



National Action Plan on Business and Human Rights

Report dated 9. December 2016 on Switzerland's strategy for the implementation of the UN Guiding Principles on Business and Human Rights in response to the parliamentary postulate 12.3503, Alec von Graffenried, 14. December 2012

Analysis and comments by the Swiss Coalition for Corporate Justice

«The End of the Beginning»

In 2011, the UN Human Rights Council unanimously adopted the UN Guiding Principles on Business and Human Rights, thereby laying the foundation for a paradigm shift: Corporations have an independent responsibility to respect human rights. Expectations towards corporations are clearly set out in the UN Guiding Principles. The times of glossy magazines reporting on companies' philanthropic projects in developing countries are over. Today, corporations must actively ensure that human rights are respected throughout their global business operations. Naïve assumptions such as no harm can come so long as intentions are good, or that shortcomings in the profit-orientated core business can be compensated with social projects, are overdue, as they simply do not meet the expectations of the international community. Today, human rights and sustainability must be consistently integrated into business practices and risks must be sought out proactively.

This aim has not yet been reached. The UN Guiding Principles' author, Professor John Ruggie, called the 2011 consensus «The End of the Beginning». Five years on, we are still at «the Beginning». Even though several states have published national action plans, most of them merely take stock of current policies. Yet, an increase in international dynamics is tangible. There is growing recognition of the fact that overarching principles need to be accompanied by clear requirements and binding laws to ensure that all corporations assume their responsibility.

Switzerland published its National Action Plan on Business and Human Rights on 9. December 2016 in response to the parliamentary postulate 12.3503 by Alec von Graffenried. The Swiss Coalition for Corporate Justice, a coalition of several non-governmental organizations, followed the development of the action plan very closely and, when given the chance, contributed to it. This paper presents its analysis and comments.

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1. International context

«The root cause of the business and human rights predicament today lies in the governance gaps created by globalization (...).»

John Ruggie, UN Protect, Respect and Remedy Framework 2008

1.1. Origin and adoption of the UN Guiding Principles

Over the course of the last three decades, the gap between corporations' global business opportunities and states' possibilities to regulate these activities has increased. Several attempts by the international community to tackle this challenge failed due to lack of consensus. After an ambitious attempt in 2003, which was met by strong opposition by corporations and industrialized states, Kofi Annan appointed a Special Representative to pick up the pieces. Within six years, John Ruggie, a Political Scientist at Harvard, developed a framework and a set of 31 implementing principles. Part of the resources to carry out this work was funded by Switzerland. In 2011, the [UN Guiding Principles on Business and Human Rights \(UNGPs\)](#) were unanimously adopted in the Human Rights Council and recognized by states, corporations and civil society as the smallest common denominator.

The «UN Protect, Respect and Remedy» Framework as well as the UN Guiding Principles are based on three pillars:

- **Duty to protect:** the state duty to protect against human rights abuses by third parties, including business;
- **Responsibility to respect:** the corporate responsibility to respect human rights;
- **Access to remedy:** Access to remedy for victims in case of human rights abuses by corporations.

Image 1: UN Framework and Guiding Principles

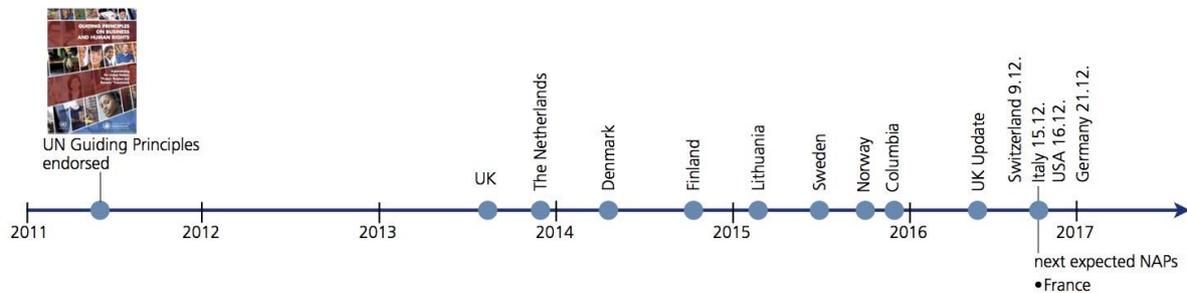


States were then asked to develop National Action Plans (NAP) to implement the Guiding Principles.

1.2. Progress of implementation in other countries

Switzerland is the 9th country to publish a National Action Plan. So far, mainly European countries have published NAPs. Two dozen countries are currently developing their plans, in particular countries in Latin America and Africa. The UK already published an updated version of its NAP this year. Alongside Switzerland, Italy, the US and Germany just published their first NAP and France is about to publish its.

Image 2: Timeline of National Action Plans



Overall, National Action Plans have rarely brought about a political momentum leading to new measures. The most interesting political developments that have taken place over recent years have all happened outside of NAP processes (see next paragraph). National Action Plans can be seen as a window into the current state of debate in a country rather than an actual plan of action.

1.3. International trend towards mandatory human rights due diligence

In the context of the State Duty to Protect (Pillar 1) and according to the UN Guiding Principles, states are urged to implement a «smart mix» of voluntary and binding measures as well as to periodically analyze any potential gaps in existing laws that oblige corporations to respect human rights. The key element of the Corporate Responsibility to Respect (Pillar 2) is to embed Human Rights Due Diligence into internal business operations in order to proactively identify and prevent human rights risks. States are urged to promote and demand the Corporate Responsibility to Respect through various measures (see image 3). The UN Guiding Principles recommend governments regulate human rights due diligence processes when it comes to doing business in conflict-affected areas as well as business by state-affiliated corporations bearing significant risks. In 2016, the Council of Europe adopted recommendations concerning the implementation of the UN Guiding Principles, suggesting the introduction of general, mandatory human rights due diligence processes, especially where negative consequences could be particularly severe.¹

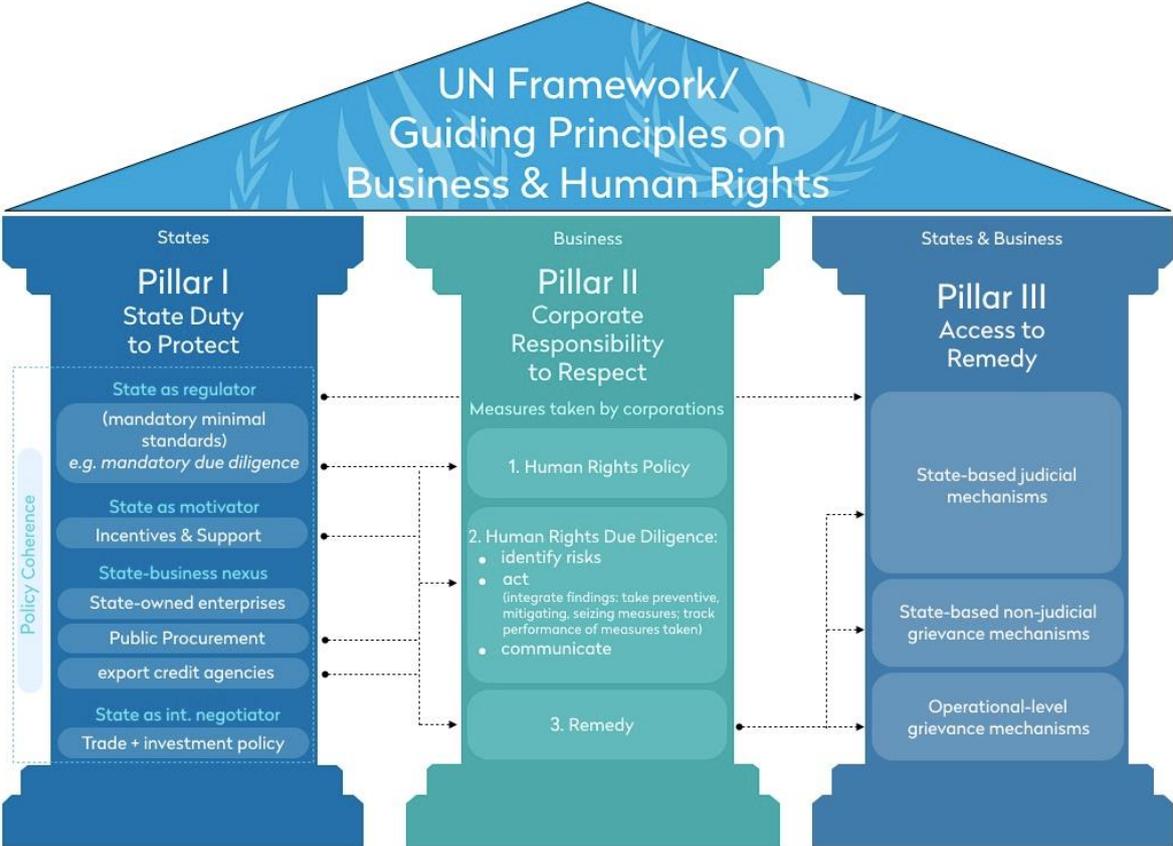
Several separate political processes concerning the topics subsumed under the UN Guiding Principles (see image 3) are currently underway. One of the most formative developments is the fact that increasingly, human rights due diligence processes are becoming binding and are turning from «soft law» to national legislation (see image 4). As a first step, the US and the UK have introduced specific reporting requirements regarding modern slavery in supply chains. The EU has made reporting on human rights due diligence mandatory for large corporations. However, the tendency is making human rights due diligence as a whole mandatory: «There is a clear move from a logic of reporting – of ‘comply or explain’ without any real obligation of means or result – to a logic of compliance that involves the monitoring role of the judiciary and, sometimes, civil and/or criminal liability on the part of the company for the harm caused»². In the last couple of years, the USA and the EU – through various regulations –

¹ Recommendation CM/Rec (2016) 3 of the Committee of Ministers to member States on human rights and business, para. 20 and Explanatory Memorandum para. 36.

² «The Rise of mandatory human rights due diligence», in: UN OPS, *Future Proofing Procurement*, 2016.

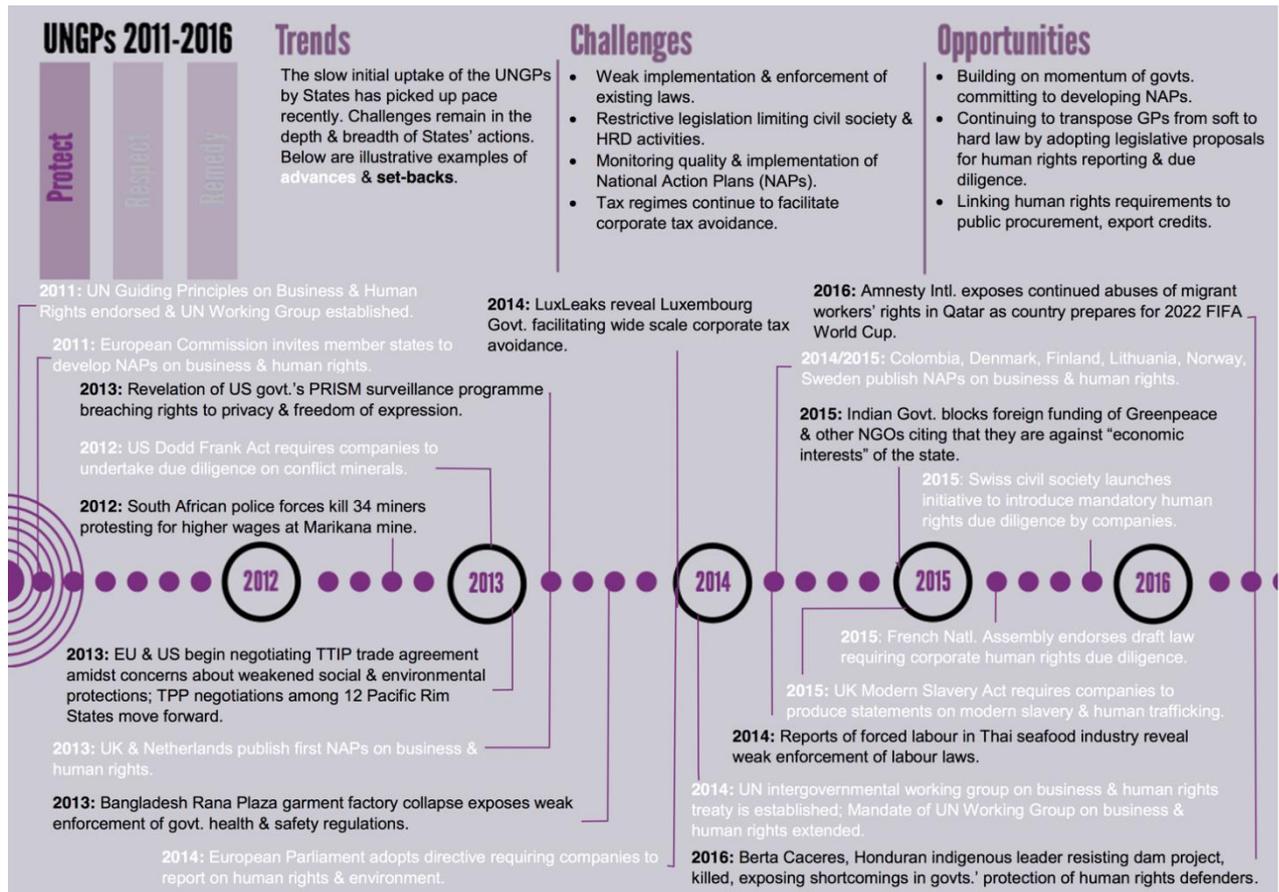
introduced comprehensive mandatory due diligence for specific areas (minerals from high-risk areas, illegal logging, human trafficking). France is currently finalizing a draft law which would introduce a general, cross-sectoral human rights due diligence for large corporations. Pursuant to this draft law, the OECD recently observed that «expectations of due diligence with regard to environmental and social impacts are increasingly being incorporated in domestic legislation»³. This is also where the Responsible Business Initiative, which seeks to introduce human rights due diligence into Swiss law, fits in. With the exception of certain requirements for private security companies, Switzerland knows no such regulations.

Image 3: Topics subsumed under the UN Guiding Principles



³ [OECD Concept Note](#), 26.11.15

Image 4: The UN Guiding Principles five years in – Résumé on Pillar 1 (source BHRRC 2016)



2. The UN Guiding Principles in Switzerland

Switzerland supported the development of the UN Guiding Principles on Business and Human Rights providing both personnel as well as financial resources. The implementation in Switzerland was however largely driven by civil society and Parliament. Even though a year after the adoption of the UN Guiding Principles, a «Multi-Stakeholder Dialogue on Business and Human Rights» led by the Federal Department of Foreign Affairs and the State Secretariat for Economic Affairs was initiated, the dialogue was – in retrospect – perceived to be unsatisfactory by various stakeholders. Indeed, the aim and purpose remained unclear. No basic consensus was found and the leading business associations as well as the State Secretariat for Economic Affairs did not agree on the need for action by government.⁴ The official stakeholder consultation concluded: «(...) the majority of the corporations [regards] the status quo considerably more critically than the business associations.»⁵

2.1. Process of developing the National Action Plan on Business and Human Rights

[Postulate 12.3503, Alec von Graffenried, A Ruggie Strategy for Switzerland](#)

As the implementation of the UN Guiding Principles in Switzerland was lagging behind, it was up to the National Council to kick-start the process on 14. December 2012 by adopting [postulate 12.3503](#). This postulate demanded the development of a «Ruggie Strategy», i.e. a National Action Plan on Business and Human Rights. In particular, the strategy was meant to apply the paradigm shift triggered by the UN «Protect, Respect and Remedy» framework; introduce measures to protect human rights, improve access to justice for victims, and suggest measures to increase Switzerland's foreign policy coherence. An identical postulate was submitted in the Council of States ([12.4100 Raphaël Comte](#)) and withdrawn after the adoption of postulate 12.3503 in the National Council.

The adoption of the postulate was followed by a lengthy process:

- The peace research institute Swisspeace was mandated by the Federal Government to hold a stakeholder consultation on the development of a strategy to implement the UNGP. The subsequent [report](#) is comprised of (1) stakeholders' assessments of the current state of the implementation of the UNGP, as well as (2) the expectations towards the NAP overall. The report was meant to aid the interdepartmental working group mandated to develop the NAP as a basis for its elaboration.
- Even though the «majority of the stakeholder groups interviewed» said it lacked⁶ a systematic analysis of the gaps in Swiss law and practice in relation to the UNGP, and despite the Federal Council's prior announcement to provide such a report⁷, such an analysis is not part of the NAP.
- The two years notice for implementing the postulate (end of 2014) passed without any strategy being published. This was justified by a lack of resources in the State Secretariat for Economic Affairs (see also Questions [14.5649](#) and [14.5591](#) as well as official information to the stakeholders dating 28 January, 2015).

⁴ «At federal level (particularly within the Federal Department of Foreign Affairs and the State Secretariat for Economic Affairs), the importance of Ruggie's UN Guiding Principles for Switzerland is currently being discussed. (...) Ruggie's UN Guiding Principles [are] first and foremost an instrument towards raising and promoting awareness (...). Only a few, if any, concrete directives can be derived from the UN Guiding Principles. Prior to analyzing Switzerland's compatibility with Ruggie (key word gap analysis), reaching a common understanding of the UN Guiding Principles in Switzerland is paramount» (Response dated 30.09.2012, Economiesuisse, Employers' Association, Swissholdings)

⁵ Summary report on stakeholder consultations on the NAP, March 2014, p. 7. Amongst others, ten large corporations and five associations were interviewed.

⁶ Summary report on stakeholder consultations on the NAP, March 2014, p. 9

⁷ Letter by the Federal Council to a group of Parliamentarians dated 28.03.2014: «Based on an internal review as well as the results of the consultation of external stakeholders, the federal administration will identify potential gaps and the need for action, and define appropriate measures in a strategy. We agree with you that the definition of gaps and the need for action are an integral and indispensable step between the review and the development of a strategy with concrete measures. This gap analysis will be carried out by administrative bodies in order to raise as much awareness of the UN Guiding Principles as possible with affected actors.»

- On 1 April 2015, the Federal Government's [position paper on the social responsibility of corporations \(CSR-Positionspapier\)](#) was adopted. The paper focuses exclusively on self-regulation and voluntary initiatives of corporations. However, the paper does not include an impact study of current CSR measures of Swiss corporations. The UN Guiding Principles did not make it into the paper despite having been adopted four years before.
- On 14 April, 2015, the Federal Administration sent a first draft of the National Action Plan to various stakeholders asking them to comment within 10 days. The deadline was pushed back by a couple of days after complaints by several stakeholders.
- Due to widespread criticism by various stakeholders, the action plan was reworked completely. Only in July 2016 did the stakeholders receive the new version, the structure of which had been adapted according to the recommendations by the UN Working Group.

2.2. Background: civil society initiatives and parliamentary processes

Petition «Droit sans frontières»

In November 2011, the Swiss Coalition for Corporate Justice, comprising of 50 Swiss non-governmental organizations at the time, launched a petition named in French [«Droit sans frontières»](#). The petition urged the Federal Council and the Parliament «to ensure that corporations domiciled in Switzerland respect human rights and the environment worldwide». The wide-spread media coverage and the great interest by the international community that followed the petition triggered a large debate on business and human rights in Switzerland. The campaign succeeded in bringing the debate to the political level after years of civil society and business discussing the topic. The petition was handed over in June 2012 with a total of 135,000 signatures collected within 7 months.

Parliamentary initiatives

Due to growing public interest in a political reaction, several parliamentary procedural requests were launched from 2012 onwards. In 2012 and 2013, nine interpellations regarding the implementation of the UN Guiding Principles, a meaningful combination of binding and voluntary measures in that area, as well as an assessment of international regulations on Business and Human Rights were submitted and discussed. At the same time, the National as well as the State Council's Foreign Policy Committees debated the «*Droit sans frontières*» petition which led to several initiatives by those Committees.

The National Council's Foreign Policy Committee's [postulate 12.3980](#) led to the report [«Comparative legal analysis – Human Rights and Environmental Due Diligence in relation to extraterritorial operations by Swiss corporations»](#) which was published in May 2014 along with a report by the Swiss Institute of Comparative Law. The report stated: «The density of international corporations domiciled in Switzerland is extremely high. The question whether Switzerland shouldn't act as a role model in the implementation of the UN Guiding Principles on Business and Human Rights as well as other international standards on human rights and the environment, is therefore justified».

The [committee's motion 14.3671](#) which – on the basis of the report – called for a consultation draft, was adopted in March 2015 with 91:90 votes, the president casting the deciding vote. Under pressure from the Swiss People's Party as well as business associations, a request to reconsider the issue was granted. A few minutes before the end of the meeting, the National Council voted again and the motion was rejected with 95:86 votes.⁸

⁸ Official Bulletin, 11.03.2015: <https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=35080>, see also [Handelszeitung 20.3.15](#), «Kuriöses Politikarussell um mehr soziale Verantwortung»

Responsible Business Initiative

In April 2015, the Swiss Coalition for Corporate Justice, comprising of over 60 Swiss non-governmental organizations at that time, launched the [Responsible Business Initiative](#). The core element of the initiative is a mandatory due diligence with respect to human rights and internationally recognized environmental standards for Swiss corporations. The initiative is closely oriented on the UN Guiding Principles. The implementation of mandatory due diligence would be guaranteed by a liability provision under civil law. The initiative was submitted in October 2016 with over 120,000 valid signatures.

3. Assessment by the Swiss Coalition for Corporate Justice

3.1. Introduction / Structure

It took Switzerland four years to develop a NAP. The NAP is the first consolidated «strategy paper» that seeks to integrate all the previously adopted instruments and to view them in the context of the UN Guiding Principles on Business and Human Rights.⁹ The NAP follows the structure of the Guiding Principles and it conforms largely to the Guidance on National Action Plans on Business and Human rights (UNWG Guidance).¹⁰

3.2. Lack of a Baseline Assessment

A key element was omitted in the drafting process of the NAP. The Guidance on National Action Plans on Business and Human rights (UNWG Guidance) – the development of which was supported financially by Switzerland – provide for a «detailed baseline assessment», which Switzerland should have carried out as well.

The UN Working Group on Business and Human Rights (UNWG) recommends that – as a first step – states identify actual and potential adverse human rights risks (risk analysis) in relation to corporations domiciled in their country. Said mapping should be carried out in consultation with national and local NGOs. As a second step, current national laws and policies should be assessed (National Baseline Assessment, NBA) and gaps should be identified on the basis of a systematic analysis of previously identified risks (Gap Analysis).¹¹ For this purpose, the government is urged to identify laws, regulations and policies which relate to the state's obligations under Pillars I and III of the Guiding Principles. Moreover, states should identify gaps in the protection of human rights. The Danish Institute for Human Rights (DIHR) and the International Corporate Accountability Roundtable (ICAR) jointly devised a toolkit for the development of NAPs. It contains a detailed matrix to assist governments in developing «National Baseline Assessments» (NBA). The UNWG recommends the use of this matrix. Germany and Chile developed their NAPs using the tool and systematically identified gaps in their current legislation.

Switzerland decided to forego such a Baseline Assessment, the result of which is a NAP that essentially reviews government measures already in force.

The same procedure should be applied by corporations in relation to their responsibilities under Pillars I and III. It should cover questions around the extent to which corporations assume their Human Rights

⁹ The NAP is «the first strategy paper by the Federal Government which focuses specifically on Business and Human Rights». NAP, p.30

¹⁰ http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf

¹¹ The first step for an evidence-based prioritization is the identification of adverse corporate-related human rights impacts. This includes impacts occurring on the State's territory as well as abroad with the involvement of a company domiciled in the country. Moreover, it comprises impacts occurring at the time of assessment as well as potential future impacts. (...) In any case, relevant stakeholders should be invited to participate and provide input. For impacts occurring extraterritorially, this might mean engaging with local NHRIs or civil society organizations. The Government should make the results of the assessment publicly available. UNWG Guidance, p. 7

Due Diligence (HRDD) and whether they have introduced mechanisms, which allow for operational-level grievance mechanisms. Different stakeholders, including non-governmental organizations, should be invited to participate in the development of such an analysis. Lastly, the results of the analysis – including priorities and concrete measures stipulated in the NAP – should be put up for discussion amongst the different stakeholders, including NGOs.¹²

The Federal Council chose not to carry out a detailed gap analysis and instead reviewed existing instruments. This decision was made without informing stakeholders (business, trade unions, NGOs). In the first stages of the development of the NAP, a consultation process among NGOs and corporations was carried out. However, the government did not specify how inputs provided through the consultation process would be used and weighted. In response to a question by Parliamentarians in November 2013, the Federal Council confirmed¹³ its intentions to carry out an analysis of *potential gaps* and *necessary measures* in view of the development of a strategy containing concrete measures.¹⁴ As it shows, the Federal Council neither summarized what came out of internal as well as external consultations, nor did it carry out an analysis of the required measures.

Nevertheless, an external analysis and identification of potential gaps in the implementation of the Guiding Principles in Switzerland is planned for 2020, which is when the NAP should be updated and revised. It is uncertain which institution will be mandated to carry out such an analysis and on which criteria.

Conclusion: *It is regrettable and difficult to understand why no Baseline Assessment was carried out during the four years it took to develop the NAP.*¹⁵

3.3. Nothing new in terms of substance, particularly in relation to binding regulation

In terms of substance, the content of the NAP is disappointing. When analyzing the fifty «political instruments» in the NAP as a whole – which do seem impressive at first glance – one cannot help but notice that only 13 of them are actually new. The remaining instruments refer to activities, which Switzerland had already introduced. Seven out of the 13 new instruments were already included in the *Federal Council's Position Paper and Action Plan on Corporate Responsibility with respect to Human Rights and the Environment* dating from April 2015.¹⁶ The plan does not provide for (new) laws specifying the government's «expectations» towards corporations. In fact, the Federal Council refuses to introduce binding measures, which is stated in the very first paragraph: «The NAP doesn't stipulate any new, legally binding measures».

Against this backdrop, it is worth mentioning that the UN Committee on the Rights of the Child in its observations dating from 4 February, 2015, expressed its concern over the lack of a «regulatory framework which explicitly lays down the obligations of companies acting under the State party's jurisdiction or control to respect the rights of the child in operations carried out outside of the State party's territory». The Committee urged Switzerland to introduce corresponding legislation.¹⁷

¹² For this purpose, the toolkit developed by ICAR and the Danish Human Rights Institute could have also served as a reference. <http://icar.ngo/analysis/napsreport/>

¹³ The letter was co-signed by the following members of Parliament: von Graffenried, Haller, Moser, Ingold, Sommaruga, Seydoux, Comte

¹⁴ 17.03.2014 / Report Swisspeace: «the majority of the interviewees from all stakeholder groups regret the absence of an independent and systematic review and analysis of existing gaps.»

¹⁵ The version of the NAP that was put forward for consultation contained the following sentence: « Nevertheless and contrary to the recommendations by the UNWG, it was decided to renounce an analysis of existing gaps for the time being». That sentence was omitted from the version adopted by the Federal Council on 9 December 2016.

¹⁶ <http://www.news.admin.ch/NSBSubscriber/message/attachments/38880.pdf>

¹⁷ The UN Committee on the Rights of the Child « is concerned that the State party (Switzerland) solely relies on voluntary self-regulation and does not provide a regulatory framework which explicitly lays down the obligations of companies acting under the State party's jurisdiction or control to respect the rights of the child in operations carried out outside of the State party's territory. (...) the Committee recommends that the State party: Establish a clear regulatory framework for the industries operating in the State party, including through expediting the adoption of the Ruggie Strategy for Switzerland, to ensure that their activities do

The six measures that are genuinely new are limited to promotional measures around corporate social responsibility. In this context, the Federal Council foresees «promoting good practices» by introducing an award called «*Swiss Business and Human Rights Champion*». Its aim is to reward «corporations with exemplary contributions in the area of Business and Human Rights». ¹⁸

A campaign launched in 2012 which aims at raising awareness about sexual exploitation of children and minors by tourists is mentioned as one of the measures even though the Federal Government has cut financial support starting 2017. ¹⁹

Other new measures include strengthening existing activities of the Federal Department of Foreign Affairs by raising awareness amongst and providing support to corporations with extra-territorial operations²⁰, as well as through awareness and internal training programs within the Federal Administration. ²¹

Conclusion: The NAP contains only a limited number of new measures. Their scope is restricted and they are non-binding.

3.4. Switzerland's «smart mix»: Is it really smart?

The NAP's conceptual basis is the «smart mix» through which Switzerland seeks to assume its obligations in relation to the protection of human rights: «The Federal Government [aims at] assuming its duty to protect through a smart mix of non-binding and – if necessary – additional legal provisions as well as national and international measures».

The Federal Council recognizes «the state duty to protect human rights in relation to corporations domiciled and/or operating in Switzerland as outlined in the UN Guiding Principles». However, the Federal Council insists on reducing the administrative burden of corporations to a minimum, making reference to the constitutional principles of proportionality and economic freedom.

The Federal Council's understanding of the «smart mix» leads it to conclude that there is no need for binding legislative measures. However, the effectiveness of the various measures is not discussed and no reason is given for the Federal Council's decision to discard legislative measures.

Only a survey by sectors would have provided a serious analysis of the corporate human rights risks as stipulated in the Baseline Assessment (see above). Without such an analysis, it is difficult to estimate to what extent the voluntary measures touted by the Federal Council will be effective in terms of advancing corporate responsibility to respect human rights.

The fact that seven measures put forward in the NAP already figure in the 2015 Federal Government's CSR Strategy, which by the way is regarded as «complementary and equivalent» to the NAP, reinforces the impression of vagueness when it comes to the Federal Council's expectations towards corporations.

Conclusion:

Switzerland's application of the «smart mix» is extremely conservative. The added value of the NAP as an instrument towards the implementation of the UN Guiding Principles at a national level is thus very restricted..

not negatively affect human rights or endanger environmental, labor and other standards, especially those relating to children's rights, and ensure its effective implementation »

¹⁸ Pi9.

¹⁹ Pi14.

²⁰ Pi23: «The Federal Government will increasingly include diplomatic missions in its efforts to raise awareness and provide support regarding corporate respect for human rights. This includes, amongst others, training and sensitization of diplomatic staff, an improved exchange of best practices amongst diplomatic missions as well as with relevant agencies of the Federal Government, and active communication on activities of the diplomatic missions.»

²¹ Pi31: «The Federal Government offers a block course on Business and Human Rights for employees of the Federal Administration in the context of their annual human rights training course, as well as for aspiring diplomats in the context of their human rights training.»

3.5. NAP: a continuous process, insufficiently monitored and updated

We welcome the fact that the Federal Council sees «the implementation of the UN Guiding Principles as a continuous process which needs to be adapted according to ever-changing challenges and which contributes significantly to averting potentially conflicting goals between Switzerland's human rights policies and its foreign economic policies». However, the mechanisms thought to follow up on and update the NAP are insufficient and should be amended and/or specified.

In practice, «the Federal Department of Foreign Affairs as well as the Federal Department of Economic Affairs, Education and Research are urged to publish a joint report on the progress made by the end of the legislature». Said report shall be commented on by a «supporting group» comprised of two members from the following stakeholder groups: business (multinational corporations and SME), civil society (Academia and NGOs), as well as the administration (Federal Department of Foreign Affairs and Federal Department of Economic Affairs, Education and Research). The report is to be published at the end of each legislature. A previous version of the NAP stipulated annual progress reports. Business associations suggested two-yearly reports. The four year period until the revision of the NAP – which will happen for the first time in 2020 – is far too lengthy. To keep up with swift international developments, in particular in the areas of transparency, mandatory human rights due diligence and access to remedy, a review should take place every two years. Moreover, a four-year period makes it impossible for Parliament and the public to monitor progress.

Moreover, the fifty measures in the NAP are not accompanied by any criteria specifying how those measures will be implemented and evaluated. There are no clear expectations in the NAP with regards to concrete steps towards improving Switzerland's human rights record. Finally, neither does the NAP contain a roadmap nor a timeline regarding the implementation of the measures.

Conclusion:

A four-yearly review of the NAP is insufficient. A report on progress and implementation should be made available to Parliament and the public on a yearly basis. A detailed roadmap with indicators to measure progress is imperative.

3.6. Remediation: The road is long

In the NAP, the Federal Council aims at identifying the means by which improved access to justice can be achieved for victims of human rights abuses to file complaints and seek redress.²²

In the third part, which deals with Pillar III (Access to Remedy), the Federal Council recognizes its responsibility for ensuring access to remedy in Switzerland to victims of human rights abuses. This applies to cases in which corporations domiciled in Switzerland are complicit in human rights abuses abroad and in which victims have neither meaningful access to justice nor a prospect for remediation in their countries. For such cases, the Federal Council «considers judicial as well as extra-judicial mechanisms in the spirit of the *smart mix*».²³ No further explication is given. The Federal Council refers to the Council of States' Foreign Policy Committee's postulate 14.3663 «Access to Remediation» dating from August 2014 which demanded a report analyzing judicial and extra-judicial measures by other states on how victims of human rights abuses can obtain redress in the country where the responsible company is domiciled. The Swiss Centre for Expertise in Human Rights (SCHR) and the Swiss Institute of Comparative Law are currently working together on said study which is supposed to be finalized «by the end of 2016».

²² NAP, Introduction, p.4

²³ NAP, Guiding Principle 25, p.3

We regret that the results of that study are not included in the NAP, contrary to the Federal Council's previous announcements.²⁴ It will be imperative to scrutinize «the implementation of possible measures in Switzerland» - which the Federal Council has promised to consider – in view of the review of the NAP in 2019.

The concrete implementation of the *Recommendation of the Committee of Ministers* [of the Council of Europe] *to member States on human rights and business* dating from 2 March 2016 and in particular chapter IV «Access to remedy», is not addressed in the NAP. The recommendations by the Council of Europe cover measures primarily targeted at securing easier access to remediation for victims. To achieve this goal, the Council of Europe recommends governments should introduce civil liability of corporations in cases in which they are responsible for human rights abuses. In the NAP, the Federal Council states it does fulfill «one of the key elements of the recommendations of the Council of Europe on Business and Human Rights» and that «Switzerland will in deed implement the recommendations by the Council of Europe through the NAP».²⁵ The Federal Council seems to presume that all the recommendations by the Council of Europe are implemented through the adoption of a NAP – without specifying which measures will be taken.

Conclusion:

In relation to access to justice for victims of human rights abuses, the NAP offers no improvement. In addition, the implementation of the recommendations of the Committee of Ministers of the Council of Europe on human rights and business remain uncertain.

4. Comments on specific topics

4.1. Human Rights Due Diligence

Pi1 Human Rights Due Diligence

Human Rights Due Diligence is the core element of the UN Guiding Principles' second pillar. Switzerland's current National Action Plan on Business and Human Rights (NAP) contains several, at times contradictory, references to human rights due diligence.

Even though in the NAP, the Federal Council considers human rights due diligence to be the core element for the implementation of the Corporate Responsibility to Respect²⁶, the Federal Council's expectations towards corporations lack in clarity. The Federal Council states that corporations *can* follow the UNGPs' second pillar as well as the OECD Guidelines for multinational enterprises and goes on to present human rights due diligence as one of the possible instruments, along with «policy commitment», «remediation» and «consultation with stakeholders». This contradicts the spirit and purpose of the UNGPs for which policy commitment; human rights due diligence, consultation with stakeholders, impact assessment, reporting and remediation are cumulative and interdependent operative elements of the second pillar.²⁷

However, other references are also made. The Federal Council's expectations are most clearly expressed in footnotes 13 and 14: The UNGP's second pillar as well as chapter 4 of the OECD Guidelines for multinational enterprises are considered by the Federal Council to be «benchmarks for expectations towards corporations». They also refer to the explanations given in the UN's «Interpretive

²⁴ See response by the Federal Council dating from 15 June 2016 in response to the question by Rosemarie Quadranti (15.5314) dating from 10 June, 2016.

²⁵ NAP, Pi43, p. 36.

²⁶ NAP, p. 11.

²⁷ UNGP 16 – 24

Guide» which should be considered as well, for instance: «corporations domiciled in Switzerland should also ensure that human rights are equally respected by their subsidiaries».

The NAP further states that even though to date, Switzerland does not require a general, legally binding human rights due diligence for corporations, the Federal Council supports (Pi 1) and promotes (Par. 4.2.) voluntary human rights due diligence.

Italy just announced in its NAP that it would consider a legislative reform on human rights due diligence.²⁸ Germany plans to evaluate the implementation of human rights due diligence in German corporations on a regular basis starting 2018. The Federal Government announced that unless more than 50% of large corporations will have implemented robust human rights due diligence mechanisms until 2020, it will consider further measures including legally binding regulation.²⁹

The Federal Council's position clashes with the current international developments regarding binding human rights due diligence³⁰ as well as civil society's growing interest³¹. Legally requiring Swiss corporations to carry out human rights due diligence would not only clarify expectations, it would also allow for international standards to be applied.

4.2. Human Rights Due Diligence for state-controlled business enterprises

Pi17 Human Rights Due Diligence by state-owned and state-controlled business enterprises

The question of the implementation of the UNGP becomes even more pressing for state-owned or state-controlled business enterprises. Such businesses enjoy both the credibility and reputation of the State and may be subject to funding by tax money. This type of status requires high performance on governance, sustainability, and respect for human rights. The special responsibility of state-controlled businesses is repeatedly emphasized throughout the UNGPs (GP4). It also applies to situations in which services under the responsibility of the government such as health care, education, or defense, are outsourced or privatized (GP5).

The UN Working Group emphasizes the importance of this section in its recommendations towards governments. The Working Group recommends that governments ensure state-controlled businesses carry out effective human rights due diligence. It also recommends the introduction of strict reporting and controlling mechanisms in order to guarantee that state-controlled businesses respect human rights. The Working Group emphasizes the need to ensure sufficient resources for supervising state-controlled businesses. In Switzerland, the business-state nexus is regulated in the report on Corporate Governance, which was adopted in September 2006.

In the NAP, the Federal Council observes that said report does not contain one single criterion regarding Business and Human Rights. However, no conclusions are drawn from this observation. The Federal Council does not foresee adding a provision to the report that would require corporations to carry out human rights due diligence. Neither does the Federal Council plan on introducing mandatory human rights due diligence in the strategic goals for state-controlled businesses which are revised every four years. This represents a missed opportunity. While other countries such as Sweden or Finland have introduced measures that go in that direction, Switzerland has resorted to vague, ineffective messages. This is all the more disappointing given that a previous version of the NAP dating from June 2016 did include mandatory human rights due diligence for state-controlled businesses.

²⁸ «Planned measures: Conduct a comprehensive review of the existing commercial and civil law to assess and evaluate legislative reform introducing provisions such as the 'duty of care' or due diligence for companies;», [NAP Italy](#), p. 17.

²⁹ [NAP Germany](#), p. 12 and 40.

³⁰ See chapter 1.3.

³¹ The core element of the Responsible Business Initiative is a binding due diligence with regards to human rights and the environment, see chapter 2.2.

4.3. Policy Coherence

Pi28 Coherence in policy, strategy and action plans

In the National Action Plan, the common understanding of the term «coherence» suggests that it doesn't refer to coherence in terms of content, but rather to the formal coherence of different strategic papers. This means that political negotiations are neither being sought nor initiated. The question regarding conflicts of interest between achieving economic development on the one hand and human rights policies on the other hand is not tackled in the report. The NAP doesn't specify the process for resolving tensions or contradictory strategies between different departments or within a department.

It remains unclear how the Federal Council intends to ensure coherence in terms of human rights obligations. There is a need for 1) an office in the Federal Administration to identify conflicts of interest and lead on structuring the political discussion aimed at finding coherent solutions for such conflicts; 2) a human rights strategy of the Federal Council (as opposed to a human rights strategy by the Federal Department of Foreign Affairs); and 3) a clearly defined process of participation for non-governmental organizations on the issue of coherence.

Pi29 Review of laws regarding their conformity with the UN Guiding Principles

Conformity of laws with the UNGPs is interpreted to mean that national law should enable respect for human rights rather than hindering it. This is a heavily diluted interpretation of Guiding Principle 8 which urges all state-based actors and institutions to observe the state's human rights obligations.

While the previous version of the NAP dating from June 2016 stipulated that the Federal Government would mandate the Swiss Centre of Expertise in Human Rights (SCHR) to assess all new or pending laws, the current version is weaker as it has replaced the verb «would» by «can». It remains completely uncertain when and on the basis of which criteria the Federal Council will mandate such an assessment. Thereby, the Federal Council also falls behind the recommendations of the UN Working Group which recommends: «Tasking an independent institution, such as the NHRI, to assess new laws for their effect on business and human rights issues and define formal processes through which such concerns can be raised».³²

Pi32 National Human Rights Institution

The risk remains that a legislative proposal concerning the National Human Rights Institution (NHRI) will be put forward which will not ensure sufficient independence of the future NHRI. Should this happen, the Paris Principles will not be fulfilled and Switzerland will still not have an internationally recognized NHRI with A status. The NAP makes no mention of such potential consequences. As the UNGPs grant a critical role to the NHRI in their implementation, the NAP should insist on a NHRI in conformity with the Paris Principles.

4.4. Coherence in economic agreements

Pi33 Coherence between free trade agreements and protection of human rights

Guiding Principle 9 states that «states should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts».³³

The Federal Council points out that in free trade agreements, Switzerland advocates for the introduction of coherence provisions on human rights, labor rights, and environmental standards. In practice, in free trade agreements, such provisions usually appear in the preambles as well as in the chapter on

³² «Guidance on National Action Plan on Business and Human Rights», p.22

³³ UNGP 9

sustainability. As opposed to economic provisions in the agreements, those parts don't fall under the sanctions mechanisms.

Moreover, the UN Covenants I and II as well as the eight ILO Core Conventions – i.e. the relevant instruments when it comes to human rights – are often only mentioned in parts. In the free trade agreement with China, the Universal Declaration of Human Rights isn't mentioned at all. The provisions cited are thus non-binding and insufficient. Also, the provision which foresees that «agreements may not adversely affect or question existing obligations under international as well as human rights law», is worthless in practice as this will not be reviewed in any way. In order to effectively review such a provision, Human Rights Impact Assessments would have to be carried out before entering into free trade agreements. In the context of the Universal Period Review, the CESCR (Committee on Economic, Social and Cultural Rights) urged Switzerland in 2010 to carry out such impact assessments.

4.5. Commodities: Financial transparency, gold and other conflict minerals

The commodities sector is of special importance in the political debate in Switzerland. Switzerland is the most important marketplace for commodities globally and also the leading location of gold refineries.

Pi15 Disclosure requirements for payments to governments

In 2013, the Federal Council analyzed the risks linked to the commodities sector in a baseline report. However, the only new and binding measure that was announced was a law on disclosure requirements for payments to governments in order to tackle the misappropriation of commodity revenues in resource-rich countries. The availability of state revenues greatly influences the capacities of such countries when it comes to protecting human rights. In the EU and the US, such laws on transparency of payments from commodity extraction have already come into force and also apply to larger Swiss corporations that are either listed on the stock exchange or registered. The existing gap regarding transparency relates to commodity trading. Even though a report by the Federal Council dating from 2014 stated that «as the leading marketplace for commodities worldwide, Switzerland has a particular responsibility when it comes to supporting international efforts towards increased transparency», the Federal Council – to our surprise – in its message on the revision of company law dating from November 2016, decided to completely omit commodity *trading*. The measure mentioned in the NAP was thus undermined and deprived of its substance³⁴.

Gold and other minerals from high-risk areas (Pi 16, Pi 22, Pi 25)

The NAP makes reference to the Federal Council's pending report on human rights risks in the gold sector. It also mentions the *Better Gold Initiative*, under which one ton of gold from certified mines has supposedly been imported into Switzerland since 2013. However, this doesn't essentially reduce the need for action, as is demonstrated by the fact that in 2013 alone, Switzerland imported 3,080 tons of raw gold. There is a need for broader measures. Until this day, Switzerland hasn't taken any steps towards ensuring the implementation of the thematic OECD Guidance³⁵ that it developed. Moreover, the NAP speaks only of «considering» legal measures. The US, on the other hand, introduced mandatory human rights due diligence in 2010 and the EU finalized a regulation that will be adopted in early 2017. In both cases, there is an explicit reference to the OECD Guidance which means that in this case, «soft law» has become binding at a national level. An OECD evaluation noted that: «Regulatory measures have had the largest impact (...) well designed regulatory approaches have provided the strongest impetus for business to change»³⁶.

Clearly, the policy chosen by the Federal Council is not built on proactive or appropriate approaches, but rather on a 'wait and see' tactic and a delayed 'copy-paste' mode. This even holds true in exemplary

³⁴ See [Press release by Swissaid/ Public Eye](#), 23.11.16

³⁵ <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>

³⁶ OECD 28.04.16, [Report of the Implementation of the Responsible Supply Chain of Minerals Guidance](#)

cases in which a) Switzerland is a global leader in high-risk sectors, and b) where a gap in regulation currently exists or is foreseeable in the near future.

5. Conclusion

Five and half years after the adoption of the UN Guiding Principles and four years after the adoption of postulate 12.3503 «A Ruggie Strategy for Switzerland», the Federal Council adopted the National Action Plan for Switzerland. While the publication of the NAP represents an important milestone and sets Switzerland among the first countries to endow themselves with such a strategy, its content falls short of expectations. Instead of offering insights on possible and innovative ways to implement the UNGPs, the NAP simply reviews current regulations and policies. This contrasts with the most recent NAPs from other countries, such as Italy, the US and Germany, which went one step further by integrating a comprehensive Baseline Assessment and/or examining the possibility of introducing legally binding measures. Given the high density of transnationally operating corporations domiciled on Swiss territory, the NAP would have been the perfect opportunity for Switzerland to honor its responsibility and show its commitment in the field of business and human rights. The current approach, based exclusively on voluntary measures, does not equip Switzerland with the sufficient tools to safeguard its international reputation.

Out of 50 measures presented in the NAP, only six are genuinely new and are circumscribed to promotional activities and the improvement of existing instruments carried out by the Federal Department of Foreign Affairs. While the Federal Council emphasizes its willingness to communicate more clearly on its expectations towards Swiss corporations, the NAP does not explicitly formulate what those expectations entail. The Federal Council's understanding of the «smart mix» leaves out binding measures even for high-risk sectors such as conflict minerals. No mandatory human rights due diligence is envisioned for state-controlled businesses despite the State's increased responsibility for the activities of such companies. This conservative stance ignores the current international trend towards mandatory human rights due diligence. Moreover, the neat overview offered by the NAP's analysis of remediation measures does not point to political action. Whether the much-awaited report on remediation in response to postulate 14.3663 will yield any new insights or not is still unknown.

Whereas the structure of the NAP carefully follows the Guidance of the UN Working Group, the process and monitoring for developing the NAP does not enjoy the same degree of adherence. In addition to the fact that no systematic gap analysis was carried out, the anticipated implementation process is insufficient given the omission of indicators and deadlines for each measure as well as the lengthy review process.

The Swiss Coalition for Corporate Justice remains hopeful that the NAP's shortcomings with regards to the development process as well as in terms of substance will be corrected during its revision. The coalition reaffirms its continued willingness to engage in the process.

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