutive elements.[23] An important issue was that there was no clear dimension at the

[15] European Commission, 'A Renewed EU Strategy 2011–14 for Corporate Social Responsibility', COM/2011/681/FINAL (25 October 2011), para 4.8.2.

[16] On the difference between corporate social responsibility and business and human rights, see Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14:2 *Journal of Human Rights* 237.

[17] Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Doc 11855/12 (25 June 2012), para 25(c).

[18] United Kingdom, the Netherlands, Denmark, Sweden, Lithuania, Germany, France, Switzerland, Poland, Italy, Spain, Finland, Norway and Belgium.

[19] European Commission, 'Action Plan on Human Rights and Democracy (2015–2019): Keeping Human Rights at the Heart of the EU Agenda', JOIN (2015) 16 final, para 17b.

[20] Council of the European Union, EU Action Plan on Human Rights and Democracy (2015–2019), Doc 10897/15 (20 July 2015), para 18a,c.

[21] Human Rights Council, 'Outcome of the Second Session of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/G.12/2/1 (7 June 2012), para 2, where the Working Group endorsed the proposal on developing national plans to implement the UNGPs in EU member states.

[22] Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/20/29 (10 April 2012), para 68.

[23] General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/69/263 (5 August 2014).

time of what NAPs in the context of corporate responsibility might entail, to which the Working Group responded by pointing out that '[t]he fundamental purpose of a national action plan is to prevent and strengthen protection against human rights abuses by business enterprises through an inclusive process of identifying needs and gaps and practical and actionable policy measures and goals.'[24] In that same line, the report sets out that 'States take stock of what they are already doing to implement the Guiding Principles and identify gaps which require further policy action to implement the Guiding Principles.'[25] In principle, the logic behind NAPs revolves around the measures and projects that states must develop to fill the regulatory, legislative and policy gaps that enable the existence of grey areas, and through which businesses impact human rights negatively – either voluntarily or involuntarily.

The clarification made by the UN Working Group on business and human rights regarding what is expected of NAPs, as well as a series of multi-stakeholder consultations that developed both prior to and after the presentation of the report, have increased the attention to this topic, which has even extended to other regions of the world. In the Americas, for example, the Organization of American States (OAS) started considering the issue of business and human rights in 2014,[26] although the topic of NAPs did not formally become part of the agenda until 2016, through a resolution[27] that requested the Secretary-General, the Inter-American Commission on Human Rights and the Executive Secretariat for Integral Development to collaborate within their corresponding mandates to the development of standards in the field of business and human rights, *inter alia* through the development of NAPs as a means to implement the UNGPs.[28]

While the development of these instruments has been relatively slow, its discussion at the state level started advancing more quickly after the adoption of the UN Human Rights Council resolution on the elaboration of an international legally binding instrument[29] on human rights and transnational corporations and other business enterprises in June 2014. Somehow, the fact that states were confronted by an eventual (and possible) international regulatory framework on business and its impacts on human rights has generated an important amount of pressure to advance these public policies, possibly as an alternative to justify that it is not necessary to establish another conventional framework,[30] and to reinforce the UNGPs (considered a legally flexible strategy) through implementation mechanisms.

However, it is important to consider how NAPs, as public policy tools, may relate to the overall international human rights framework. This aspect is relevant due to the fact

[24] Ibid, para 2.

[25] Ibid, para 6.

[26] OAS General Assembly, 'Promotion and Protection of Human Rights in Business', AG/RES.2840 (XLIV-O/14) (4 June 2014).

[27] OAS General Assembly, 'Promotion and Protection of Human Rights', AG/RES. 2887 (XLVI-O/16) (14 June 2016).

[28] Ibid, para I.ii.3. The 2017–2021 Strategic Plan of the Inter-American Commission on Human Rights also makes explicit reference to their project to work in supporting the development of National Action Plans by states in the Americas.

[29] Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', A/HRC/RES/26/9 (26 June 2014).

[30] A clear sample of this is the insistence of the EU Delegation during the first session of the Intergovernmental Working Group to include a panel on the implementation of the UNGPs, whose objective was to highlight the adequacy of National Action Plans.

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that public policies, as part of state action, are subject to the same international human rights obligations as other measures that may be adopted by the state. A remarkable difference in the use of public policies in different areas of state action, and their use as public instruments in the field of human rights, lies precisely in the type of 'problem' that is being addressed. This is directly linked to the special character that human rights hold under international law, where state obligations are rather process oriented,[31] and evaluated in light of the level of effectiveness achieved in the prevention and protection from human rights violations. Human rights law is essentially composed of obligations of means,[32] which contemplate the importance that the state takes all necessary measures to ensure compliance with and protection of human rights standards, and where this is not possible, to ensure adequate investigation, sanction and redress for wrongdoing.[33] Thus, ineffective state action, in whichever form it may happen, may lead to the international responsibility of the state.[34]

If this holds true for state actions that have been traditionally used under international human rights law, such as legislation, the same criterion would necessarily apply for other, more 'novel' (or unexplored) approaches to implement international obligations. In the case of public policies, and especially of human rights policies, it would thus not be sufficient to create or adopt a public policy for the sake of state action alone; on the contrary, that public policy would necessarily have to ensure adequate compliance with international human rights standards, in order to provide appropriate protection to individual and collective rights. This argument is relevant for the analysis of NAPs on business and human rights as public policies, because it would signal the importance that the measures that states include in NAPs are designed to ensure effective results, in order to adequately address the legal and policy challenges that exist in domestic jurisdictions and that represent important impediments to the respect, protection and fulfilment of human rights *vis-à-vis* the conduct of transnationally operating (as well as national and local) business enterprises. However, before engaging in a more detailed analysis of how NAPs may contribute to the realization of human rights, it is important to clarify what public policies are, as well as their purpose, potential and objectives to become adequate instruments for the implementation of the UNGPs, aspects that will be addressed in the following sections.

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[31] Joanna Kulesza, *Due Diligence in International Law* (Leiden: Brill-Nijhoff, 2016) 262; Vincent Chétail, 'The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward' in Denis Alland et al (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Leiden: Brill-Nijhoff, 2014) 105.

[32] Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, 2nd edn (Cambridge: Cambridge University Press, 2014) 477–488.

[33] Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Melbourne: Oxford University Press, 2011) 112–113.

[34] Philip Alston and Ryan Goodman, *International Human Rights* (New York: Oxford University Press, 2013) 1047: 'Ultimately, effective protection of human rights must come from within the state. The international system generally seeks to compel states to fulfil their obligations through one or another method – either observing national law (constitutional or statutory) that is consistent with the international norms, or making the international norms themselves part of the national legal and political order.' See also Kathia Martin-Chenut and Camila Perruso, 'Organes de protection des droits de l'homme et responsabilité des entreprises: la contribution des obligations positives' in Kathia Martin-Chenut and René de Quenaudon (eds), *La RSE saisie par le droit: Perspectives interne et international* (Paris: A. Pedone, 2016) 659.

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B. Defining Public Policies

In order to have a common understanding, at least for the purpose of this article, on the meaning and definition of public policies, it is particularly relevant to conceptualize them,[35] as well as to make reference to their elements and objectives. For Hassenteufel, public policies combine two elements: *polity* and *policy*. *Polity* refers widely to politics, as a form of power that legitimizes the use of public force; the second one, *policy*, refers to the idea of a series of determined actions or omissions as a basis of a rational decision, undertaken by a collective or individual actor. Combining both elements, Hassenteufel considers that public policies are thus the representation of a programme of action of one or several public or governmental authorities.[36] Accordingly, public policies have three elements: their *foundation*, or the logic giving rise to those actions, which obviously derives from a social or public issue that the state, within its functions and activities, must address; the *instruments of action*, through which the states develop the necessary actions to address the issue or problem; and finally, the *public* upon which the action is executed.[37]

Two other French scholars, Mény and Thoenig, consider that public policies have five elements: a group of concrete measures giving substance to policies; to a higher or lower degree, authoritative decision-making; a general action framework, that is, an integral and coherent programme to address a specific issue; a public to which the policy is directed; and finally, a series of goals or objectives to fulfil or satisfy.[38] The goal of those five elements is to resolve a specific issue through concrete actions or measures taken by the state.[39] For Vázquez and Delaplace, 'public policy aims to rationally address a public problem through a process of government action'.[40] To achieve this, public policies must go through permanent and continuous cycles of analysis, implementation and assessment,[41] in an effort to try to resolve the issues that may exist in a specific society.

This aspect in particular raises an important question: what can be understood as an 'effective' public policy? In a 1986 essay, Nagel pointed out that '[a]s a general matter, effectiveness of public policies can be defined as the extent to which the policies are achieving the benefits they are supposed to achieve plus any unanticipated side

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[35] Marcelo González Tachiquin, 'El estudio de las políticas públicas: un acercamiento a la disciplina' (2005) 2 *Quid Juris* 99, 110, mentioning that public policies imply the establishment of one or several strategies oriented to finding solutions to public problems, while ensuring social benefits resulting from the decisional processes involving a collaboration of government and civil society.

[36] Peter Hassenteufel, *Sociologie politique: l'action publique*, 2nd edn (Paris: Armand Colin, 2014) 7.

[37] Ibid, p 9.

[38] Yves Mény and Jean-Claude Thoenig, *Politiques publiques* (Paris: P.U.F., 1989).

[39] Pierre Muller, *Les politiques publiques*, 10th edn (Paris: P.U.F., 2013) 25.

[40] Daniel Vázquez and Domitille Delaplace, 'Public Policies from a Human Rights Perspective: A Developing Field' (2011) 14 *SUR-International Journal on Human Rights* 34.

[41] Ibid. According to the authors, 'The cycle is comprised of seven processes: the entry of the problem into the public agenda, framing of the problem, designing possible solutions, analysis of the pros and cons, decision-making, implementation, and evaluation.' However, they add: 'Today we know that the public policy process can follow these steps, but that it is not always and not necessarily the case. Not uncommonly, the links can merge together and the step-by-step process can become less clear.'

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benefits'.[42] Thus, public policy as a tool for administrative or state action will be effective to the extent that it achieves its specific objectives or purposes, which have to be identified at the design and planning stage, and then monitored as it is implemented and put into practice.

According to Sandfort and Moulton, '[t]o carry out programs successfully, it is essential for implementators to have a clear sense of the results desired to help shape implementation activities…[P]olicy and program implementation systems normatively should ultimately create public value. It is what justifies the change that is being attempted–change that tries to counteract the tendency in large systems for inaction and drift'.[43] In this sense, there is a clear link between an existing need in a given society, a public tool designed to address that need, and the required expectation of the result to be achieved in order to satisfy that public necessity through the use of that programme or policy, with the satisfaction of that necessity being the main criterion to determine the effectiveness of a specific public policy tool.[44] This generic conceptualization of the content and purpose of a public policy is relevant to the main aspect discussed in this article: the adoption of public policies to address the imbalances of power, lack of adequate regulation and oversight, and deficient protection of human rights *vis-à-vis* economic activities and processes led by business enterprises.[45]

While international law has rarely focused on the use of public policies as implementation mechanisms to ensure compliance of international obligations at the domestic level, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises explicitly made a point that states should use *all* the legal and administrative options available to protect human rights from harmful corporate activities.[46] It is important to reflect at this point, then, what changes could be introduced by NAPs – as public policy tools, a type of instrument that is not as commonly used as other forms of state action – in a national context, and more importantly, to identify what their potential and challenges may be for the adequate implementation of the UNGPs.

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[42] Stuart S Nagel, 'Efficiency, Effectiveness, and Equity in Public Policy Evaluation' (1986) 6:1 *Policy Studies Review* 99.

[43] Jodi Sandfort and Stephanie Moulton, *Effective Implementation in Practice: Integrating Public Policy and Management* (San Francisco: Jossey-Bass, 2015) 12–13.

[44] This, however, is obviously confronted to the politics of its corresponding scenario. Ibid, p 13: 'It is well established that in public programs, definitions of effectiveness vary dramatically because of political differences, competing vantage points, and multiple goals. Desired results often are left intentionally vague in normal policy statements not only to provide political cover, but also to allow localized interpretations and evaluations of effectiveness. In fact, many scholars note the irony that what is good for implementation – clear assignment of responsibilities, specification of change processes, and clear outcomes – is often very bad for politics.' See also Christopher C Potter and Jennifer Harries, 'The Determinants of Policy Effectiveness' (2006) 84:11 *Bulletin of the World Health Organization* 843, who identify the limiting factors to the effectiveness of policies in the health sector, which may be analogically applied to the business and human rights context.

[45] On this point, see Hassenteufel, note 36, p 19, who points out that transboundary interactions – such as those that take place in the business and human rights context – are less controlled by states, due to the importance that some transnational actors (such as NGOs, businesses or experts) have gained in such processes; Franck Petiteville and Andy Smith, 'Analyser les politiques publiques internationales' (2006) 56:3 *Revue française de science politique* 357, 362; Yilmaz Argüden, *Keys to Governance* (London: Palgrave-Macmillan, 2011), 39–40.

[46] Human Rights Council, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', A/HRC/8/5 (7 April 2008), paras 18–22.

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C. The Purpose, Potential and Challenges of NAPs on Business and Human Rights

This section analyses the way in which NAPs on business and human rights can enhance the potential of state action to address the different issues that appear in this area, and underlines some of the main challenges faced by NAPs – and consequently, by states – to generate effective change in law, policies and practices at the domestic level. To do so, it first explains the purpose and effects that NAPs may have from a general perspective, to then address the specific possibilities and challenges to which these instruments are confronted to, through particular aspects that may contribute or limit the potential of states to effectively regulate business-related human rights abuses.

As indicated above, public policies are tools available to states in order for them to satisfy a public need or to address a social issue. In the case of NAPs on business and human rights, they have been identified as mechanisms or instruments to ensure the adequate implementation of the UNGPs.[47] Nevertheless, the fact that the obligations and responsibilities set forth in the UNGPs are directed to different actors – the state and business enterprises – makes some of its contents more prone to be addressed by states through the design and use of public policies. This is so because pillars I and III of the UNGPs refer explicitly to state action, while pillar II revolves around corporate initiatives that are recommended for implementation as an independent responsibility for businesses, regardless of state action (or lack of it). As a result of this state-centred focus, NAPs are limited by the fact that, as public policies, they have (direct) effects only on public officials from the Executive branch, which is in charge of regulatory functions, but hardly upon the Legislature or the Judiciary of the state, which have a different role to play within the state structure. Thus, the difference in the functions of the three branches of the state imposes a direct limitation in the potential effects – and effectiveness – of NAPs to fulfil their goal in the implementation of the UNGPs.

Despite this situation, the importance or relevance of developing a NAP is not affected, given that pillar I of the UNGPs refers not only to legislative action (such as in the case of corporate law), but also to other administrative and regulatory functions, including awareness-raising in the context of business operations in conflict zones, the nexus between state and businesses (through state-owned enterprises, joint ventures or public–private partnerships, for example), and most importantly, to horizontal synergy and coherence among the different ministries or offices of the Executive branch to ensure the adequate respect and protection of human rights *vis-à-vis* the private sector. This horizontal synergy or coordination – identified as *horizontal policy coherence* in Principle 8 – is understood as 'supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and

[47] Hassenteufel, note 36, pp. 10–12. According to the author, there are several types of policies, including *incentive policies* that do not necessarily correspond to a specific or clear content, and that have a symbolic dimension. They can include reports, public speeches or organizational measures that do not necessarily aim to the adoption of concrete decisions, but rather acting in relation to the representation of an issue and showing that public officials are concerned by a particular challenge or problem.

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insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations'.[48]

As a result, states are expected to take different capacity-building measures within and across their ministries, in order to ensure that regardless of the specific policy area they work on, human rights will be upheld in the course of their activities, decisions and procedures as a general governmental policy, in order to fulfil their international human rights obligations to protect, respect, ensure and fulfil human rights. Thus, compliance with the international legal framework on human rights becomes a specific criterion to measure the effectiveness of a domestic public policy – and in particular in relation to business and human rights, to fulfil its international obligations as understood through the lens of pillar I of the UNGPs.

In that regard, *horizontal policy coherence* should allow a state's ministries and departments to work in a coordinated manner that allows them to surpass the general divide that exists between those ministries in charge of promoting trade, investment and labour, and those in charge of the promotion and protection of human rights and/or the environment.[49] This divide, generally marked by the ignorance or lack of consideration of human rights obligations by those bodies in charge of managing the economic aspects of public policy, implies that a more concerted and conscious effort should be made to ensure that any public body is aware and capable of fulfilling the human rights obligations that may be relevant to its activities or regulatory functions, in order to avoid violating an international obligation – and to potentially have the state's international responsibility compromised.

It is precisely in relation to this aspect where NAPs, as vehicles for the implementation of international obligations, become relevant tools to contribute to the performance of the existing state's duties under international law, most notably through two channels: *awareness-raising*, on the one hand, and *implementation measures*, on the other hand, as defined by the UNGPs. These two are the main activities that can be undertaken by the different ministries of the Executive branch, whose main role is to supervise and enforce the strict compliance with the legal and regulatory framework by the private sector. Nevertheless, as public policies, NAPs may be better equipped to ensure adequate awareness-raising, through dissemination and capacity-building exercises, that should then – in principle – pave the way for adequate implementation measures by public officials in regulatory bodies. Thus, in a sense, the measure of effectiveness of a NAP will necessarily be defined by its success in interministerial awareness-raising of the state's duties under pillar I of the UNGPs, that should translate into effective compliance of the state's human rights obligations –and a successful horizontal policy coherence on business and human rights. In other words, NAPs can be important tools to improve the protection and respect of human rights by states – and as a consequence, by businesses – and especially to align state actions to promote responsible business conduct.

[48] Human Rights Council, note 2, commentary to Principle 8.

[49] General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/73/163 (16 July 2018), para 84(a): 'The lack of policy coherence between governmental departments and agencies that shape business practice and the human rights obligations of the State is a significant gap. A good starting point, however, is that this is increasingly being recognized by most Governments, including in the growing number of national action plans.'

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In relation to pillar III, NAPs may also be effective for the adequate development and implementation of *non-judicial remedies*,[50] which tend to be within the regulatory functions undertaken by the Executive branch of the state.[51] Thus, as a result of the awareness-raising and horizontal policy coherence components of NAPs, the different administrative units of the Executive branch should be better prepared to enforce their corresponding international human rights obligations, while providing an adequate access to administrative or non-judicial remedies for victims of business-related human rights abuses, in compliance with pillar III of the UNGPs, an obligation that finds its roots in existing international human rights instruments through the rights of access to remedy and due process of law.

These considerations on the purpose and possible effects of NAPs as a governmental tool to enhance compliance with human rights need to be considered in light of the potential advances and challenges that can appear during the implementation of these public policies. There are several potential avenues to contribute to the advancement of the implementation of the UNGPs through NAPs. One of them, for example, is the possibility of *generating coherence and synergy* among the different governmental organs in charge of corporate regulation, which is undoubtedly a required first step to generate the necessary political and administrative environment that would enable effective regulation of business enterprises. This could be achieved through a NAP process, which can facilitate the involvement of different ministries, potentially enabling more knowledge and commitment on the necessity (or duty) to regulate corporate activities in order to prevent negative human rights impacts, which could therefore lead to an enhanced and coherent domestic regulatory system.[52]

However, this is confronted to the reality of decision-making differences among states, where their structures may not necessarily be well suited to ensure the necessary coherence or horizontal unity that is supposed – or predicted – to result from NAPs. Such is the case of federal states, where the fragmentation and distribution of powers, competences and jurisdictions represents a singular challenge due to their complex administrative structure, without mentioning the different political–economic spheres

[50] Human Rights Council, 'Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms: Report of the United Nations High Commissioner for Human Rights', A/HRC/38/20 (14 May 2018), paras 6, 10: 'State-based non-judicial mechanisms may take many different forms. In most jurisdictions, a range of mechanisms with a role to play in the handling of complaints and/or resolving disputes arising from business-related human rights abuses may be identified … While some have mandates relating to all human rights, many are specialized bodies that focus on specific human rights-related themes, such as labour rights, non-discrimination, consumer rights, the right to privacy, environmental rights, or the rights to water or to health. Common examples of relevant State-based non-judicial mechanisms include labour inspectorates; employment tribunals; consumer protection bodies (often tailored to different business sectors); environmental tribunals; privacy and data protection bodies; State ombudsman services; public health and safety bodies; professional standards bodies; and national human rights institutions … State-based non-judicial mechanisms can be broken down into five broad categories: complaint mechanisms; inspectorates; ombudsman services; mediation or conciliation bodies; arbitration and specialized tribunals.'

[51] Ibid, A/HRC/38/20 (14 May 2018).

[52] cf. Damiano de Felice and Andreas Graf, 'The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights' (2015) 7:1 *Journal of Human Rights Practice* 40, 47: 'Coordination among different government actors is one of the most daunting challenges in the implementation of human rights, be it at the state level in federal countries … or with respect to specific bureaucratic units … The consequence is that compliance with human rights norms is favoured by a certain degree of centralization of decision making and implementation…'.

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that may be in favour or against a determined policy at the different levels of government – or outside of them – and which may try to influence its development in a particular sense.

Another potential contribution of NAPs to advance the implementation of the UNGPs is through *governmental coordination* to achieve a specific goal, without necessarily giving rise to new legal obligations for third parties (either business enterprises or victims of human rights abuses). In this regard, the awareness-raising purpose of NAPs can serve to establish conduct or orientation guidelines for the public administration, in order to enhance their human rights performance *vis-à-vis* corporate activities, in an effort resembling a soft power (or even smart power) policy,[53] which leads to generate links and coordinated actions under a voluntary logic, without making the state commit to any particular performance.[54]

This collaborative approach is not to be neglected, given the potential it may hold to ensure the development of good practices across governmental ministries and agencies, which would be the result of effective awareness raising. This could be the single most important contribution that a NAP can make in relation to state action. As Backer points out, the essential objective of NAPs must be that the state complies with its own due diligence obligation, through the dissemination of knowledge on its international obligations among the different governmental levels, departments, agencies and ministries, in order to have administrative coordination and coherence with regard to the respect, protection and fulfilment of human rights.[55] As a result of the alignment in public functions, states would have better capacity to prevent human rights violations to people in their jurisdiction, including of those that occur as a result of corporate activities.

There are other potential elements to advance the implementation of the UNGPs through NAPs, especially those related to the third pillar. For example, NAPs can be instrumental in addressing or contributing to *remove practical obstacles to access to remedy*, particularly for state-based non-judicial mechanisms, including for those bodies in charge of prosecution and regulation. In this regard, NAPs can be ideal instruments to strengthen the capacity of prosecutorial or regulatory institutions, especially in relation to the (economic) imbalance that usually exists between parties and their legal representatives. Thus, access to free and quality legal representation can be an aspect addressed – and developed – through public policies, which can be improved through

[53] Joseph S Nye, 'Hard, Soft, and Smart Power' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford: Oxford University Press, 2013) 559, 563–565; see also Su Changhe, 'Soft Power' in Andrew F Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford: Oxford University Press, 2013) 544.

[54] Claire Methven O'Brien et al, 'National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool' (2016) 1:1 *Business and Human Rights Journal* 117, 118; de Felice and Graf, note 52, p 44: 'The production of a government strategy does not coerce governments to take action, nor does it create transnational links between domestic and international actors'.

[55] Larry Catá Backer, 'Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All' (2015) 38 *Fordham International Law Journal* 457, 473–474, 476: 'The First Pillar instructs States that they must, as an initial matter, deal with the structures and substance of their own duty to protect human rights before they turn that aggregation of duty (expressed in law and policy) outward to regulatory objects. Thus every NAP ought to require States to look to themselves first'.

specific business and human rights capacity-building for public prosecutors or defenders, or through budgetary reallocation to strengthen institutional capacity.

The same can be said in relation to some *non-judicial mechanisms*, such as OECD National Contact Points (NCPs), which in many cases are inserted within governmental ministries, and would thus be subject to the determinations made in business and human rights public policies. In this case, for example, NCPs in many countries suffer from inadequate or insufficient funding, personnel and institutional visibility to truly perform their role as non-judicial dispute-settlement mechanisms. NAPs can be an appropriate venue to address their role and functioning, including through restructuring processes (for example, by making them into tripartite mechanisms, or through the adoption or development of internal rules of procedure), or through the creation of rosters of external independent experts to participate in their specific instances, in addition to enhancing the budgetary allocations that they regularly receive. This type of decision, for example, could be considered as actions to implement the state obligations under pillar III of the UNGPs.

This could also be achieved in relation to *national human rights institutions* (NHRIs),[56] despite them being independent or autonomous institutions *vis-à-vis* the state, and therefore not necessarily within the scope of action of NAPs (although this can vary among states). Even though not formally part of the state apparatus, they can contribute indirectly to the realization of access to remedy through their complaints-handling function – in collaboration with the Executive – as well as in relation to capacity-building across governmental agencies and with other non-state actors, including the private sector.

Despite these possibilities to advance the implementation of some aspects contained in pillars I and III of the UNGPs, NAPs could also be confronted to important challenges. Three of them can be clearly identified: First, one of the most relevant challenges for the success of NAPs is the difficulty to generate *vertical policy coherence* – understood as the alignment of legislation, regulation and state policies – solely through the development of a public policy;[57] as it will be seen *infra*, existing NAPs have so far not addressed or been successful in that regard, a situation that points to the organic limitation that results from the separation of powers within a given state.[58] Without legal reform, NAPs will potentially be ineffective to generate actual change in business conduct *vis-à-vis* human rights, and would therefore have their effects limited to the public administration. Indeed, without the appropriate legal and political framework in place, it would be more difficult for the state to effectively regulate corporate conduct, therefore recreating the particularly declarative character that maintains the *status quo* unchanged.

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[56] On this point, see Surya Deva, 'Corporate Human Rights Abuses: What Role for National Human Rights Institutions?' in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (London: Routledge, 2011).

[57] Methven O'Brien et al, note 54.

[58] It is surprising to see that the inherent difficulties deriving from the separation of powers are not discussed in this topic. The adoption of public policies and legislation are completely separate and independent functions, often surrounded by antagonism between the different parties. Thus, the adoption of a National Action Plan or even the diagnosis identifying the need to undertake legal reforms to cover the gaps that may be detected as a result of a baseline assessment, do not imply that a legislative reform will take place.

A second challenge would be the *lack of adequate measurement* in the implementation of public policies, which would make it more difficult to ascertain whether effective changes in state or business conduct are taking place. This, in turn, brings about two specific results: first, that the push to ensure a global uptake of NAPs has been marked by a relative stridency, without providing sufficient evidence that they can produce actual practical effects that curb business-related human rights violations; and second, that states have been able to avoid fulfilling their obligations to regulate and adopt legislative measures at the domestic level through the adoption of NAPs, which in turn allows them to escape the coercive character that other domestic or international legal measures could impose.[59]

A third important challenge that exists is related to the *timeframe of public policies*: by being linked to political cycles, policies may be affected by the change of priorities of the public agenda during a governmental transition, which may also translate into the loss of the achievements and lessons learned in the elaboration and implementation of action plans. Therefore, it is particularly necessary to include the essential provisions regulating the form and substance of the corporate responsibility to respect human rights in the legislative and regulatory domestic frameworks. This could very well happen in the context of the development of a NAP if the participation of the three branches of government is ensured, or if the 'action' element in the national plan indeed focuses on achieving structural and substantive change, in order to create the necessary momentum to propose legislative reforms that focus on closing the gaps that exempt corporations from their responsibility to respect human rights. In practice, however, this is not an automatic process, and it must be borne in mind that public policies strictly generate effects on the Executive branch, but not necessarily on the other branches of government.

Over-estimating the potential effects and impacts that a public policy may have could unfortunately lead to mirages that inhibit the true effectiveness of policy initiatives.[60] Thus, it will be very important that states do not focus exclusively in the development of action plans, but in an integral project that allows the adaptation of the legal and policy framework in order to foster an integral regulation of businesses in relation to their human rights performance.[61]

As it can be observed, the development of NAPs can present both opportunities and challenges for states to fulfil their international human rights obligations as understood through the lens of the UNGPs. Their correct identification and treatment would be fundamental to determine if such public policies can be useful tools to generate positive developments for states, businesses and victims, or if they are placebos that

[59] Of course, it does not escape out attention that even conventional human rights instruments (as well as domestic legislation and regulation) can be insufficient tools against the lack of political will to implement them at the domestic level, an issue that is unfortunately present in a large majority of states. However, the relative specificity of the content of international instruments and the obligation to adopt measures to render them effective are ingredients that may evolve into clear obligations and responsibilities, and that could eventually help victims in judicial procedures seeking reparation.

[60] The UN Working Group has highlighted the importance of improving the policy, legislative and regulatory domestic frameworks to prevent human rights violations and protect against them. General Assembly, note 23, para 7e.

[61] Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012); Methven O'Brien et al, note 54, p 122: '…if NAPs commit only to "voluntary" approaches, and not "hard law" or "regulatory" ones, it is unlikely they will achieve the regulatory "smart mix" needed to deliver change on the ground'.

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unfortunately will inhibit concrete and effective state actions in their quest of corporate regulation.

III. National Action Plans in 'Theory' and 'Practice'

The initial conception of NAPs in the work of European institutions, and its subsequent adoption by the UN Working Group on business and human rights as one of its core strategies to advance the implementation of the UNGPs, has given rise to both a 'theory' and a 'practice' of NAPs. In the first case, the characteristics, processes and substance of NAPs have been largely developed by the UN Working Group through its 2014 report and its 2016 guidance (section A below), whereby they have set forth the minimum practical and substantive elements that such public policies should have. This, however, needs to be contrasted with the actual state 'practice' that has taken place in the development, implementation and follow-up of these public policies (section B below), in order to assess the extent to which they intersect to ensure the implementation of the UNGPs (section C below). In that regard, this section will seek to make an evidence-based analysis of how the expectations regarding NAPs and their implementation by states may only contribute to a limited extent to the full implementation of the UNGPs – that which is under the control of the Executive branch of governments.

A. The 'Theory' of NAPs: the Working Group Report and its Practical Guidance

As already mentioned, the UN Working Group devoted its 2014 report to the General Assembly to the issue of NAPs on business and human rights,[62] where it defined its objective as being one of stocktaking and filling the normative and regulatory gaps that allow business-related human rights violations to happen. However, as clarified by Michael K Addo, the intention of the Working Group was not just to assess the importance of NAPs to implement the UNGPs, but also to provide practical guidance to states[63] that would enable them to have a clear notion of the procedural and substantive aspects that should be taken into consideration when developing, implementing and reviewing a NAP. As the 'theoretical standards' in relation to these public policy tools, they have contributed to clarify the basis upon which a state may develop a national public policy on business and human rights, while also suggesting an evolution in the understanding and characteristics of NAPs.

To begin with, NAPs are defined in the Working Group report as a state-oriented tool to prevent and protect human rights against abuses by business enterprises.[64] However, while the main focus is obviously on the state and its actions to protect human rights, the UN Working Group also points out the importance that NAPs are seen not only as public strategies to orientate state action in order to fulfil existing legislative, regulatory or practical gaps, but also as a sort of guidance or interactive platform with companies in

[62] General Assembly, note 23.

[63] Michael K Addo, *Open Consultation on the Strategic Elements of National Action Plans in the Implementation of the UN Guiding Principles on Business and Human Rights*, 20 February 2014, p 2.

[64] General Assembly, note 23, para 6.

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order for them to fulfil their own responsibilities.[65] In that sense, the Working Group proposes, on the one hand, vertical coherence in relation to those public instruments that are used by the state to fulfil its role in the protection of human rights, and on the other hand, horizontal coherence *vis-à-vis* the different (state and non-state) actors that intervene in corporate regulation – regardless of the public or private character of their capital – including in relation to the use of human rights due diligence.[66]

The report also identifies different measures that can be taken by states to implement their duties under the UNGPs. Regarding pillar I on the state duty to protect, the report highlights that NAPs are adequate instruments to determine state obligations in relation to state-owned or controlled enterprises, as well as private businesses.[67] In general terms, the report identifies four measures that should be included: a stipulation of the expectation of states regarding corporate behaviour; a guidance and support role of states in relation to the corporate responsibility to respect; the use of incentives to foster responsible business conduct; and the importance of adapting or developing domestic legislation, in addition to a 'smart mix' strategy.

In relation to pillar III, the Working Group points out that the state must use all sorts of mechanisms that may provide remedy for victims, including judicial, non-judicial and non-state remedies. On judicial remedies, the report clearly identifies the need to reduce legal and practical obstacles that hinder access to remedy for victims, as well as clarifying the use of extraterritorial jurisdiction. Another aspect that is underscored is the need to analyse the liability of parent companies for the acts of their subsidiaries.[68] Regarding non-judicial remedies, the report highlights the need to address existing obstacles that hinder the performance of OECD National Contact Points or national human rights institutions. Lastly, the report mentions the relevance for companies to develop their own grievance mechanisms or to participate in external ones.[69]

While the focus of the report makes it address some substantive issues that are relevant in terms of the process, content, implementation and review of NAPs, it differs greatly from the definitive guidance issued by the Working Group in November 2016, which is more concerned with suggesting uniformity across all NAPs in terms of structure and substance.[70] In that regard, the Working Group guidance underlines that the substantive value of NAPs resides in the possibility of ensuring horizontal coherence across governmental agencies, and in identifying national priorities and adopting consequent policy measures. In terms of process, it is suggested that NAPs may foster transparency and predictability for stakeholders, a continuous monitoring, measuring and evaluation process, and provide a platform for multi-stakeholder dialogue.[71]

Some specific aspects highlighted in the guidance are the importance that the lead in the process is taken by a governmental department or agency after a political

[65] Ibid, para 33.

[66] Ibid, paras 37–39.

[67] Ibid, para 44.

[68] Ibid, paras 68–70.

[69] Ibid, paras 71–72.

[70] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, (Geneva: OHCHR, 2016).

[71] Ibid, p 1.

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commitment to develop a NAP,[72] and that every step of the process provides for a multi-stakeholder format.[73] It also makes a specific recommendation in terms of undertaking a baseline assessment, in order to understand the shortcomings and gaps in law, policy and practice, in consultation with different stakeholders, before drafting the policy document.[74] In terms of substance, the guidance suggests an overall structure and content of NAPs, including an explicit commitment to the UNGPs and an expectation that businesses will respect human rights; background and context in which the NAP is situated, for example as a stand-alone document or as an element of a broader public policy; the government response to the challenges that were identified in the baseline assessment and in consultations with stakeholders, including the existing and prospective measures that will be taken to address the challenges; the attribution to a governmental body, a timeframe for its implementation and indicators to measure progress.[75] Finally, the guidance suggests that the NAP should specify the implementation mechanisms and review processes that will be available, in order to periodically monitor, assess and update the policy as required.

Beyond the obvious differences between the Working Group's report and guidance, another interesting parameter that reflects the expectations of the Working Group in terms of NAPs are its statements during the annual Forum on Business and Human Rights, or in the country visit reports submitted to the Human Rights Council. In the first case, for instance, the Chairperson of the Working Group highlighted during the 2017 Forum that a current concern in relation to NAPs lies in the quality of the existing examples, particularly in relation to pillar III, which has not been especially forward-looking in existing national business and human rights policies.[76]

In the second case, the Working Group has repeatedly stated in its country reports that NAPs should be instrumental in ensuring or enhancing policy coherence and coordination across governmental agencies, as well as in fostering multi-stakeholder dialogue.[77] However, in certain instances, it has revealed further matters of concern: for example, in the country report on the United States of America, the Working Group pointed out that the state should make an assessment of the challenges in relation to access to remedy,[78] and even of extraterritoriality, as it stated that the NAP should take account of the domestic and foreign dimensions of the duty to protect,[79] in a clear reference to legislating and regulating corporate activities of US companies abroad.

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[72] Ibid, pp 5–6.

[73] Ibid, pp 7–8.

[74] Ibid, pp 8–9.

[75] Ibid, pp 11–12.

[76] *Statement by Surya Deva, Chairperson of the Working Group on Business and Human Rights*, 2017 UN Forum on Business and Human Rights, Closing plenary, 29 November 2017, available at http://www.ohchr.org/Documents/Issues/Business/ForumSession6/ClosingSuryaDeva.pdf (accessed 9 April 2018).

[77] Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Report on the First African Regional Forum on Business and Human Rights', A/HRC/29/28/Add.2 (2 April 2015), para 91.

[78] Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Visit to the United States of America', A/HRC/26/25/Add.4 (6 May 2014), para 18.

[79] Ibid, para 102(a).

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The issue of remedies was again brought up in the report on the visit to Mexico, where it recommended that the government should use the NAP to review the existing obstacles to remedy,[80] and further stated that the Government should undertake a realistic assessment of the existing challenges and propose adequate measures for action.[81] This aspect was repeated in its report on the visit to Korea, where it highlighted the role of NAPs in assessing the current legal and regulatory framework, and in determining how to improve access to remedy for victims of business-related human rights abuses.[82] Finally, in the press release following the visit to Peru, the Working Group underscored the importance that the NAP baseline analysis looks into the aggregated impacts of industries, the role of small- and medium-sized enterprises, and the informal economy,[83] thus stating the need for the NAP to address some of the specific areas of concern for the state, thus having a more tailored approach to the national context and situation.

As can be observed in terms of the 'theoretical' approach undertaken by the Working Group in its reports and guidance, it is clear that the expectation is for states to focus on developing a public policy, in order to fulfil the two main aspects that have been identified as the most relevant contributions of NAPs to the business and human rights agenda so far: policy coherence and awareness-raising, or horizontal coherence. An effective effort in relation to these two elements could potentially then lead to broader changes that may allow for vertical coherence to develop, through the adaptation of legal standards and procedures that allow for more effective regulation, and finally, to address the legal and practical obstacles existing in relation to access to remedy. Beyond these specific goals for the Working Group, an important matter of concern is the approach and consideration that states are giving to these recommendations when developing and adopting NAPs on business and human rights.

B. NAPs in 'Practice': An Assessment

As mentioned in the Introduction, a relevant sample of existing NAPs will be assessed in order to identify common aspects, divergences among them, and their position *vis-à-vis* the 'theory' developed by the Working Group. In that regard, it is useful to mention at this stage that the seven NAPs that were analysed[84] were selected taking into consideration two main criteria: their belonging to different legal traditions, and regional representation (thus including the two NAPs from South America, four from European countries, and the one from the United States). Before going into detail as to the different aspects that have been identified in the sample, it is important to note that a common trait

[80] Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Visit to Mexico', A/HRC/35/32/Add.2 (27 April 2017), para 108.

[81] *Statement at the End of Visit to Mexico by the United Nations Working Group on Business and Human Rights*, Mexico City, 7 September 2016, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20466&LangID=E (accessed 9 April 2018).

[82] Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Visit to Korea', A/HRC/35/32/Add.1 (1 May 2017), para 56.

[83] *Statement at the End of Visit to Peru by the United Nations Working Group on Business and Human Rights*, Lima, 19 July 2017, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21888&LangID=E (accessed 9 April 2018).

[84] Those of France, Colombia, Chile, the Netherlands, Belgium, the United States and the United Kingdom.

across NAPs has been their focus on actions that can be undertaken by the public administration, that is, by the Executive branch.

The seven NAPs analysed for this study reveal several aspects that would appear to be common policies, most notably in relation to actions that states intend to take to implement their first Pillar obligations. Uniform among them are measures to provide guidance and raise awareness, both among public officials in different governmental ministries, and within the business sector. This aspect is especially relevant, given the common objective of public policies of ensuring adequate knowledge and responses from public officials in relation to specific concerns or issues, but also due to the concern that the state must take steps to ensure that companies operating in their territory or jurisdiction understand fully the importance of respecting human rights throughout their operations and commercial relationships. Another aspect that appears in this regard, although related to access to non-judicial remedy, is the question of National Contact Points (NCP) reform and strengthening. All seven states that were reviewed established in their NAPs the importance of improving the capacity and effectiveness of their NCPs, in order to provide another avenue for remedy distinct from judicial remedies. As it can be observed, and as it was posited *supra*, these actions fall under the scope of the Executive branch, therefore allowing the public administration some level of discretion in determining how to implement these policies directly.

In addition to these, several proposals would appear in a relevant number of NAPs. The two most commonly addressed in the plans that were sampled are public procurement requirements, on the one hand, and supply-chain transparency and oversight, on the other hand. The first one could be expected, due to the important leverage that the state can exercise in imposing conditions *vis-à-vis* companies interested in providing some sort of public service.[85] Thus, with the only exception of France, the six other states did contemplate measures to address business and human rights in their public procurement requirement or policies. The second aspect that is widely acknowledged is supply-chain transparency and oversight, which highlights a common trend that has appeared in both the European Union and the United States, focusing specifically on supply chain due diligence and non-financial reporting duties. This, of course, finds support in the enactment of legislation or directives in both geographic regions, which establish the obligation for companies to 'know and show' what they are doing to prevent human rights abuses in their supply chains.

Finally, two other aspects that were relatively common across the sample are the issue of state-owned enterprises, recognized and addressed in the NAPs of Belgium, the United Kingdom, Chile and Colombia, and the issue of legal reform, especially in relation to enhancing access to judicial remedy, particularly by identifying shortcomings and legal and practical obstacles that may hinder victims' rights. In this regard, Belgium, for example, proposed to request an expert group to issue recommendations on how to overcome obstacles to judicial remedy; France, on the other hand, mentioned its commitment to work in the development of a legal recourse to fight a decision by a

[85] For an interesting study on this issue, see Claire Methven O'Brien, Nicole Vander Meulen and Amol Mehra, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (July 2016).

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prosecutor not to pursue an alleged crime committed by a French company (or person) outside of France, as well as in addressing denial of justice within its jurisdiction.

Colombia also made indirect reference to the possibility of undertaking legal reforms, particularly by identifying barriers to remedy in their jurisdiction and tasking a working group to propose measures to mitigate the existing barriers; and finally, the Netherlands, in the first iteration of its NAP in 2013, vowed to undertake studies on how to improve judicial and non-judicial mechanisms. Nevertheless, none of them actually *committed* to undertake legal reforms – whether substantive or procedural – as a result of the adoption of their action plans.

As it can be observed, most measures proposed in these NAPs are particularly connected to the regulatory power of the state, which would explain the focus on measures that the public administration itself can address – in most cases, without necessarily relying on the Legislature or the Judiciary. Yet, measures such as legal reform may require the active involvement of the Legislature, which could then make NAPs a starting point to analyse the existing shortcomings or deficiencies in legal standards, in order to work collaboratively with the other branches of government to achieve meaningful reform that leads to an improved system of remedies, or to the establishment of legal obligations of companies to undertake mandatory human rights due diligence.

Beyond these similarities, many specific differences among NAPs were also identified, which would point to the particular interests of those states to focus on aspects that are nationally relevant. Some of those differences are, for example, the issue of federal states and distribution of duties across different levels of domestic jurisdictions, identified in the Belgian NAP, which serves to show the inherent difficulties for different forms of states and their internal coordination.[86] Other issues that are also especially highlighted in some NAPs are the intent of linking the NAP process to the wider issues of sustainable development and climate change (as seen in the French and Chilean NAPs), or even to ongoing national processes, such as in the case of Colombia with its peace and transitional justice efforts.[87] Other states have chosen to include a specific role for their national human rights institutions in advancing the policy objectives set forth in the NAP, as in the cases of Chile and Colombia in relation to capacity-building and complaints-handling, or as in the case of France, in which the NHRI is tasked with monitoring the execution of the French NAP.

While different in scope and focus, the sampled NAPs identified a central role for the Executive branch, especially in relation to horizontal policy coherence, on the one hand, and on the possibility of using its regulatory powers to address business conduct and their potential effects on human rights, on the other hand. While some other measures appearing in the sample would require involvement of other branches of government – such as the idea of supply chain transparency – their presence relates to their existence in

[86] For example, the only other federal state in the sample are the United States, which however do not specify measures to ensure that its constituent states work closely with the federal government to implement the NAP. A different scenario can be seen in the German NAP, where some measures are expected to be addressed by state and local governments in coordination with the federal government.

[87] Paloma Muñoz Quick, 'Buscando la reconciliación: Planes de Acción para lograr la transición' in Humberto Cantú Rivera (ed), *Derechos humanos y empresas: reflexiones desde América Latina* (San José: IIDH, 2017) 313.

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domestic legislation or regional regulations, but are not included as goals that should result from a NAP; instead, the focus is on the exercise of the regulatory functions of the state in relation to an already-existing standard. A similar situation takes place in relation to pillar III, where the idea of undertaking an assessment of the existing obstacles to judicial remedy can be managed directly by the Executive branch, which does not actually generate changes in legislation and judicial processes, and would therefore have limited effects for victims and their right to access to justice. The same goes for non-judicial remedies identified in the sample, which may actually be modified or affected by actions of the Executive branch, without need for the other branches of government to intervene. As it will be seen in the following section, a contrast between the 'theory' and 'practice' of NAPs shows that as public policy tools, their effects may be limited to those aspects under control of the government, which should then lead to a reconceptualization of the role of NAPs in the business and human rights discussion.

C. 'Theory' *v* 'Practice': An Analysis of the Implementation of the UNGPs Through NAPs

Beyond the aspects highlighted above, the Working Group's 2014 report to the General Assembly and the 2016 Guidance focus on several key process and content elements that will be measured against state NAP practice in the following paragraphs.

One of the aspects that the Working Group highlights as a special trademark in the design and development of NAPs on business and human rights is the necessity to maintain a multi-stakeholder approach, in order to ensure access to the relevant positions and opinions from businesses, civil society, trade unions, victims, national human rights institutions, governmental agencies and other participants that may be affected or interested by these processes. This aspect is replicated in the 2016 Guidance, where inclusiveness and transparency are defined as essential criteria. From the analysed sample, all the NAPs highlight a multi-stakeholder approach and participation at different stages during the process of development,[88] an approach that may lead to general awareness-raising across sectors and actors.

In terms of content, the Working Group report identifies several underlying principles of the substance of NAPs that should be present, starting with a complementarity approach between pillars I and II that underlines the importance of including measures related to the actions the state will take to protect human rights, but that should consequently spark action to encourage business respect for human rights. An additional element is the use of a smart mix of measures to address the corporate responsibility to respect (an issue also clearly highlighted in the Working Group guidance), as well as the need for a tailored approach in the NAP, followed by the need to strengthen vertical and horizontal coherence.

[88] Yet, significant opposition appeared in the cases of Chile, Colombia and France, where the NAP processes were criticized for the lack of effective participation of different stakeholders in the definition of priorities and modalities to be followed in the public policy. This points to a crucial difference between multi-stakeholder participation and multi-stakeholder development and decision-making, a situation that reflects the definitive role that public authorities play in the definition of public policies. On these aspects, see ICAR and Dejusticia, *Assessment of the National Action Plan (NAP) on Business and Human Rights of Colombia* (May 2017) 1; DIHR, 'France', *National Action Plans on Business and Human Rights*, available at https://globalnaps.org/country/france/ (accessed 20 February 2018).

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From the sample analysed for this article, it is clear that not many of the expectations set out in the Working Group report or guidance are met in practice. For example, in general terms there is no smart mix of measures to address corporate responsibility; quite the opposite, NAPs focus explicitly and exclusively on actions that the Executive branch can affect and control directly, without intervention from the Legislature or the Judiciary. This, of course, has an impact in other content elements, such as the recommendation to strengthen vertical coherence, and in relation to the complementarity and interrelatedness of the first and second pillars, which are supposed to be addressed through legislation and guidance.

The analysis also shows that so far, states have basically chosen to ensure guidance and awareness raising in their NAPs, generally among governmental and business stakeholders (and thus contributing to horizontal coherence), but have not yet decided to take a further step towards domestic legalization of the corporate responsibility to respect.[89] As explained above, this may be the result of the consideration of public policies as administrative tools that do not fall within the legislative purview, effectively preventing long-term actions that could be addressed through legislation.

This, of course, also has important negative effects in terms of enhancing accountability and the rule of law in business and human rights cases, particularly due to the fact that parties to a dispute concerning human rights abuses will not necessarily be able to rely on public policies alone as the basis for their legal arguments in a judicial process. This could also be helpful to explain why the focus of existing NAPs has been on reinforcing or reforming National Contact Points, but not in adopting 'binding' measures that address actual legal procedures. The same situation can be seen in relation to extraterritorial regulation of business activity, which would – at least in civil law jurisdictions – require a legal norm stipulating the obligation to take steps to prevent human rights abuses abroad, in the same vein as the French law on *devoir de vigilance* has done.[90]

The relevant sample that has been analysed so far could lead us to conclude that NAPs will only be effective to some extent – that which is under control of the executive branch. This, however, does not necessarily mean that future NAPs may not be able to bridge the divide in order to ensure coherent action among the three branches of government; but it does point out that insofar as NAPs only involve ministries and agencies depending on the Executive, and not the other political branch of the state (the Legislature), its scope and general effects to ensure relevant change in terms of legislation and access to remedy will be limited.

IV. Concluding Thoughts: Effective Instruments or Collaborative Mirages?

As we have already argued, NAPs may present numerous options and opportunities to develop the issue of business and human rights at the domestic level, as well as to

[89] Ibid.

[90] Stéphane Brabant and Elsa Savourey, 'Loi relative au devoir de vigilance: Des sanctions pour prévenir et réparer?' (2017) 26 *Revue internationale de la compliance et de l'éthique des affaires* 21; Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2:2 *Business and Human Rights Journal* 317.

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identify action areas that states may work on to improve the level of human rights protection *vis-à-vis* corporate activities.[91] However, they may also constitute a detour from what states and companies really need to do in order to identify, prevent and/or mitigate negative human rights impacts. Thus, it is necessary to take into consideration that public policies can be complementary tools to state action for the implementation of their conventional human rights obligations, but not substitutes for them. One of the advantages of seeking the implementation of international law (whether in hard or soft form) through public policy instruments is the possibility to achieve real changes or effects in the administrative functioning of the state[92] (and in parallel regarding corporate activities), even if they are not necessarily of a legal nature. Undoubtedly, that is one of the aims of the UNGPs: the combination of instruments of a different nature that allow achievement of the ultimate objective, that is, an economic regulation and management that respects the conventional principles and commitments in the field of human rights. It is a novel focus that could offer results depending of the degree of commitment of each state.

Of course, NAPs will not solve the issues that states face when regulating business activities; on the contrary, its effects will be largely limited to the identification of governance gaps, and to propose actions that the public administration may try to achieve in order to reduce or suppress them. It is, in a way, the very first step in an otherwise large-scale project requiring constant updating. Despite the stridency that these processes have generated in different countries, precautions must be taken to ensure that the development of NAPs does not become a substitute to regulation and legislation that states must ensure to give more weight to their legal and policy architecture; instead, they should be understood as permanent complements[93] that guide state activity in this field, as suggested by different human rights treaty bodies.[94] Certainly, the heterogeneous level of social, economic and legal development of the different countries lead to underscore the importance of 'tailored' processes that focus on the needs and priorities of each state for the protection of human rights, and that do

[91] Backer, note 55, p 469: '… NAPs are understood to offer a tool for governments to articulate priorities and coordinate the implementation of the GPs, to effectively conduct a due diligence exercise in the furtherance of their duty to protect human rights…'.

[92] In that sense, adequate implementation of public policies by governments would theoretically render the adoption of domestic and international binding instruments unnecessary; cf. Sara Blackwell and Nicole Vander Meulen, 'Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights' (2016) 6:1 *Notre Dame Journal of International and Comparative Law* 51.

[93] An important example of the possible complementarity between legislation and public policies can be observed in the United States of America, where the Dodd-Frank Wall Street Reform and Consumer Protection Act's section 1502 addressing due diligence in minerals supply chains and the National Action Plan on Responsible Business Conduct (despite its lack of progressive focus) coexist. Another example is France, where the law on duty of vigilance and the NAP represent binding and non-binding measures to address the issue of corporate human rights responsibilities.

[94] Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', E/C.12/GBR/CO/6 (24 June 2016), paras 11–13; Committee on Economic, Social and Cultural Rights, 'Concluding Observations on the Sixth Periodic Report of Sweden', E/C.12/SWE/CO/6 (24 June 2016), paras 11–12; Committee on Economic, Social and Cultural Rights, 'Observations finales concernant le quatrième rapport périodique de la France', E/C.12/FRA/CO/4 (24 June 2016), paras 12–13; Committee on the Rights of the Child, 'Concluding Observations on the Combined Third and Fourth Periodic Reports of Ireland', CRC/C/IRL/CO/3-4 (1 March 2016), paras 23–24. It must be noted that treaty bodies have considered the focus on National Action Plans insufficient to effectively control and regulate corporate activity; thus, they recommend the adoption of a binding regulatory framework at the domestic level.

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not seek to replicate the experience of other states with a different level of development.[95]

In summary, it will be especially important that NAPs on business and human rights do not become mirages that seem to indicate that states have done their homework. Only through a 'smart mix' of voluntary and mandatory measures, incentives and sanctions, will it be possible to advance in the formulation of integral state projects that address the main governance deficiencies that contribute to the existence of grey areas where most corporate human rights violations take place.

[95] See María del Mar Rojas Buendía, 'El desarrollo de los Planes de Acción Nacional sobre empresa y derechos humanos y el estado actual de los Planes de Acción sobre RSC: España y los países nórdicos' (2016) 23 *Universitas. Revista de Filosofía, Derecho y Política Pública* 35, explaining some of the motives why not all states can follow the voluntary model that has been particularly advanced by Nordic countries.

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