

NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS

A Toolkit for the Development, Implementation, and Review of
State Commitments to Business and Human Rights Frameworks



TOOLKIT COMPONENT 3: MONITORING AND REVIEW OF NAPS

The Danish Institute for Human Rights (DIHR) is Denmark's national human rights institution. Its mandate is to promote and protect human rights and equal treatment in Denmark and abroad. The Human Rights and Business Department is a specialized unit within DIHR focusing on the role of the private sector in respecting human rights.

The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labor, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations.

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CHAPTER 7: MONITORING AND REVIEW OF NAPs

Finalizing a NAP should not be seen as the end of a process, but as the beginning of its implementation phase. The incorporation of monitoring and review processes into this implementation phase increases the likelihood that the commitments made in the NAP will be carried out in practice. At the same time, by scrutinizing successes and failures, monitoring and review can foster information exchange and the sharing of best practices within and among governments, as well as with wider society.

This Chapter maps and analyzes a range of potential routes for tracking progress toward the fulfillment of NAPs commitments at the national and international levels.¹ Concerning the international level, the mapping addresses existing human rights reporting mechanisms, such as the UN Human Rights Council's Universal Periodic Review (UPR) process. In addition, the Chapter considers the potential for new, dedicated mechanisms to review business and human rights NAPs and efforts by stakeholders to put them into effect.

7.1. MAPPING OF OPTIONS

National Level

Progress Review Led By Government

The first option is for the government itself to lead a periodic review of progress toward fulfillment of the NAP. Typically, the body that coordinated the NAP process would be expected to undertake this task in conjunction with a government or stakeholder Steering Committee, where one is established. Usually, it would be appropriate for a progress review of some kind to take place at mid-term, as well as at the end of the NAP period. In both cases, general principles relating to NAPs processes, as set out in Chapter 6, should be applied, particularly with regard to stakeholder participation and transparency.²

During review, the State's performance in meeting targets and benchmarks set down in the NAP should be assessed and reported on. On this basis, goals and commitments contained in the NAP can be updated, and a revised version of the NAP can be released to stakeholders.

Independent National Monitoring Mechanisms

Here, inspiration is taken from the most recently concluded of the UN's seven core human rights treaties, the UN Convention on the Rights of Persons with Disabilities (CPRD).³ The CPRD requires the establishment, by States Parties, of a framework to promote and monitor the Convention's implementation, which must include one or more "independent mechanisms."⁴ Under

the CPRD, an existing body such as the State's NHRI⁵ or another entity set up for this purpose can be allocated this function.

States could adopt this model also in relation to business and human rights. Thus, an independent body, such as the NHRI, another existing body, or a body to be newly established, could be given the role of monitoring implementation of the NAP. If established across a number of jurisdictions, these monitoring bodies could be engaged, for example, through networks at the regional or international levels in dialogue, information-exchange, and the sharing of best practices with other governments and stakeholders. Such a process of dialogue could also have the effect of gradually promoting convergence in approaches, increased transnational cooperation on problems of common concern and the normative consensus and mutual confidence needed to prepare the ground for discussion of the development of binding legal standards.

International Level

Universal Periodic Review (UPR) by the UN Human Rights Council (UNHRC)

The UN Human Rights Council (UNHRC) has a broad mandate to promote and protect human rights and fundamental freedoms. One of the key functions of the UNHRC is to facilitate the Universal Periodic Review (UPR) process. Through the UPR, the human rights record of each of the UN's 192 Member States is reviewed once every four years.⁶ The scope of the review is in line with the human rights guaranteed by the Universal Declaration of Human Rights (UDHR) and set out in the UN Charter, other UN human rights instruments, ratified treaties, voluntary pledges, and applicable international humanitarian law.

The UPR is a peer review process.⁷ It is conducted by a UPR Working Group, made up of forty-seven Member States of the UNHRC, with assistance from a group of three States who serve as rapporteurs. Each State's appraisal is based on: (1) information provided by the State in a report; (2) information from experts and other UN organs; and (3) information from other stakeholders, including NGOs and the State's NHRI.

The UPR proceeds via an interactive discussion wherein UN Member States can pose questions and comments and make recommendations to the State under review. A final report, the "outcome report," provides a summary of the discussion. States are then responsible for implementing those of the recommendations which they accept. States are then subject to a mid-term review, after two years, in which stakeholders can again participate. After four years, the State must provide information on progress made.

In the current context, the question is whether a review of a State's business and human rights NAP and any progress or review reports could be incorporated into the UPR process in a meaningful and valuable way. Advantages of this approach would include increasing the profile and political

significance of business and human rights issues by raising them routinely in the UN's principal human rights dialogue process. A drawback of this approach, on the other hand, would be the likelihood that business-related abuses and issues are excluded to make way for other human rights issues which are in fact or are perceived to be more pressing. Another potential weakness is that a reviewing State might deliberately choose not to highlight business and human rights issues where these are of a politically sensitive nature or to avoid business-related issues being raised by other States when it, in turn, is under review.

UN Human Rights Treaty Monitoring Bodies

Of the UN's core human rights conventions, ten provide for the establishment of a treaty monitoring body to promote implementation by States of their obligations under the instrument in question.⁸ Treaty bodies' members are independent experts,⁹ and they have the task, *inter alia*, of reviewing the compliance of States Parties with their treaty obligations on a four- or five-year basis.

The review process differs in its details across treaty monitoring bodies but in general consists of two steps. First, a report prepared by the State is considered by a sub-group of the committee. On the basis of this report and other information received, for instance, from CSOs and the NHRI, this sub-group compiles a "list of issues" that it would like the State to address.¹⁰ The State under review then submits a written response to the "list of issues." At the second session, the State's delegation presents its report and responds to questions posed by Committee members. This is intended to be a "public and constructive dialogue" between the delegation and the Committee. Finally, the Committee develops its Concluding Observations, which detail the extent to which the State is in compliance with its substantive obligations, as well as recommendations for improvements.

The UNGPs address all internationally recognized human rights and, in principle, can be raised in discussion in any treaty body. In addition, two of the UN's treaty monitoring bodies, the Committee on the Rights of the Child and the Economic and Social Rights Committee, have already produced guidance relating to business and human rights issues. It might be considered, then, that review of State implementation of the UNGPs could be considered step-by-step, and with regard to impacts on the different types of rights and categories of rights-holders addressed by each of the different UN conventions in the course of the State's successive review by each of the treaty bodies.

Such an approach would have the value of disaggregating business-related human rights abuses and supporting the formulation of specific actions to prevent and remedy such impacts across vulnerable and marginalized groups and in line with the requirements of the HRBA.

On the other hand, a segmented analysis with a focus on specific rights or groups would be less likely to seek or identify weaknesses in a State's approach to business regulation in general or deficits in regulation affecting all categories of rights-holders equally. Moreover, in practical terms, there would rarely be the scope for a detailed engagement with the concepts and standards of the UNGPs

given time and resource constraints on the review process. A further issue might be the generation of a range of divergent interpretations of the UNGPs, with no one body capable of advancing authoritative jurisprudence.

While a narrow-scope, specialized review of States' implementation of the UNGPs by treaty monitoring bodies could thus constitute an invaluable and necessary supplement to other processes, it seems unlikely that, alone, it could achieve an adequate or consistent scrutiny of States' steps toward UNGPs implementation.

Regional Peer Review and Reporting Processes

The European Union, as mentioned in Chapter 2, already requests its Member States to produce national plans both on CSR¹¹ and business and human rights, as well as on a range of other, unrelated topics, though with the shared element that a common policy framework in relation to the topic in question has been established at the EU level.¹² A one-time peer review exercise has been deployed by the EU to evaluate Member States' CSR NAPs, in which all Member States participated in 2013.¹³ In relation to some other NAPs, Member States participate in voluntary peer review processes, under the so-called "Open Method of Coordination."¹⁴

In general, this mechanism proceeds as follows. First, Member States take measures intended to meet the goals and objectives of the stated community-level policies. Subsequently, Member States supply reports on the basis of a common format, benchmarks, and indicators, which are subject to scrutiny and discussion through a structured dialogue process.¹⁵ General reports may then be produced that compare approaches taken toward reaching common goals and make recommendations.

For some human rights policy areas, the Council of Europe relies on a less demanding peer reporting exercise, based on standard questionnaires to be completed by its Member States, in order to promote follow-up and implementation of soft legal standards.¹⁶

Any of these models could be replicated in Europe or by regional organizations in other continents, such as the OAS, ASEAN, or African Union, to supply a follow-up and monitoring process based on NAPs on business and human rights. ASEAN's Intergovernmental Commission on Human Rights has, indeed, recently completed a peer review exercise of national measures to promote CSR,¹⁷ while the OAS has adopted a decision expressing support for the UNGPs and States' implementation of them.¹⁸ The African Union, through its New Partnership for African Economic Development (NEPAD), operates on a voluntary basis the African Peer Review Mechanism, which covers the broad areas of economic and political governance, thus appearing to providing an appropriate platform into which consideration of UNGPs could be integrated.¹⁹

Among strengths of this kind of approach to follow-up and oversight of NAPs are that they allow for monitoring and evaluation informed by, and that address, regional frameworks relevant to business and human rights, in addition to global standards. In a global-level review, for example in the UN setting, the role and impact of such rules may not be fully considered. Too much regionalization, on the other hand, could arguably undermine the UNGPs as a common global framework, were the UNGPs to be subject to divergent interpretations at the regional level.

Existing peer review procedures have also been criticized for failing to provide for sufficient participation by civil society and other stakeholders.²⁰ Careful consideration would then need to be given to how the voices of affected rights-holders or their representatives, especially those from beyond the borders of participating States, would be heard in regionally-focused monitoring processes. On the other hand, in terms of practical arrangements, for instance travel and working languages, regional processes may be more readily accessible and cost-effective.

Review by the UN Working Group on Business and Human Rights (UNWG)

The UN Working Group on Business and Human Rights (UNWG) launched a Repository of NAPs in February of 2014.²¹ The Repository gathers all finalized NAPs published by States. In June 2014, the Human Rights Council, in renewing the UNWG's mandate, gave it the new tasks of seeking information from States on their NAPs and encouraged States and other stakeholders to provide relevant information to the UNWG.²² Specifically, the UNHRC “welcome[d] the efforts of the Working Group to build a database of national action plans” and “encourage[d] States to submit information on their national action plans,”²³ by way of annual updates. Arguably, the terms of the UNHRC Resolution provide a sufficient basis for the UNWG now to undertake a regular review of States' NAPs, at least in relation to those States that are willing to cooperate with such an exercise.

As regards participation by “relevant stakeholders,” such as civil society groups and companies, this could be accomplished by the UNWG providing an area of the Repository for such stakeholders to submit “shadow reports” or assessments of a particular State's NAP, which would then be considered alongside the NAP and other information presented by the government, by the UNWG.

Review Under a New International Business and Human Rights Instrument

If a new legal instrument on business and human rights were concluded by States, it might provide for a dedicated monitoring and review process on business and human rights. Indeed, as illustrated by the foregoing mapping and discussion, it is now an established norm that human rights instruments should make provision for scrutiny of State measures toward compliance and implementation of substantive obligations they have undertaken. Based on this Chapter's analysis, it can be seen that there are a range of monitoring and review options, each with strengths and weaknesses that could be incorporate into such an international agreement:

- Review by a new independent expert monitoring body in the UN, or by the UNWG;
- Review by a national mechanism States would be obliged to establish under the instrument;
- Review via a new UN-based peer review mechanism; and/or
- Review via peer mechanisms or voluntary reporting at regional level

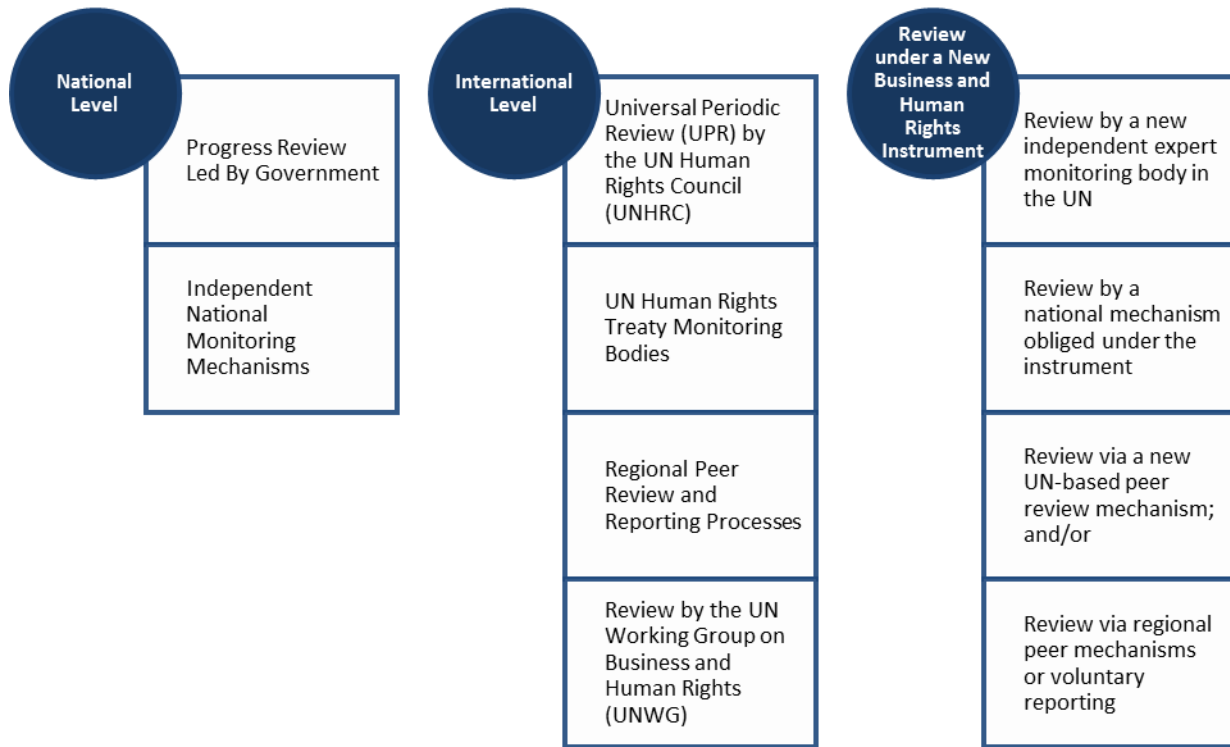
7.2. NAPS FOLLOW-UP: SHORT- AND LONG-TERM GOALS

In Chapter 6, principles were identified for follow-up on NAPs. These included the principles that: (1) NAPs should identify who is responsible for implementation of individual action points and overall follow-up, and (2) NAPs should lay out a framework for monitoring and reporting of implementation.

In addition, it is suggested that, in the short-term and at a minimum, States should also cooperate with the UNWG and its NAPs Repository. They should make provision for review and monitoring of their NAPs by an independent body, as described above, taking inspiration from the model to promote implementation of the UNCRPD. States should also integrate reporting on development and implementation of NAPs commitments into the existing UPR process in their roles both as subjects and scrutinizers of other countries' track records. At the same time, wherever relevant, States should report on relevant implementation measures before UN treaty-monitoring bodies and through regional mechanisms.

In the longer term, measures to monitor implementation and review should be supplemented by additional oversight mechanisms at the regional or international level, or both, and States should seek to take steps toward this objective.

FIGURE 11: FOLLOW-UP MODALITIES TO NAPS



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- ¹ See generally Claire Methven O'Brien, *Transnational Business and Human Rights: The Case for a Multi-Level Governance Approach* (2007), available at <http://www.humanrightsbusiness.org/files/About%20us/NYU%20WP%20Outline%20O%27Brien.pdf>; Claire Methven O'Brien, *Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011), available at <http://www.humanrightsbusiness.org/files/About%20us/Methven%20OBrien%20UNWG%20sub280212.pdf>.
- ² This is also in line with the UNCRPD, the most recent of the UN's core human rights conventions, which provides under Art 33(3) that: "Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process." *Convention on the Rights of Persons with Disabilities*, UN.ORG (December 13, 2006), <http://www.un.org/disabilities/convention/conventionfull.shtml>.
- ³ *Id.*
- ⁴ *Id.* at art. 33(2).
- ⁵ For example, the German Institute for Human Rights (DIMR) houses the National Convention on the Rights of Persons with Disabilities (CRPD) Monitoring Body. *Monitoring Body*, DEUTSCHES INSTITUT FÜR MENSCHENRECHTE, <http://www.institut-fuer-menschenrechte.de/en/monitoring-body/frequently-asked-questions.html#c12635> (last visited June 6, 2014). This body is tasked with reviewing and providing recommendations about political, judicial, and administrative decisions that impact aspects of the CRPD. It also participates in experience and information exchanges with other NHRIs and monitoring bodies that oversee the CRPD in other countries.
- ⁶ *Basic Facts About the UPR*, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, , <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (last visited May 29, 2014).
- ⁷ The OECD has for many years relied on peer review to compare experiences and examine best practices in a number of policy areas. *Examples of Peer Review*, OECD.ORG, <http://www.oecd.org/site/peerreview/examplesofpeerreviews.htm> (last visited June 28, 2014).
- ⁸ See *Monitoring the Core International Human Rights Treaties*, OFF. HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx> (last visited May 29, 2014). See also Michael O'Flaherty & Claire O'Brien, *Reform of the UN Human Rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, HUM. RTS. L. REV. 2007 7(1), 141.
- ⁹ *Id.*
- ¹⁰ OFF. HIGH COMM'R FOR HUM. RTS., FACT SHEET NO. 16: THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 16 (1991), available at <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf>.
- ¹¹ EU CSR Strategy 2011, *supra* note 3.
- ¹² *Id.*
- ¹³ See, e.g., *Peer Review Report: Peer Review on Corporate Social Responsibility—Rome (Italy)* (June 5, 2013), available at <http://ec.europa.eu/social/main.jsp?langId=en&catId=22> (search "CSRpreport" in keyword search bar). Peer groups are comprised of representatives of four different Member

States and a representative of a relevant Directorate-General (DG), such as DG Enterprise and Industry. At the end of each peer review meeting, a report is created and published on the website of DG Employment, Social Affairs, and Inclusion. The report summarizes the dialogue that the States engaged in and includes a brief description of any NAP progress made in each State, the questions posed by the other States, and the answers or explanations provided. The report includes a discussion on the common themes addressed during the meeting and proposals made for more effective ways of enhancing “the credibility and visibility of CSR.” These peer review meetings are intended to help Member States learn from one another’s initiatives and to identify and discuss common issues. There is no mention of any input from or participation of other stakeholders in the final reports currently available.

¹⁴ This is known as the “Open Method of Coordination.”

¹⁵ See, e.g., *Communication from the European Comm’n, European Governance—A White Paper*, C 287/1 (2001), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0428&rid=2>; *Social Protection & Social Inclusion*, EUROPEAN COMMISSION: EMP., SOC. AFF. & INCLUSION, <http://ec.europa.eu/social/main.jsp?langId=en&catId=750> (last visited June 28, 2014); *Reinforcing the Open Method of Coordination for Social Protection and Social Inclusion*, EUROPA: SUMMARIES OF EU LEGISLATION http://europa.eu/legislation_summaries/employment_and_social_policy/social_inclusion_fight_against_poverty/em0011_en.htm (last updated February 17, 2009).

¹⁶ *Armed Forces: Conscientious Objection*, COUNCIL EUR., http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Armed_Forces/Default_en.asp (last visited June 28, 2014); http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/LGBT/LGBT_en.asp.

¹⁷ See ASEAN Workshop on CSR Thematic Study, *supra* note 61.

¹⁸ OAS Resolution, *supra* note 60.

¹⁹ *African Peer Review Mechanism (APRM)*, NEPAD.ORG, <http://www.nepad.org/economicandcorporategovernance/african-peer-review-mechanism/about> (last visited June 28, 2014).

²⁰ *Open Method of Coordination*, EUROFOUND, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/openmethodofcoordination.htm> (last visited June 28, 2014); Stijn Smismas, Univ. of Trento, *Modes of Governance and the Participatory Myth* (2005), available at http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/4/workshop%20mannheim%20oct05%20papers/Smismans_New%20Governance%20and%20participatory%20myth%20%28ECPR%29.pdf; Employment, Social Affairs & Inclusion, *Corporate Social Responsibility (CSR) in the EU*, EUROPEAN COMMISSION, <http://ec.europa.eu/social/main.jsp?catId=331> (last visited June 9, 2014).

²¹ *State National Action Plans*, OFF. HIGH COMM’R HUM. RTS. <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited May 30, 2014).

²² UNHRC Res. June 27, *supra* note 2.

²³ *Id.*