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**BUSINESS AND
HUMAN RIGHTS**
UN GUIDING PRINCIPLES

WORKING PAPERS

Strengthening State Accountability on Business and Human Rights at International Level

JOHN E. GROVA*
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*John was an Associate Researcher at the Geneva Academy (2020-21) and served as advisor to the UN Forum on Business and Human Rights since its inception in 2012 and to UN Working Group on Business and Human Rights, including its project on the next decade of the UN Guiding Principles on Business and Human Rights (UNGPs 10+).

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TABLE OF CONTENTS

| | |
|--|----|
| 1. Introduction..... | 2 |
| 2. National action plans as tools for State accountability? | 4 |
| A. National level developments | 4 |
| B. International level peer reviews of NAP performance?..... | 5 |
| 3. The role of UN human rights mechanisms in driving State accountability..... | 7 |
| A. UN Working Group on Business and Human Rights | 7 |
| B. Annual UN Forum on Business and Human Rights..... | 8 |
| C. Special Procedures communications | 9 |
| D. Treaty bodies..... | 10 |
| E. UPR | 11 |
| 4. Lessons from peer review initiatives outside the UN human rights system | 12 |
| A. OECD system | 12 |
| B. Other peer review initiatives for States | 14 |
| 5. Conclusion | 15 |

ABSTRACT

This research brief examines existing mechanisms for holding States accountable for their performance in implementing the UN Guiding Principles on Business and Human Rights (UNGPs). It explores how national action plans on business and human rights can provide an entry point for accountability and the potential of State peer reviews as tools for not only learning but also greater accountability and drivers of better practice. The brief analyses efforts of the UN human rights system and beyond the UN, particularly at the OECD.¹

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1. INTRODUCTION

In 2021, the [United Nations Guiding Principles on Business and Human Rights](#) (UNGPs), the authoritative global framework for the respective duties and responsibilities of States and businesses in preventing and addressing adverse business-related human rights impacts, turned 10. Yet, even as first decade of implementation efforts saw significant progress especially as witnessed through policy level developments, coherent State and business action and systematic monitoring remain work in progress.

One aspect where room for improvement is noticeable is the evolvment of effective mechanisms at the international level to hold States accountable for how they are implementing the UNGPs. For the purpose of this paper, accountability is understood as a “soft” form of holding States to account through greater transparency on performance or non-performance against commitments and practical steps to implement the UNGPs (to implement the State duty to protect against business-related human rights abuse, to foster responsible business that respects human rights and ensure access to remedy for victims of business-related human rights abuse).

The need for progress along this dimension – as one lever among others to help drive faster and wider implementation by States – was highlighted in the [UNGPs 10+ Roadmap for the Next Decade of Business and Human Rights](#), developed by the [UN Working Group on Business and Human Rights](#): “*More systematic tracking of UNGPs implementation efforts by States, combined with greater use of peer review systems, will help support more effective implementation and accountability over the next decade. This is a key part of a more ambitious and coherent strategy for the way forward.*”

This Geneva Academy research brief, prepared in support of the UN Working Group’s efforts to promote action on the UNGPs 10+ Roadmap, outlines experiences relating to State accountability at national, regional and international levels and analyses gaps and

opportunities. It focuses particularly on peer review initiatives (though not exclusively), given their potential in supporting greater transparency and accountability and driving better practice over time. The brief’s main objective is to reinforce the UNGPs 10+ Roadmap recommendations of leveraging the potential of existing mechanisms, notably the Universal Periodic Review, and establishing a collaborative initiative to develop workable metrics and systematic data gathering on State implementation, in turn contributing to strengthened international level accountability for State performance on the UNGPs.

UNGPs 10+ ROADMAP DIAGNOSIS AND RECOMMENDATIONS



STOCKTAKING FINDINGS:

- Whereas initiatives for assessing businesses’ human rights due diligence and management of human rights risk exist and are being developed further, efforts to develop systematic tracking of implementation by States have been less explored.
- Existing platforms such as the Universal Periodic Review (UPR) and the annual UN Forum on Business and Human Rights have not been used enough to support systematic sharing of lessons learned and track progress, and regional peer learning initiatives beyond pilot stage do not yet exist.
- For the next decade, State implementation and accountability need to be supported by integration of UNGPs implementation review in existing mechanisms as well as new efforts around peer learning, collection of good practices and systematic monitoring of State implementation.

OUTCOMES NEEDED FOR THE NEXT DECADE:

- Peer learning and review platforms for States on UNGPs implementation exist for all regions.
- The UPR systematically reviews State performance in implementing the UNGPs.
- Metrics for systematically tracking and assessing effective UNGPs implementation by States have been developed by the UN.

ILLUSTRATIVE ACTIONS FOR SUPPORTING PROGRESS TOWARD THIS GOAL STATES SHOULD:

- Support efforts to develop streamlined peer learning and review mechanisms and actively participate in such efforts to share lessons learned on existing legal and policy measures (for example national action plans on business and human rights), through regional and global platforms.
- Engage in regular review of national action plans at national level with other stakeholders, including national human rights institutions, academia, business organizations, unions, civil society and representatives of affected communities.

REGIONAL ORGANIZATIONS SHOULD:

- Support development of peer learning and review platforms for sharing lessons learned on State implementation, in collaboration with the UN within the context of existing or new UN regional forums on business and human rights.

NATIONAL HUMAN RIGHTS INSTITUTIONS SHOULD:

- Track State implementation of the UNGPs and support national level review processes.
- Engage in regional and international dialogue to support peer learning initiatives and improve tracking of State implementation, through regional and global networks for national human rights institutions.

Business organizations, unions, civil society organizations and other relevant stakeholders such as indigenous peoples' networks, should call on States, regional organizations and the UN to develop systematic gathering of data, lessons learned and platforms for peer learning and review – and engage constructively in such processes to drive wider and deeper UNGPs implementation.

Civil society organizations, trade unions and organizations working with human rights defenders and affected stakeholders should evaluate State implementation of the UNGPs.

UN ENTITIES WORKING TO PROMOTE THE UNGPS SHOULD:

- Explore ways to systematically use the UPR and other regular review mechanisms, as well as the UN Forum on Business and Human Rights as an opportunity to review UNGPs implementation by States and other actors.
- Regularly assess State implementation of recommendations from the Working Group and OHCHR and highlight examples of good practice.
- Engage in collaboration with other international organizations and other relevant partners to develop methodologies to better measure the implementation of UNGPs by States and pursue new partnerships to elaborate core business and human rights indicators as a condition for systematic, consistent and comparable data generation at the national level.
- Engage in collaboration with other stakeholders to develop methodologies and build metrics for measuring effective UNGPs implementation by States, including focus areas such as national action plans, human rights due diligence legislation, and the State-business nexus (State as an economic actor), with the objective of developing a database or monitoring platform that tracks State action.
- Track UNGPs integration by the UN system.

⇒ <https://www.ohchr.org/ungps10plusroadmap>

2. NATIONAL ACTION PLANS AS TOOLS FOR STATE ACCOUNTABILITY?

The development of national action plans (NAPs) on business and human rights has been highlighted as one of the most visible signs of efforts by States to operationalise the UNGPs and as potentially useful tools for driving more effective implementation, stakeholder engagement and accountability. The UN Human Rights Council has noted in resolutions (most recently in resolution 44/15²) the “role that national action plans and other such frameworks on business and human rights can play as tools for promoting the comprehensive, coherent and effective implementation of the Guiding Principles on Business and Human Rights” and encouraged “all States to enhance efforts to implement the Guiding Principles on Business and Human Rights, including through appropriate policy frameworks, regulations and the development of national action plans on business and human rights”.

A. NATIONAL LEVEL DEVELOPMENTS

As of late 2021, 27 countries had such plans, two with chapters on business and human rights within their wider human rights strategy, and 16

were in the process of developing dedicated plans.³

The UN Working Group tracks information about State NAPs that have been published or are in progress.⁴ A more comprehensive online resource tracking such developments with a database on thematic issues covered in existing NAPs is provided by the Danish Institute for Human Rights at globalnaps.org.⁵

To date the Working Group has not assessed the quality of individual NAPs, but has more generally noted that “the relative lack of quality in the content of many national action plans and in several processes highlights the shortcomings of these initiatives if they are not backed by concrete State action and inclusive stakeholder engagement, even if some of the latest national action plans show clear signs of improvement.”⁶ Assessments have been undertaken in particular by the Danish Institute and by civil society organizations.⁷

As noted by the UN Working Group’s stocktaking on the first decade of the UNGPs, where NAP development was accompanied by national baseline assessments, they have “provided previously non-existent benchmarks upon which State implementation of the Guiding Principles can be assessed.”⁸ However, in practice accountability has proven more elusive as highlighted in academic research.⁹ A recent study by the Danish Institute examines this issue further by analysing eight NAPs and identifies seven currently existing “accountability mechanisms” in these NAPs:

² <https://undocs.org/A/HRC/RES/44/15>

³ <https://globalnaps.org/>

⁴ <https://www.ohchr.org/EN/Issues/Business/Pages/national-actionplans.aspx>

⁵ <https://globalnaps.org/>

⁶ <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf>, p. 11.

⁷ <https://globalnaps.org/resources/>. For civil society assessments, see also e.g. https://media.business-humanrights.org/media/documents/files/Action_Platform_Final.pdf; <https://icar.ngo/assessments-of-existing-national-action-plans-naps-on-business-and-human-rights-august-2017/>.

⁸ <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf>, p. 11.

⁹ E.g. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/51687C20A72589C0D9A34B13F1790C15/S2057019815000140a.pdf/national_action_plans_current_status_and_future_prospects_for_a_new_business_and_human_rights_governance_tool.pdf; <https://globalnaps.org/wp-content/uploads/2020/07/scho%CC%88nsteiner-pan-empresas-y-derechos-humanos-chile-borrdor-2019.pdf>; <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/national-action-plans-on-business-and-human-rights-progress-or-mirage/4EC3C14499353D1CEE3E5A96458F6363/share/1782c9def801d1ac2c75f56faf3fb12cc5b340c5>.

1. SMART (specific, measurable, achievable, realistic and time-bound) actions and indicators;
2. A body responsible for implementation;
3. A body responsible for oversight;
4. Stakeholder participation in monitoring, follow-up and review mechanisms;
5. State reporting;
6. Commitment to a mid-term review and to an update at the end of the life-cycle;
7. Embedding progress on business and human rights beyond changes of government.

While there are some promising experiences in these NAP efforts, there are also considerable challenges in terms of achieving meaningful State action and accountability, and the study notes that “[F]urther research would be necessary to assess the efficacy of such mechanisms.”¹⁰

B. INTERNATIONAL LEVEL PEER REVIEWS OF NAP PERFORMANCE?

Proposals have been made to institutionalise NAPs peer reviews. A side session at the 2019 UN Forum on Business and Human Rights, organised by the Danish Institute, noted: “An institutionalised review of NAPs could be instrumental in advancing the quality of NAPs measured against criteria set forth by existing guidance on NAPs and increase their efficiency in addressing business-related human rights

issues. Peer review systems have been developed in various policy areas to assess practices and improve policy making.”¹¹

The promise of peer reviews has been recognized by States in the EU context. Notably, the Council of the Presidency of the EU has called for creation of a peer review mechanism (Netherlands 2016, Belgium 2017, Finland 2019). An action point in the outcome paper of the business and human rights conference organized by Finland’s Presidency of the Council of the European Union stated that:

“Member States and Commission/EEAS could consider piloting a system of peer reviews for assessing the effectiveness of implementation of Member States’ National Action Plans (NAPs) on the UNGPs. As about half of the EU Member States have published their NAPs, this process would also support the elaboration of NAPs by the Member States that have not yet done so. An EU peer review process could also support conducting a more rigorous review of NAPs at the UN level. In addition, the Plan could also include support to the development of NAPs on the UNGPs in third countries, including support for the evaluation of their effectiveness and sharing of the lessons learned.”¹²

Under the Presidency of the Netherlands in 2016, a peer review meeting was convened for EU Member States to assess progress. Similar peer review meetings were hosted by Belgium in 2017 and by Belgium and Finland in 2019.¹³

The proposal also has backing from individual States. For example, the Italian NAP declares that Italy will “[e]ngage with other States for the establishment of a mechanism of peer review for the existing National Action Plans on Business and Human Rights (in line with EU Council resolution encouraging peer learning on BHR).”¹⁴

¹⁰ <https://globalnaps.org/wp-content/uploads/2021/11/DIHR-accountability-in-the-implementation-of-business-and-human-rights-national-action-plans-november-2021.pdf>

¹¹ <https://2019unforumbhr.sched.com/event/U9Gk/claiming-accountability-through-peer-review-of-national-action-plans-a-simulation>.

¹² https://eu2019.fi/documents/11707387/12748683/BHR_konferenssi_Perspectives_Paper.pdf/e683f507-5bff-f09d-127b-f5ece1ea62b1/BHR_konferenssi_Perspectives_Paper.pdf.

¹³ https://globalnaps.org/wp-content/uploads/2019/12/peer-review_naps_four-pager.pdf

¹⁴ https://globalnaps.org/wp-content/uploads/2017/11/italy_revised-nap_2016-2021.pdf.

In addition to EU context developments, the Council of Europe is currently undertaking a review of Member States' implementation of the UNGPs in follow-up to 2016 Recommendation of the Committee of Ministers.¹⁵ The recommendation includes a call on Member States to: "With the participation of all stakeholders, member States should continuously monitor the implementation of their National Action Plans and, periodically evaluate and update them. Bearing in mind that a suitable model may vary from State to State, member States should share their best practices concerning the development and review of National Action Plans with each other, with third countries and relevant stakeholders."

However, beyond the European context where a critical mass of governments with NAPs already exists, the prospects for institutionalising State peer reviews seems more distant, as most States do not even have a NAP and awareness on the UNGPs among government actors remains low – gaps that need to be addressed through scaled-up technical support and cooperation. Positive developments of peer learning efforts exist in some other regions, though.

In Latin America, the Organisation of American States has recommended States to develop NAPs,¹⁶ but progress in terms of NAPs being developed has remained slow. Yet, through the "Responsible Business Conduct in Latin America and the Caribbean" (RBCLAC) project, implemented by the Office of the High Commissioner for Human Rights (OHCHR) – in collaboration with the Working Group – together with the International Labour Organization (ILO) and the Organisation for

Economic Co-operation and Development (OECD),¹⁷ a NAP peer learning initiative has been established: the Intergovernmental Community of Practice on Business and Human Rights.¹⁸ Peer learning and multi-stakeholder dialogue have regularly been facilitated through regional forums on business and human rights,¹⁹ initially established by the Working Group, and currently organised under RBCLAC auspices. Peer learning on NAPs has also emerged in parts of Asia, supported by UNDP's B+HR programme.²⁰ This programme has supported both formal peer and multi-stakeholder exchange through regional forums and other events as well as technical level government-to-government peer exchanges. Early mover lessons (Thailand, with its "journey" documented in a video production²¹) have reportedly been a positive factor in the processes in other countries in the region to develop NAPs.

Even if such peer learning initiatives are strengthened further and more States develop NAPs, hurdles of political will to engage in peer reviews, supported by multi-stakeholder engagement, as means to improve practices and accountability, would first need to be overcome. Even in Europe, where political commitments have been made, it remains to be seen whether systematic institutionalised NAP peer review processes will eventually materialise.

A parallel avenue through evaluations carried out by national human rights institutions (NHRIs) could potentially be realised faster. The Global Alliance of National Human Rights Institutions (GANHRI) and regional networks could play a leadership role in reviewing State practice, in collaboration with civil society organizations and the UN, within existing

¹⁵ <https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>.

¹⁶ Organization of American States, Resolution Promotion and Protection of Human Rights, OAS AG/RES. 2887 (June 14, 2016) (XLVI-O/16)

¹⁷ <https://www.ohchr.org/EN/Issues/Business/Pages/JointProjectResponsibleBusinessConduct.aspx>.

¹⁸ <https://empresasyderechoshumanos.org/pan-edh/>

¹⁹ <https://www.ohchr.org/EN/Issues/Business/Pages/AboutRegionalForumsBHR.aspx>.

²⁰ <https://bizhumanrights.asia-pacific.undp.org/content/bizhumanrights/en/home.html>. See also: https://www.ohchr.org/Documents/Issues/Business/UNGP_sBHRnext10/inputs/undp_input_nextdecade_final.pdf.

²¹ <https://bizhumanrights.asia-pacific.undp.org/content/bizhumanrights/en/home/news-centre/the-journey-of-thailand-s-nap--video.html>.

initiatives on business and human rights.²²

3. THE ROLE OF UN HUMAN RIGHTS MECHANISMS IN DRIVING STATE ACCOUNTABILITY

A. UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS

As set out in Human Rights Council resolution 17/4,²³ the Working Group has a mandate to disseminate and promote implementation of the UNGPs. The group is also mandated to exchange and promote good practices and lessons learned on the implementation, carry out country visits, and to assess and make recommendations on UNGPs implementation.

The most comprehensive evaluation of State UNGPs implementation – and potentially one of the most effective tools in the Working Group’s toolbox to promote State accountability – undertaken by the Working Group is its country visits. The Working Group is mandated to carry out two visits per year. To date it has visited the following countries (no visits in 2020 due to the Covid-19 pandemic):²⁴

- Italy, 27 September - 6 October 2021²⁵
- Georgia, 3-12 April 2019
- Honduras, 19-28 August 2019
- Thailand, 26 March - 4 April 2018
- Kenya, 2-11 July 2018

- Canada, 23 May - 1 June 2017
- Peru, 10 - 19 July 2017
- Republic of Korea, 23 May - 1 June 2016
- Mexico, 29 August - 7 September 2016
- Brazil, 7-16 December 2015
- Azerbaijan 18-27 August 2014
- United States of America, 22 April-1 May 2013
- Ghana, 8-17 July 2013
- Mongolia, 8-17 October 2012

The country visits provide a mechanism for civil society organizations and groups representing affected stakeholders, in particular, to provide input on the assessment of State performance. The observations and recommendations can also serve as a benchmark for civil society and others to continue to advocate for progress in State implementation after the visit. For example, in Brazil the NGO Conectas has tracked State follow-up on Working Group recommendations.²⁶ While this effort highlights the potential of country visits as a mechanism to hold States to account for UNGPs implementation efforts, the NGO assessment also painted a sobering picture of the impact three years after the visit : “the economic, political and social crisis experienced in Brazil throughout 2016 and 2017 deepened the instability and setbacks in the socioenvironmental field, placing the implementation of the Working Group recommendations even further from reality than at the time of their publication in 2016.”²⁷ Beyond the question of measuring impact, however, other challenges for this mechanism (not unique to the Working Group, but generally a challenge for UN human rights mechanisms)

²² See NHRI inputs to UNGPs 10+ at <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10-inputs.aspx>.

²³ 2011. Renewed in in 2014 (resolution 26/22), 2017 (resolution 35/7) and 2020 (resolution 44/15).

²⁴ Access to reports and related documents: <https://www.ohchr.org/EN/Issues/Business/Pages/WGCountryVisits.aspx>

²⁵<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27607&LangID=E>

²⁶ <https://www.conectas.org/en/noticias/un-demands-brazil-protection-human-rights-business/>

²⁷ <https://www.conectas.org/en/noticias/un-demands-brazil-protection-human-rights-business/>

include the capacity to undertake more visits and to follow up on recommendations. To date there has not been systematic tracking of how visited States have followed up on Working Group recommendations.

As another means for State (and business) accountability, the Working Group engages in “Communications” as part of the UN Special Procedures mandates: letters sent to governments and others to seek information concerning allegations of human rights violations.²⁸ The Working Group has increasingly used this mechanism, typically in collaboration with other mandates (discussed further below).

B. ANNUAL UN FORUM ON BUSINESS AND HUMAN RIGHTS

The UN Human Rights Council established the [annual Forum on Business and Human Rights](#) in 2011 to serve as a global platform for stakeholders to “discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices.” It is guided and chaired by the Working Group, as per Human Rights Council resolutions 17/4 and 35/7, and organised by the Forum and Working Group Secretariat at OHCHR.

The Forum has provided a venue for multi-stakeholder dialogue, exchange of lessons learned among peers and across stakeholder groups, and increasingly a platform for States to announce commitments and developments to advance UNGPs implementation, notably NAPs processes.

Since the first Forum in 2012, one stated objective has been to shed light on efforts by Governments to implement the UNGPs. This

objective has explicitly been connected to the Human Rights Council’s resolution that welcomes the Working Group’s work “to collect and disseminate information on ongoing processes to develop national action plans and other relevant data on global progress in the implementation of the Guiding Principles” and the Council’s “invitation” to States and all relevant stakeholders to submit information to and engage with the Working Group on their national action plans and other relevant initiatives to implement the Guiding Principles (res. 35/7, para. 5). However, as noted by the Forum Secretariat in 2019, “such tracking to date has not been sufficiently systematic and comprehensive”.²⁹ In spite of calls on governments to submit information about implementation efforts, the response from States has been patchy.

Although the Human Rights Council’s resolution that renewed the Working Group and Forum mandates in 2020 “Encourages States and invites business enterprises to report on progress made, challenges, and lessons learned in the implementation of the Guiding Principles on Business and Human Rights during the annual Forum on Business and Human Rights, on a voluntary basis” (res. 44/15, para. 14) the impact in terms of submissions from States to the 2020 and 2021 Forums was limited, and the result for future events is likely to be the same unless followed up by a strong push on States to deliver. The addition of the wording “on a voluntary basis” on the insistence of some member States probably sums up the prospect of leveraging the annual Forum to institutionalise greater State accountability. Yet, in spite of reluctance by States to report on progress, the annual Forum has potential as a platform for more systematic stocktaking of State implementation through information provided by willing States (supported by the UN, where capacity gaps exist), civil society organizations, national human rights organizations and others to be compiled by the UN. However, this potential has not been realised to date, to a large extent due to capacity

²⁸<https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

²⁹<https://www.ohchr.org/EN/Issues/Business/Forum/Pages/SubmissionsImplementation2019.aspx>

and resource limitations. For the future, a regular report (annual or every two years) on the state of play of UNGPs implementation in connection with the Forum, could further strengthen the Forum's role as a platform for taking stock of trends and challenges.

C. SPECIAL PROCEDURES COMMUNICATIONS

Albeit “soft” (this complaints procedure “is not a quasi-judicial procedure” and does not “have power or authority to enforce their views or recommendations”), the UN human rights Special Procedures “communications” provide a unique mechanism for holding Governments and others, such as intergovernmental organisations, businesses, military or security companies, to account for alleged human rights violations. The procedure involves sending letters to implicated Governments and others, where the independent UN human rights experts report on allegations of human rights violations they have received, regarding:

- past human rights violations - which can be the object of a letter of allegation;
- on-going or potential human rights violation - which can be the object of an urgent appeal;
- concerns relating to bills, legislation, policies or practices that do not comply with international human rights law and standards.

The stated purpose of communications is for the Special Procedures to:

- draw the attention of Governments and

others on alleged human rights violations;

- ask that the violations are prevented, stopped, investigated, or that remedial action is taken;
- report to the Human Rights Council on communications sent and replies received, therefore raising public awareness on individual, and group cases as well as legislative and policies developments they have addressed in a given period.³⁰

A study carried out by the law firm DLA Piper in support of the UNGPs 10+ project analysed cases of business-related human rights allegations handled by the Working Group and other special procedures mandates (“communications”) over the last ten years (2011-2021).³¹ The review analysed 174 Communications to businesses and 338 to States.³² Overall, the mapping found a sharp rise in Communications involving business over the decade. This trend continued for 2020-21 after the research for the study was completed. The total figures for 2020 were the higher than the number analysed in the review (50 letters to businesses and 39 letters to governments) and figures for the first half of 2021 were higher than all previous years (190 letters to businesses and 45 letters to governments).

The mapping carried out for UNGPs 10+ noted that the use of the UNGPs in Communications was part of the overall trend since 2011, demonstrating “that the regime established by the UNGPs applies across companies of all sizes, all sectors, all business relationships, in all countries, for all human rights. The review found that the UNGPs are expressly referenced in the majority of responses by business enterprises (39 of 75) and States (124 of 213). (...). Out of the 213

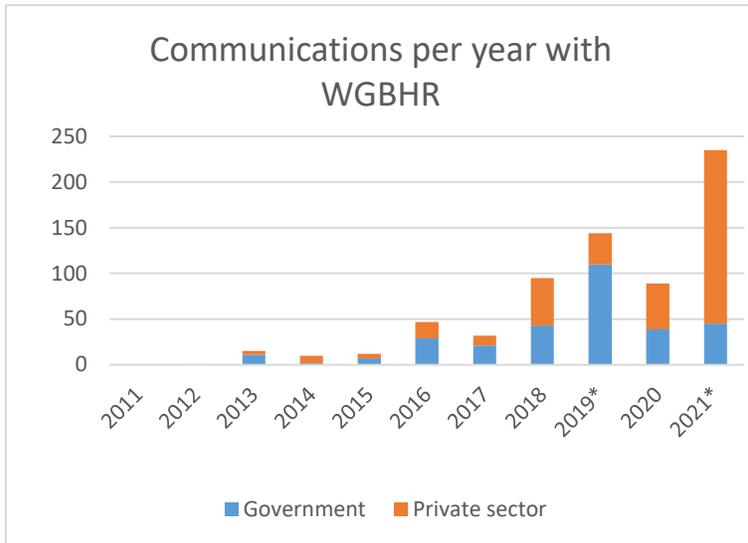
³⁰<https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

³¹https://www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/dla_piper.pdf

³² Based on data from the OHCHR SPB communications database available at

<https://spcommreports.ohchr.org/Tmsearch/TMDocuments>. The two different figures reflect the fact that in several cases letters are sent to both “home” States (where transnational corporations are domiciled) and “host” States (where the alleged abuse took place).

State responses 146 reference business and human rights legislation or policies; and 123 reference remediation or access to remedy.”



(table from the DLA Piper study for UNGPs 10+)

With regard to future work, the study suggests that in-depth studies “would be merited to complement tracking of trends, both to analyse the application of UNGPs concepts in detail, reviewing to what extent recommendations are actionable for States and business, and, crucially, to explore the situation concerning access to remedy for affected stakeholders.”

As the trend of growing attention by Special Procedures to business-related human rights concerns is expected to continue, there is also a continued need to ensure systematic application of the UNGPs across cases.

D. TREATY BODIES

To date, five of the ten UN human rights treaty bodies – the Committee on Economic, Social and Cultural Rights (CESCR), the

Committee on the Rights of the Child (CRC), the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on the Elimination of Racial Discrimination – have referenced the UNGPs in their concluding observations on various country reports, while only the CESCR and the CRC have made reference to the UNGPs in General Comments.³³ In particular CESCR General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities³⁴ applies the UNGPs, as it “seeks to clarify the duties of States parties to the International Covenant on Economic, Social and Cultural Rights in such situations, with a view to preventing and addressing the adverse impacts of business activities on human rights.” As regards State implementation, the General Comment notes that “[E]nsuring that business activities are pursued in line with the requirements of the Covenant requires an ongoing effort from States parties. To support this, the national action plans or strategies that States parties are expected to adopt to ensure full realization of the Covenant rights should specifically address the question of the role of business entities in the progressive realization of Covenant rights.”

Before the Covid-19 pandemic hit the activity of treaty bodies, the number of recommendations from CESCR explicitly relating to business and human rights saw a steady increase, up from 6 in 2013 to 28 in 2019,³⁵ typically including recommendations to States to strengthen protection against business-related human rights abuses through improving the regulatory framework and policy action through a national action plan on business and human rights.

Beyond CESCR and the CRC, which have

³³<https://www.debevoise.com/insights/publications/2021/07/un-guiding-principles>

³⁴https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en.

³⁵ <https://uhri.ohchr.org/en/search-human-rights-recommendations>.

increasingly held States to account for their performance in protecting against business-related human rights abuses, there is significant room for other treaty bodies to apply the UNGPs more systematically in addressing business-related human rights concerns.

Following on from Human Rights Council resolution 26/9, an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. While still ongoing, an eventual treaty would normally involve a follow-up mechanism for States Parties to report on progress. The latest draft treaty (3rd draft) proposes creation of an oversight committee to which States will be required to submit “reports on the measures they have taken to give effect to their undertakings under” the legally binding instrument, within one year after the entry into force for the State Party concerned, and with “supplementary reports every four years on any new measures taken and such other reports as the Committee may request.”³⁶

E. UPR

The perhaps most promising avenue for strengthening State accountability for UNGPs implementation performance at the international level is the Universal Periodic Review (UPR). This unique process involves a periodic review of the human rights records of all 193 UN Member States every four-and-a-half years. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries

and to overcome challenges to the enjoyment of human rights, and for sharing of human rights practices. Importantly, the mechanism is open for participation by civil society organizations and other stakeholders.³⁷

Also, the UPR has seen a steady growth in recommendations relating to business and human rights over the last decade, especially picking up speed in the second half of the decade (see the annex for a compilation of recommendations). Starting from 2016, the most frequent recommendation involves development of a national action plan on business and human rights (52 recommendations of a total of 315 recommendations relating to business and human rights in the period from 2011 to 2021).³⁸

In the first half of the decade, there appeared to be a disconnect between the UPR and the business and human rights movement: civil society organizations that typically engage in the UPR were less aware of the UNGPs or did not apply the UNGPs in their advocacy; business and human rights focused organizations were less aware of the UPR;³⁹ and States active on the UNGPs (e.g. through NAP processes) rarely made recommendations on business and human rights. As demonstrated by the figures, the connection has been strengthened in more recent years. There is also documentation of positive impact of the mechanism, where UPR engagement played a role in the development of NAP processes in for example Kenya and Thailand.

Yet, there is scope for realising the leverage of the UPR to a bigger extent if used more systematically. This would appear to be a low-hanging fruit in comparison to most other proposals but would require follow-up from different actors, given that the mechanism is already in place and accepted by States.

³⁶<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>.

³⁷<https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx>.

³⁸ <https://uhri.ohchr.org/en/search-human-rights-recommendations>.

³⁹ An exception included the Institute for Human Rights and Business, which submitted several country assessments in the period 2010-2015: <https://www.ihrb.org/search/search-results?keywords=UPR>.

Concretely, there is a need for:

- Greater awareness-raising and capacity building on the UNGPs among civil society organisations, NHRIs and UN entities that regularly engage in the UPR as well as awareness-raising on the UPR mechanisms among civil society organisations and others in the business and human rights field. Here the Working Group, OHCHR and UNDP could play a key role.
- Practical guidance for civil society organisations, including on reporting timelines for countries under review and the type of information that may be useful. UNDP's B+HR is currently developing a guide that is intended to meet this need.
- Engagement with States that are actively supporting UNGPs promotion and encourage them to make recommendations to States under UPR review.
- Inclusion of business and human rights as a standard item in the technical guidelines from OHCHR for written documentation by States, OHCHR and others (inter alia, NGOs, NHRIs, human rights defenders, academic institutions and research institutes, regional organizations, as well as civil society representatives).
- UNGPs implementation indicators that would enable systematic data gathering and comparison of practice over time and between countries. Work to develop such indicators is long overdue (as highlighted in the UNGPs 10+ Roadmap). The Working Group and OHCHR could naturally play a leading role in an initiative in collaboration with other actors, such as UNDP, OECD, the

Danish Institute for Human Rights, as well as civil society organizations, other UN experts, business organizations, academics and others, to develop a set of indicators to support systematic tracking and evaluation of progress over time.

4. LESSONS FROM PEER REVIEW INITIATIVES OUTSIDE THE UN HUMAN RIGHTS SYSTEM

A. OECD SYSTEM

Beyond the UN human rights system, the mechanism most closely related to assessing UNGPs performance of a State actor is the OECD national contact point (NCP) review system. The OECD Guidelines for Multinational Enterprises' chapter on human rights mirrors the second pillar of the UNGPs, and the Guidelines generally adopts the due diligence concept of the UNGPs. Under the OECD Guidelines, adhering governments (currently 50) have a legal obligation to set up an NCP, with a mandate to promote the OECD Guidelines, and related due diligence guidance, and to handle cases (referred to as "specific instances") as a non-judicial grievance mechanism.⁴⁰ Paragraph 19 of the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises encourages NCPs "to engage in horizontal, thematic peer reviews and voluntary NCP peer evaluations".⁴¹

The stated objectives of the peer review include:

- Identifying the NCP's strengths and positive results as well as any gaps and

⁴⁰ <https://mneguidelines.oecd.org/ncps/>.

⁴¹ 4 The Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises is

reproduced in Part II of the booklet on the Guidelines www.oecd.org/daf/inv/mne/48004323.pdf.

possibilities for improvement;

- Making recommendations for improvement in line with the Guidelines;
- Serving as a learning tool for reviewed and participating NCPs.

The overarching goal is to help improve effectiveness of NCP in implementing the OECD Guidelines, including by assessing performance of the NCP against the mandate and the core criteria for functional equivalence (visibility, accessibility, transparency and accountability).⁴²

The OECD Secretariat reports on peer reviews annually in the NCP activity report.⁴³ Civil society assessment of the peer review process has found that “NCPs, as well as their stakeholders, generally found the peer review process to be beneficial. However, this research has found that there were important variations across peer reviews and that implementation of peer review recommendations has been incomplete and often ad-hoc, focusing on relatively easy fixes like promotion-related activities, rather than changes to more impactful issues, such as those related to institutional structure and the specific instance process.”⁴⁴ OECD Watch has pointed to a number of limitations in of the set-up of the process:

- the government under review controls the report’s content;
- participation is voluntary, and there is limited participation by the NCPs with greatest need for improvement;
- recommendations from other NCPs are

generally vague.⁴⁵

Due to these limitations, OECD Watch is undertaking its own systematic evaluation of NCPs to hold them to account on their performance and with a view to help improve their effectiveness. The OECD Watch NCP Evaluations assess NCPs on 40 “organisational, procedural and communications key performance indicators based in the OECD Guidelines”.⁴⁶

Within the OECD system, another avenue with potential to holding governments to account for business and human rights performance is at the point of accession to the OECD,⁴⁷ which involves a thorough review of a country’s “state of readiness” assessed against core OECD community values and economic and public governance indicators. This includes evidence of “progress towards adherence to the Declaration on International Investment and Multinational Enterprises”.⁴⁸ Increasingly issues relating to environmental law, labour rights and business and human rights are being considered. While only applying to new prospective OECD members, if the process gives as much emphasis to business and human rights as investment and economic policy considerations, it could provide a powerful tool for influencing State practice.

Also, within the OECD system, the OECD’s Development Assistance Committee (DAC) conducts periodic reviews of the individual development co-operation efforts of DAC members. The policies and programmes of each DAC member are critically examined approximately once every five years. DAC peer reviews assess the development co-operation performance across government of a given member and examine policy, finance and implementation. They take an integrated,

⁴² <https://mneguidelines.oecd.org/national-contact-point-peer-reviews-core-template.pdf>.

⁴³ <https://mneguidelines.oecd.org/2020-Annual-Report-MNE-Guidelines-EN.pdf>.

⁴⁴ <https://www.oecdwatch.org/wp-content/uploads/sites/8/2018/06/2018-Peer-Review-Report-AC-ICAR-OW.pdf>.

⁴⁵ Interview with the author.

⁴⁶ <https://www.oecdwatch.org/indicator/>.

⁴⁷ <https://www.oecd.org/legal/accession-process.htm>

⁴⁸ <https://www.oecd.org/mcm/documents/C-MIN-2017-13-EN.pdf>.

system-wide view of the development co-operation and humanitarian assistance activities and seek input from a wide range of stakeholders – civil society, parliament, private sector and partner countries.⁴⁹

A key challenge for allowing for effective monitoring, transparency and accountability with regard to State performance on the OECD Guidelines for Multinational Enterprises, however, concerns the availability of systematic tailored data. Just like the UN system has not developed systematic monitoring of States' UNGPs implementation, the OECD system has to date not developed a centralised database and quality indicators *to track and evaluate State* implementation of the OECD Guidelines. While the OECD is a powerhouse for economic and development data collection and rankings, this potential has so far not been tapped in the area of responsible business.

B. OTHER PEER REVIEW INITIATIVES FOR STATES

A mapping of other existing peer review initiatives that could provide lessons for State peer reviews in the area of business and human rights highlighted the following examples:⁵⁰

- Implementation Review Mechanism of the UN Convention Against Corruption: The Implementation Review Mechanism (IRM) is a peer review process that assists States parties to effectively implement the Convention. In accordance with the terms of reference, each State party is reviewed by two peers - one from the same regional group - which are selected by a drawing of lots at the beginning of each year of the review cycle. The functioning and the performance of the IRM is guided and

overseen by the Implementation Review Group, an open-ended intergovernmental group of States parties which is a subsidiary body of the CoSP and was created together with the IRM in Resolution 3/1.⁵¹

- The Financial Stability Board (FSB) Peer Review: The FSB began a regular programme of peer reviews in 2010, consisting of thematic reviews and country reviews. FSB peer reviews focus on the implementation and effectiveness of international financial standards developed by standard-setting bodies (SSBs) and of policies agreed within the FSB. In addition to being a condition of FSB membership peer reviews are an important institutional mechanism to promote complete and consistent implementation of agreed G20/FSB financial reforms and are a means of fostering a race to the top by FSB member jurisdictions. They provide an opportunity for FSB members to engage in dialogue with their peers and to share lessons and experiences. The oversees the functioning of the peer review programme.⁵²
- Open Method of Coordination (OMC) of the European Union (EU): The OMC has provided a new framework for cooperation between the EU countries, whose national policies can thus be directed towards certain common objectives. Under this intergovernmental method, the EU countries are evaluated by one another (peer pressure), with the Commission's role being limited to surveillance. The OMC takes place in areas which fall within the competence of EU countries, such as employment, social protection, education,

⁴⁹ https://www.oecd-ilibrary.org/development/oecd-development-co-operation-peer-reviews_23097132.

⁵⁰ https://globalnaps.org/wp-content/uploads/2019/12/peer-review_naps_four-pager.pdf.

⁵¹ <https://www.unodc.org/unodc/en/corruption/implementation-review-mechanism.html>.

⁵² https://www.fsb.org/work-of-the-fsb/implementation-monitoring/peer_reviews/.

youth and vocational training.⁵³

- African Peer Review Mechanism (APRM) of the African Union: A Specialized Agency of the African Union (AU), the African Peer Review Mechanism (APRM) was initiated in 2002 and established in 2003 by the African Union in the framework of the implementation of the New Partnership for Africa's Development (NEPAD). APRM is a tool for sharing experiences, reinforcing best practices, identifying deficiencies, and assessing capacity-building needs to foster policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration. Member countries within the APRM undertake self-monitoring in all aspects of their governance and socio-economic development. African Union (AU) stakeholders participate in the self-assessment of all branches of government – executive, legislative and judicial – as well as the private sector, civil society and the media.⁵⁴

However, further work to analyse lessons learned for State peer learning and review in the area of business and human rights would be merited.

5. CONCLUSION

To date, international level accountability for how State performance in implementing the UNGPs is at best patchy, but a number of efforts and opportunities on which to build further exist, both within the UN system and beyond. State peer reviews, supported by multi-stakeholder engagement, could provide a particularly promising avenue, but practical and political hurdles will need to be addressed. Relatively low-hanging fruits for progress in the near future could be to strengthen the regular reporting on trends in connection with the UN Forum and to systematically integrate UNGPs implementation evaluation, including with regard to State performance in developing and implementing NAPs, in the existing UPR mechanism. A key challenge for realising such systematic integration – and for improving monitoring and accountability of State performance on the UNGPs overall – is the need to develop implementation indicators and a centralised database to track and evaluate progress over time, which – as highlighted in the UNGPs 10+ Roadmap – needs to be built out in parallel with strengthened technical cooperation and capacity-building efforts.⁵⁵

⁵³ https://eur-lex.europa.eu/summary/glossary/open_method_coordination.html.

⁵⁴ <https://au.int/en/organs/aprm>.

⁵⁵ See in particular Goal 8.2 “Enhance capacity-building and coordination to support faster and wider UNGPs uptake and implementation”, <https://www.ohchr.org/Documents/Issues/Business/WG/ungps10plusroadmap.pdf>.

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The Geneva Academy of International
Humanitarian Law and Human Rights

Villa Moynier
Rue de Lausanne 120B
CP 1063 - 1211 Geneva 1 - Switzerland
Phone: +41 (22) 908 44 83
Email: info@geneva-academy.ch
www.geneva-academy.ch

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