

NEXT DECADE | 10+



**BUSINESS AND
HUMAN RIGHTS**
UN GUIDING PRINCIPLES



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SPECIAL PROCEDURES

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Guiding Principles On Business And Human Rights At 10: Taking stock of the first decade

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Report of the Working Group on the issue of human rights and
transnational corporations and other business enterprises

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Executive summary

The 16th of June 2021 marks the 10th anniversary of the UN Guiding Principles on Business and Human Rights (UNGPs). Their unanimous endorsement by the UN Human Rights Council was a landmark moment for efforts to promote corporate respect for human rights and sustainable business.

This 10-year anniversary is an important milestone, but there is much more at stake in the current global environment which makes today a real inflection point for the future we want: the climate and environmental crises, combined with other major global challenges, such as shrinking civic space, populism, corruption, conflict and fragility, and yet unknown human consequences of technological developments. The socio-economic crisis resulting from COVID-19 has further laid bare and amplified gross existing inequalities and injustices, including pervasive gender and racial discrimination.

Responsible business must be at the core of the responses to these challenges. The UNGPs' three pillars tell us what is needed in practice: States must protect human rights, business should respect human rights, and victims need access to effective remedy. The UNGPs provide the authoritative framework and a key tool for States and businesses to avoid reverting to business as usual, but to forge a new and better normal that prioritizes respect for people and the environment – supported by other stakeholders and inclusive multilateralism.

Against this backdrop, and as part of its mandate to promote the UNGPs, the Working Group on Business and Human Rights has been undertaking a project (UNGPs 10+) to take advantage of the 10th anniversary to take stock of UNGPs implementation to date and chart a course for action in the decade ahead. **This report by the Working Group takes stock of the first ten years of UNGPs implementation by States and business.**

UNGPs 10+ process: stakeholder inputs

Multi-stakeholder dialogue and consultations in all regions were a defining feature of the mandate that developed the UNGPs. It has also been at the core of the Working Group's mandate and methods of work, including throughout the UNGPs 10+ project. While this report cannot do justice to all the valuable insights emerging from the many consultations and written inputs, they helped to inform the stocktaking and the continuing process to develop a roadmap for the next decade. A key objective has also been to provide a platform for stakeholders' assessments of developments to date and their priorities for realizing implementation of the UNGPs over the coming decade. Submissions and consultation summaries are posted on the project web page and a dedicated portal hosted by the Business and Human Rights Resource Centre.

Between July 2020 and February 2021, more than 30 virtual consultations were organized by the project team or by partners supporting the project. In addition, Working Group members participated in numerous events organized by business, civil society, the United Nations, and others that helped generate further awareness and input. Consultations with stakeholders involved civil society networks in Africa, Asia, Europe, North America and Latin America, several global and national business organizations, institutional

investors, governments, national human rights institutions, human rights defenders, indigenous peoples' networks, trade unions and others. The UNGPs 10+ project provided a key framing for the RBCLAC regional Forum (September 2020) and the first UN regional Forum on business and human rights for Eastern Europe and Central Asia (organized by UNDP, November 2020). The annual UN Forum on Business and Human Rights served as a key opportunity for global multi-stakeholder dialogue. An open call for written inputs and online questionnaire (UNGPs 10+ 'have your say') generated more than 200 responses from business organizations, civil society networks, national human rights institutions, governments, trade unions and others. Solicited inputs addressed a range of topics e.g., UNGPs' impact in litigation, stock exchanges' ESG guidance, gender, indigenous peoples' perspectives, data on strategic lawsuits against public participation, and patterns of a decade of UN special procedures "communications" involving business, as well as mappings of regional developments in Africa, Asia and the Arab States undertaken by UNDP and in LAC by OHCHR.

The stocktaking includes an assessment of progress, gaps, and challenges, as well as obstacles and opportunities for advancing more robust policy action and change in the coming years. It will be followed by a "roadmap for the next decade", with forward-looking recommendations for State actors and business, as well as other stakeholders who have a role to play in promoting implementation of the UNGPs. This roadmap will be launched in the second half of 2021. This stocktaking report is accompanied by an addendum report on the uptake of the UNGPs among institutional investors and with recommendations for rights-respecting investment.

Looking back, the UNGPs have contributed to significant progress towards promoting respect for human rights in a business context. They have clearly articulated the different but complementary roles of States and business in preventing and addressing business-related human rights impacts. They have reminded States of their human rights obligations as they relate to business and clarified the responsibility of businesses themselves to respect human rights, even when States may not live up to their own duties. By positioning the need for greater access to effective remedy for victims of business-related harms as a core pillar, the UNGPs have also helped shift the focus from corporate philanthropy to accountability as an essential feature of responsible business.

This clarity and common platform for action did not exist before 2011. Monitoring of and achieving accountability for business-related human rights abuses is still a work in progress. Yet, a decade of implementation of the UNGPs has been marked by its most notable normative innovation – the expectation that businesses exercise human rights due diligence – morphing towards a legally binding standard of conduct, while States and businesses have begun to implement the framework to prevent and address business-related harms to people. Introduced by the UNGPs, human rights due diligence requires businesses to identify, prevent and mitigate their adverse impacts and to account for how they address them. This normative clarification is the cornerstone of the business responsibility to respect human rights, and is likely the most influential contribution of the UNGPs. Beyond increasingly being embedded in law, the uptake of the human rights due diligence standard by organizations framing and influencing business operations and decision-making in different regimes has created what can be best described as a consolidated web of pressure, where a range of different actors are mandating or incentivizing business to respect human rights. The broad institutional uptake of human rights due diligence by various actors ranging from companies themselves, but extending to business and industry platforms, investors, States, and multilateral lenders, has contributed to fulfilling one of the central objectives of the UNGPs by fostering convergence among the many different institutions that shape business conduct. In particular, the concept of corporate human rights due diligence has paved the way for regulatory developments, with increasing backing from business, including by investors, financial institutions and business organizations.

The past decade also highlights that, fundamentally, the “governance gaps” that created the need to develop the UNGPs still allow too many instances of business-related abuses across all sectors and regions. Further, the lack of policy coherence within States but also in business and in multilateral institutions and forums remains a key challenge. For example, benchmarking initiatives and stakeholder assessments highlight disconnect between improvements at the policy level and human rights due diligence in business practice. Similarly, while preventing and addressing adverse impacts on people and the planet is the core of the UNGPs, and the most significant contribution that most businesses can make toward sustainable development, the key standards of the UNGPs have been largely absent from the Sustainable Development Goals, or in the context of the Paris Agreement. This gap is particularly noticeable as the due diligence standard and the accountability focus of the UNGPs make them a valuable framework for practical achievement of a “just transition” to a green economy.

Overall, efforts to promote implementation of the UNGPs to date have enabled broader levels of participation from a wider range of stakeholders, challenging them, but also bringing them together to learn from each other and to generate the diversity of responses that the complex nature of business and human rights requires. Yet, more action by more States, including making full use of the available tools beyond voluntary measures, and more action by more businesses, including among small and medium-sized enterprises (SMEs) that are challenged by limited resources and few practical tailored tools, is still a matter of urgency.

Looking ahead, the mandatory human rights due diligence wave and the increasing focus on effective regulation offer opportunities and drivers. The onus is on States to develop effective laws and regulations, but also to use the wider range of policy tools – a “smart mix” – to incentivize responsible business and due diligence. **In parallel, there is a need to leverage the financial sector and the momentum of the increasing focus of investors on environmental, social, and governance (ESG) factors,** though major gaps remain also in this sector as underlined in the addendum report on institutional investors. There is a need to move beyond leaders and for wider investor action to respect human rights.

Progress will also require tackling a number of gaps foreseen by the UNGPs, ranging from overcoming barriers regarding access to remedy for victims of business-related impacts, to implementing business models that do not undermine human rights, for example in the context of supply chains, purchasing practices, and in digital technology. There is also a need to develop better corporate human rights performance data, including better disclosure, alignment and consistency with human rights standards across benchmarks, scaling the availability of data, and focusing on actual performance and outcomes for people.

Some accessible opportunities for progress exist. Momentum has been increasing in some regions, which should be built upon to create lasting regional races to the top. Both regional and global level efforts in this direction should be reinforced by supporting measures. This includes the development of more systematic peer learning and accountability platforms for State implementation, supported by reinforcing efforts at regional level, as well as better tracking, including through enhancing the role of the Universal Periodic Review and the UN Forum on Business and Human Rights. It is also essential to explore options to address capacity gaps among stakeholders – from those who have to implement the UNGPs, notably governments and businesses (including SMEs) to national human rights institutions, communities, and civil society organisations.

The persistence of business-related human rights abuses should be a matter of urgent priority attention by States and business, as rights-holders continue to experience harm and remain at risk. The last

decade has underscored the point made in the UNGPs: voluntary approaches alone are not enough. The rise of mandatory measures will undoubtedly accelerate both uptake and progress. At the same time, the experience of many decades has demonstrated that legal measures are essential but not sufficient to ensure business respect for human rights.

The UNGPs, and human rights due diligence that is focused first on those most at risk, provide a blueprint for States and business for a responsible recovery from the COVID-19 crisis. Looking beyond the pandemic, at other major global challenges, meaningful progress will require a systemic approach by all stakeholders, and persistent efforts to leverage the multiple actors beyond States that frame policies, practices and indeed regulations that shape business behaviours in a smart mix of measures, which cumulatively will make the difference we need, without hoping for a silver bullet solution.

The first decade demonstrated that change is possible. This provides hope for the next ten, as a foundation to intensify efforts to address remaining gaps and seize existing opportunities. The upcoming “roadmap” rests on the common platform that was established in 2011 and the broad, growing movement converging around the UNGPs over the decade. It aims to support better coordination and accountability, and help set a course for action by States, businesses and others. As the UNGPs turn 10, States and businesses should use the anniversary moment to recommit and, set clear UNGPs implementation goals for the coming years, to increase the pace of implementation on the scale needed to deliver impact toward 2030 and beyond. and set clear implementation goals for the coming years.

For more information, see:

[UNGPs 10+ project web page](#)

[UNGPs 10+ portal hosted by the Business & Human Rights Resource Centre](#)

[Written inputs to UNGPs 10+ with more than 200 submissions from States, business organizations, national human rights institutions trade unions, indigenous peoples, civil society organizations and others](#)



Contents

Executive summary	i
Introduction	2
Mandate and methodology	4
A common global platform for action and accountability	5
An authoritative standard for responsible business	5
Human rights due diligence	6
Protect	9
Mandatory human rights due diligence	9
National action plans	11
Domestic policy coherence	11
Multilateral policy coherence	12
Respect	14
Business uptake	14
Implementation and coherence challenges	15
Business models	16
Financial actors	17
Data challenge	18
Remedy	20
Non-State-based grievance mechanisms	20
State-based non-judicial grievance mechanisms	20
Judicial remedies	21
Arbitration	21
Regionalization	23
Supporting implementation	24
Conclusion	25



Introduction

The plan was clear: “establishing universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm”, knowing full well that the unanimous endorsement of the Guiding Principles on Business and Human Rights¹ by the Human Rights Council would, “by itself ... not bring business and human rights challenges to an end”. Instead, the endorsement of the Guiding Principles would mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress could be built, step by step, without foreclosing any other promising longer-term developments.² Designed as a foundational framework to support further evolutionary progress, the Guiding Principles are now 10 years old. This milestone provides an opportunity to look back at progress and challenges to date, and more importantly, to fuel a renewed push for scaled-up global implementation in the decade ahead. That is the focus of the present “stocktaking” report.

This stocktaking exercise also comes at a time when the world is facing a convergence of crises – ranging from the ongoing human and financial costs of coronavirus disease (COVID-19) to the existential climate crisis, gross and growing inequality, pervasive gender and racial discrimination, shrinking civic space and the human costs of technological developments.

While a global public health crisis, the COVID-19 pandemic is a human rights emergency at its core. As noted by the Secretary-General of the United Nations: “Against a backdrop of rising ethnonationalism, populism, authoritarianism and pushback against human rights in some countries, the crisis can provide a pretext to adopt repressive measures for purposes unrelated to the pandemic. The instability and fear that the pandemic engenders is exacerbating existing human rights concerns, such as discrimination against certain groups, hate speech, xenophobia, attacks and forced returns of refugees and asylum seekers, mistreatment of migrants, and sexual and gender-based violence, as well as limited access to sexual and reproductive health and rights.”³

The Guiding Principles were developed amidst the 2008 economic crisis and its consequences. The analysis from that time echoes the challenges of today: “In major downturns, those who are already vulnerable – individuals and countries – are often the most severely affected. Global and national efforts are needed to limit the damage and restore economic momentum. Governments must avoid erecting protectionist barriers or lowering human rights standards for businesses; their short-run gains are illusory, and they undermine longer-term recovery ... Companies have had to acknowledge that business as usual is not good enough for anybody, including business itself, and that they

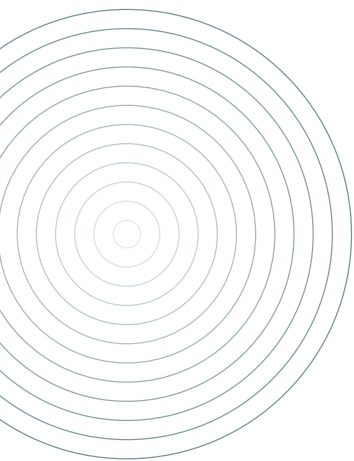
The plan was clear: “establishing universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm”, knowing full well that the unanimous endorsement of the Guiding Principles on Business and Human Rights by the Human Rights Council would, “by itself ... not bring business and human rights challenges to an end”.

Above all, the Guiding Principles provide the authoritative framework and a key opportunity for States and businesses to not revert to business as usual, but to forge a better normal that prioritizes respect for people and the environment.

must better integrate societal concerns into their long-term strategic goals. Society as a whole cries out for remedy where wrong has been done. The terms transparency and accountability resonate more widely than before. And calls for fairness are more insistent. Because the business and human rights agenda is tightly connected to these shifts, it both contributes to and gains from a successful transition toward a more inclusive and sustainable model of economic growth.⁷⁴ The fundamental ambition of the Guiding Principles of fixing the imbalance between the State, people and markets, and of narrowing and ultimately bridging the

gaps between economic forces and respect for individuals, particularly those most at risk, remains fully valid and urgent during today's crises.

Therefore, the 10th anniversary is much more than a landmark. It is a reminder of the challenges that still lie ahead. Above all, the Guiding Principles provide the authoritative framework and a key opportunity for States and businesses to not revert to business as usual, but to forge a better normal that prioritizes respect for people and the environment – supported by other stakeholders and inclusive multilateralism.



Mandate and methodology

Against this backdrop, and as part of its mandate, the Working Group launched a project in July 2020 to take stock of implementation of the Guiding Principles to date and chart a course for action in the decade ahead. Known as the “UNGPs 10+” project,⁵ this initiative has been supported by Germany and Switzerland and carried out in collaboration with the Office of the United Nations High Commissioner for Human Rights and the United Nations Development Programme and other partners.⁶

Multi-stakeholder dialogues, expert consultations, and collaborative research across all regions were a defining feature of the development of the Guiding Principles. This approach has also been at the core of the Working Group’s activities in carrying out its mandate, and of the UNGPs 10+ project which has provided a platform for documenting stakeholders’ assessments of developments to date and priorities for the decade ahead, including by sharing survey responses, written inputs, and summaries of consultations.⁷ More than 30 virtual consultations, including at United Nations global and regional forums, were organized by the Working Group and by partners supporting the project. These consultations included civil society networks in Africa, Asia, Europe, Latin America and North America; several

global, regional and national business organizations and trade unions; investors; States; national human rights institutions; human rights defenders; indigenous peoples’ networks; and academia.⁸

These inputs and consultations, as well as a decade of work by the Working Group,⁹ have helped inform the project. Due to space restraints, however, the present report cannot do justice to all the valuable inputs shared.

The present report provides a high-level stocktaking of progress and challenges to date. It provides the baseline for the forthcoming “Road map for the next decade”, which will set out more detailed recommendations, goals and targets for States, business, and other actors such as civil society organizations, labour unions, indigenous groups, professional associations and international organizations, all of whom have a key role in a broader and wider implementation of the Guiding Principles over the next decade and beyond. Recognizing the role of financial actors as key drivers for advancing business respect for human rights, the present report is also accompanied by an addendum report on the uptake of the Guiding Principles among institutional investors and on future priorities for rights-respecting investment.¹⁰

For more information, see:

UNGPs 10+ project web page

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A common global platform for action and accountability

An authoritative standard for responsible business

There is no doubt that the Guiding Principles have succeeded in providing a globally agreed-upon authoritative standard for what States and businesses need to do to respectively protect and respect the full range of human rights across all business contexts – something which did not exist before 2011.

While the call to declare traditional “corporate social responsibility” dead might have been presumptuous considering the number of awards still given every year, the Guiding Principles have clearly articulated the different but complementary roles of States and business. They have reminded States of their human rights obligations as they relate to business and clarified the responsibility of businesses themselves to respect human rights, even when States may not live up to their own duties. The Guiding Principles have successfully helped put to rest discussion on the “slippery distinction between ‘primary’ State and ‘secondary’ corporate obligations” – which would have invited “endless strategic gaming on the ground about who is responsible for what”.¹¹ By positioning the need for greater access to effective remedy for victims of business-related harms as a core pillar, the Guiding Principles have also helped shift the focus from corporate philanthropy to accountability as an essential feature of responsible business.

This normative development is easy to overlook but has been an essential step for progress. Norms shape laws, policies and practices. After years of confusion, the transformative concept¹² of an internationally recognized business responsibility to respect human rights has become the authoritative standard that defines responsible business.

The fast-growing collection of interpretive and practical guidance to support implementation –

including by the Working Group¹³ – has demonstrated that the regime established by the Guiding Principles is applicable to companies of all sizes and sectors¹⁴, to all business relationships¹⁵, in all countries, and

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for all human rights.¹⁶

Within the United Nations human rights system, treaty bodies¹⁷ and special procedure mandate holders¹⁸ have increasingly applied the Guiding Principles in their work, including through direct engagement with States and business, such as via “communications” addressing allegations of business-related human rights abuse. A mapping carried out for the UNGPs 10+ project of such communications handled by the Working Group and other special procedure mandates from 2011 to 2020 found that the Guiding Principles were expressly referenced in responses by business enterprises and States.¹⁹

The Guiding Principles have also been used as an authoritative normative framework to support the essential efforts of regional human rights mechanisms, in Africa²⁰ and Latin America,²¹ as well as of trade unions, indigenous peoples, civil

Mapping of communications handled by the Working Group and other special procedure mandates from 2011 to 2020

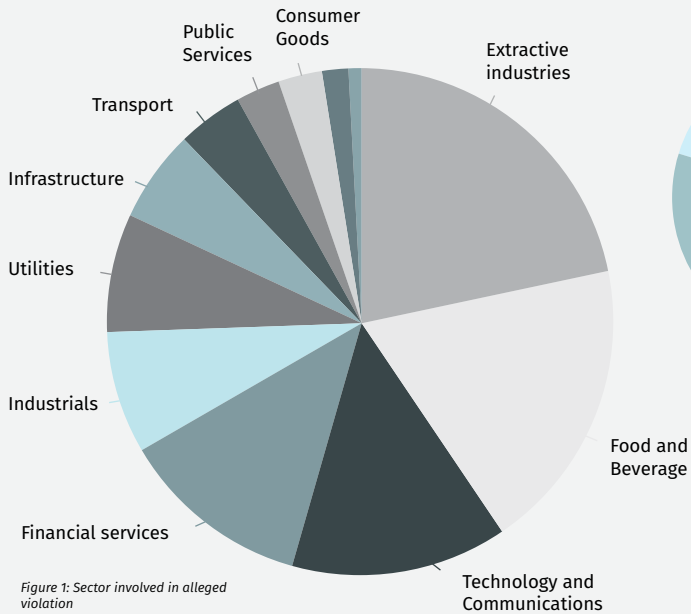


Figure 2: Country of domicile of companies covered in communications:

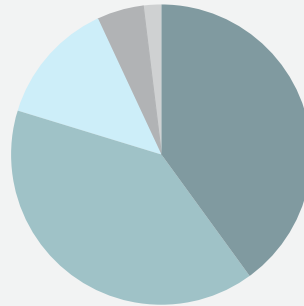
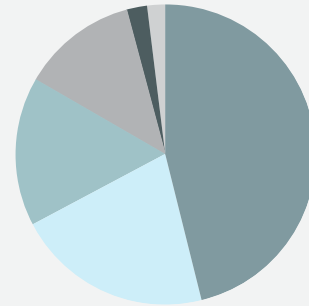


Figure 3: Region where the impacts allegedly took place:



Key for figures 2 and 3

- Asia-Pacific States
- Latin American and Caribbean States
- Western European and Other States
- African States
- Eastern European States
- Global

75 of 174 Communications received a response from the business enterprise.

Of those 75 responses:

- 39 reference the Guiding Principles;
- 46 reference risk management or diligence processes in place to identify and/or manage/prevent adverse human rights impacts; and
- 36 reference remediation.

society organizations and national human rights institutions, to monitor States and businesses and hold them accountable.

Finally, and as importantly, the Guiding Principles have helped enable multi-stakeholder dialogue grounded in a “lingua franca” – a common language understood by both private and State actors.²² The growing number of stakeholders coming together since 2012 to discuss trends and challenges in implementing the Guiding Principles at global²³ and regional²⁴ forums confirms a movement coalescing around the Guiding Principles.

Human rights due diligence

Monitoring of and achieving accountability for business-related human rights abuses is still a work in progress. Yet, a decade of implementation of the Guiding Principles has been marked by its most notable normative innovation – the expectation that businesses exercise human rights due diligence – morphing towards a legally binding standard of conduct, while States and businesses have begun to implement the framework to prevent and address business-related harms to people.

Introduced by the Guiding Principles, human rights due diligence requires businesses to identify, prevent and mitigate their adverse impacts and to account for how they address them. This normative clarification is the cornerstone of the business responsibility to respect human rights, and is likely the most influential contribution of the Guiding Principles. Beyond increasingly being embedded in law, the uptake of the human rights due diligence standard by organizations framing and influencing business operations and decision-making in different regimes has created what can be best described as a consolidated web of pressure, where a range of different actors are mandating or incentivizing business to respect human rights.

The institutional uptake of human rights due diligence by various entities has contributed to fulfilling one of the central objectives of the Guiding Principles by fostering convergence among the many different institutions that shape business conduct. This growing web of uptake has helped to compensate for each entity’s respective weaknesses and in mutually reinforcing one another’s roles.²⁵

Besides the widely known mirroring between the

A decade of implementation of the Guiding Principles has been marked by its most notable normative innovation – the expectation that businesses exercise human rights due diligence.

Guiding Principles and the OECD Guidelines for Multinational Enterprises, corporate human rights due diligence has also been incorporated into the ISO 26000 standard on social responsibility²⁶ and the International Labour Organization's revised 2017 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.²⁷ It is also the standard of reference for the United Nations Global Compact and its participants on the policies and processes they should implement in order to ensure that they follow the Global Compact principles.²⁸ Organizations such as the Fédération Internationale de Football Association (FIFA)²⁹ and the International Olympic Committee have also adopted the standard.³⁰

Importantly, human rights due diligence has started to permeate the world of financial institutions, albeit unevenly and relatively narrowly.³¹ The recognition by such institutions of their responsibility under the Guiding Principles and their integration of human rights due diligence into business relationships is an essential step in fostering corporate respect for human rights, considering the leverage that they have in providing services and influencing public and private economic actors.

In the context of multilateral lenders, the European Investment Bank,³² the European Bank for Reconstruction and Development,³³ the International Finance Corporation³⁴ and most recently the Inter-American Development Bank³⁵ refer to human rights due diligence in their operational policies, or in broader policy statements for other development

finance institutions, such as the World Bank and the African Development Bank.³⁶ These developments have provided a foundation for strengthening human rights safeguards, but overall integration of human rights due diligence into projects financed by development finance and international financial institutions remains low, including as a tool for managing risks to people in mega-infrastructure projects.³⁷ There remains a need to demonstrate that human rights due diligence is carried out effectively by these institutions and that they require the same from businesses and States benefiting from their services.

In practice, the gap still seems important. For example, the 2020 Finance in Common Summit – the first global summit of all public development banks – refused to put human rights on the agenda and in the Summit's resulting declaration. This lack of alignment with the Guiding Principles came despite repeated calls from the Working Group, other United Nations experts and civil society.³⁸ Paradoxically, the Summit's approach would not be characterized as sustainable under the European Union's Sustainable Finance Taxonomy Regulation,³⁹ binding on the organizers, which specifically requires alignment with the Guiding Principles as one of three criteria for investment to qualify as sustainable.

Overall integration of human rights due diligence into projects financed by development finance and international financial institutions remains low, including as a tool for managing risks to people in mega-infrastructure projects.

Similarly, other key international financial institutions must do better and show leadership. For example, the continued apparent inability of

the International Monetary Fund to connect social protection and a sustainable economy led the Special Rapporteur on extreme poverty and human rights to conclude it had “relegated social impact to an afterthought”.⁴⁰

The few developments in the development finance world, however partial, highlight by contrast the lack of engagement by the United Nations as an organization, beyond the efforts of particular entities such as the Office of the United Nations High Commissioner for Human Rights,⁴¹ the International Labour Organization,⁴² the United Nations Children’s Fund (UNICEF)⁴³ and the United Nations Development Programme (UNDP)⁴⁴ to promote the Guiding Principles.

Despite repeated calls from the Secretary-General for the United Nations system to lead by example,⁴⁵ and some initiatives across different fields and entities such as procurement, partnerships,⁴⁶ broader risk analysis⁴⁷ and programming,⁴⁸ and on an issue-specific basis,⁴⁹ the United Nations still falls short in integrating human rights due diligence into its own activities and business relationships.

The consequence is a lost opportunity for the United Nations system to walk its own talk, to spur uptake on a larger scale and to contribute to greater overall coherence in global governance frameworks. Almost a decade of inaction at the executive level of these institutions also reflects the limited number of requests from Member States to integrate and promote the Guiding Principles. To date, the United Nations system has not developed sufficient structures or tools to further reinforce

implementation support, including systematic data gathering, wide-ranging capacity-building, or a global “help desk” for businesses, States, civil society and other stakeholders.

Several business and industry platforms have embedded human rights due diligence into their respective expectations toward member companies,⁵⁰ such as the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters⁵¹ and the International Council on Mining and Metals.⁵² In 2020, the World Business Council for Sustainable Development made having in place a policy to respect human rights and a human rights due diligence process one of its five criteria for membership. The potential of global business organizations has yet to be tapped more fully. For example, the International Chamber of Commerce and the International Organisation of Employers have strongly supported the Guiding Principles but are yet to make human rights due diligence a requirement for members.



Despite repeated calls from the Secretary-General for the United Nations system to lead by example, and some initiatives across different fields and entities such as procurement, partnerships, broader risk analysis and programming, and on an issue-specific basis, the United Nations still falls short in integrating human rights due diligence into its own activities and business relationships.



Protect

The Guiding Principles clearly established that States should not assume that businesses invariably prefer, or benefit from, State inaction, and that States should consider a “smart mix” of measures – national and international, mandatory and voluntary – to foster business respect for human rights.

The clarification brought by the Guiding Principles on the content and extent of corporate human rights due diligence has allowed progress towards regulation and legislation in various jurisdictions and a move towards a smarter mix of actions by States.

The State duty to protect human rights is operationalized in various ways, ranging from regulation to promotion, but also when States pursue investment policy objectives and act as economic actors or in multilateral organizations, all of which are discussed below.

Mandatory human rights due diligence

One of the most remarkable developments of the last ten years is the growing understanding of the need for legal requirements based on the Guiding Principles. Such “hardening” is a normal evolution of norms, evolving from a practice of the few, to a broader uptake, to a soft and then a hard rule. While these evolutions are expected, they are usually very slow. The fast emergence of a broad consensus on the need for legal requirements based on the Guiding Principles – from civil society, union organizations and national human rights institutions, being joined by significant numbers of investors and business themselves – is thus particularly noteworthy, with mandatory human rights due diligence efforts developing at the national, regional and international levels.⁵³ While national and regional efforts have mostly emerged in Organisation for Economic Co-operation and Development (OECD) countries, they represent promising developments towards regulating business conduct more comprehensively

The clarification brought by the Guiding Principles on the content and extent of corporate human rights due diligence has allowed progress towards regulation and legislation in various jurisdictions and a move towards a smarter mix of actions by States.

and in ways that have a global reach.

Starting with efforts focused on severe impacts and certain sectors or commodities,⁵⁴ as transparency initiatives requiring companies to explain how they conduct respective aspects of human rights due diligence,⁵⁵ more recent measures have moved into legislating fuller due diligence processes while also expanding the scope of sectors and human rights covered. For example, the Law on the Duty of Vigilance of Parent and Outsourcing Companies,⁵⁶ passed in France in 2017, was the first national measure to legislate corporate human rights due diligence across sectors and issues.

Other countries, including Germany,⁵⁷ the Netherlands⁵⁸ and Norway⁵⁹ are moving towards similar legislation in 2021, with laws on corporate human rights and environmental due diligence in supply chains to be considered by Parliament.

At the regional level, the European Union is moving towards a cross-sectoral mandatory human rights

and environmental due diligence directive,⁶⁰ and the Inter-American Commission on Human Rights recommended in 2019 that its member States adopt mandatory due diligence.⁶¹ At the international level, an intergovernmental working group was established in 2014 by the Human Rights Council with the mandate of elaborating an international legally binding instrument, which would require States parties to implement mandatory human rights due diligence measures.⁶²

... an increasing number of business voices are supporting mandatory human rights due diligence measures.

While the trend is clear, many States are wary of developing mandatory measures based on fear of being the “first movers” and putting their domestic businesses at a perceived comparative disadvantage. The Swiss Federal Council, for example, used this argument to justify its opposition to a popular initiative requesting mandatory due diligence.⁶³ In this context, while the exact contours of the upcoming European directive remain to be determined, its ripple effect will affect jurisdictions beyond the European Union.

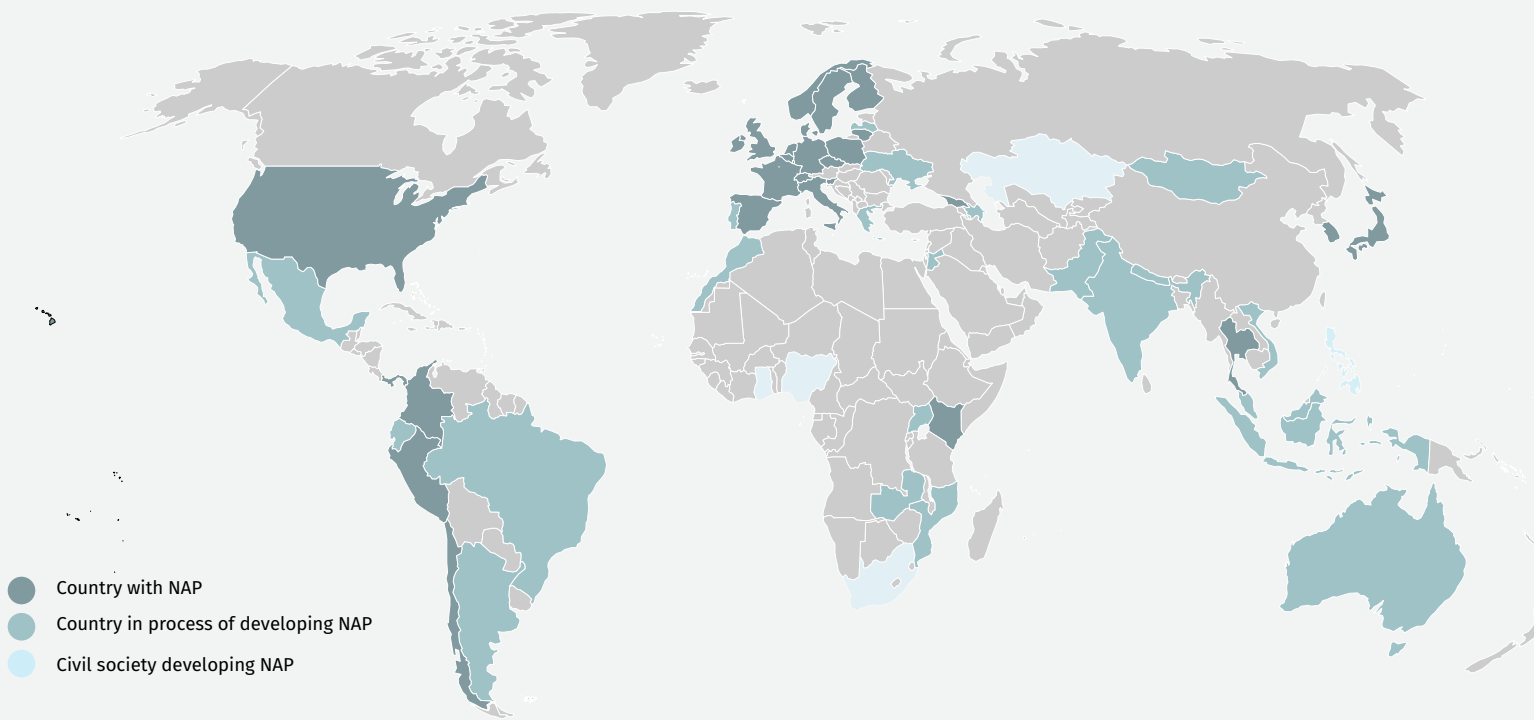
Nevertheless, because of the potential for greater legal certainty, more level playing fields, increased leverage within value chains, better-integrated risk management, and in no small part because of a decade of experience with the Guiding Principles, an increasing number of business voices are supporting mandatory human rights due diligence measures.⁶⁴ In short, the focus has shifted from whether to how to make mandatory requirements effective, and onto the implications of regulatory options.

There are multiple ways in which human rights due diligence can materialize – ranging from disclosure requirements to the broader French mandate for companies to undertake due diligence and

develop “vigilance” plans, similar to compliance programmes. In all cases, however, and not least because the negotiations for regulatory processes are often transactional, these developments will need to be followed with great attention to ensure meaningful due diligence that is aligned with the Guiding Principles. The Working Group has stressed that the nature of legal obligations and liability regimes for these types of measures will need to be carefully calibrated and further clarified⁶⁵ to avoid divergent or arbitrary interpretation, and that it will also be essential to guard against unintended consequences such as “check box” due diligence approaches or empty promises for effective remedies by States and businesses.⁶⁶ The Working Group, other special procedures and United Nations agencies have also stressed the need for such measures to address the heightened risks facing children,⁶⁷ women and LGBTI+ persons,⁶⁸ indigenous peoples,⁶⁹ human rights defenders,⁷⁰ and religious and ethnic minorities, and to address racial discrimination.⁷¹

More broadly, as the move toward mandatory measures inspired by the Guiding Principles continues, it is essential that credible enforcement and sanctions regimes be developed to ensure that these regulations are taken seriously. And additionally, that the legislators responsible for the design and operationalization of these legal regimes – and the lawyers and judges working within them – be familiar with the content of the Guiding Principles. In particular, the capacity of these actors to understand and accurately reflect what the corporate responsibility to respect entails in practice is key to ensuring that the requirements of human rights due diligence are understandable, and are properly implemented by companies.⁷²

It is essential that credible enforcement and sanctions regimes be developed to ensure that these regulations are taken seriously.



National action plans

The development of national action plans on business and human rights has been one of the most visible signs of uptake of the Guiding Principles by States. As of early 2021, there are 25 countries with such plans, two with chapters on business and human rights within their wider human rights strategy, and 18 in the process of developing dedicated plans.⁷³

The processes of developing national action plans have in places fostered improved policy coherence by bringing together State entities that traditionally may not engage in direct dialogue. These processes have also provided domestic platforms for awareness-raising and capacity-building across States and stakeholder groups. In cases where national baseline assessments have been conducted, the national action plan development process has provided previously non-existent benchmarks upon which State implementation of the Guiding Principles can be assessed.⁷⁴

Yet, the relatively low number of national action plans so far demonstrates that most States have still to prioritize implementation of the Guiding Principles. Moreover, 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.⁷⁵

A key challenge across regions remains that ministries in charge of the business and human rights portfolio often have limited resources to build capacity or raise awareness among State entities, or the sufficient political power and mandate from the highest political level to convene or influence key ministries that regulate and incentivize business.⁷⁶ How to empower positive agents of change within States has also not received enough attention.

Domestic policy coherence

The Guiding Principles underlined clearly the need

for policy coherence. They clarified that not only do the human rights obligations of States apply when pursuing investment policy objectives or when they act as economic actors, but also that States should use this role to foster respect for human rights.

While there are areas where States have regulated investment or goods flows associated with higher risks of abuse, and human rights have been mentioned in economic instruments, there is still room for improvement. The European Union–China Investment Agreement, announced in December 2020, provides an interesting example of State practice. Under the agreement, “each party agrees to promote responsible business practices, including by encouraging the voluntary uptake of relevant practices by businesses, taking into account relevant internationally recognized guidelines and principles”,⁷⁷ including expressly the Guiding Principles.

On the one hand, the explicit reference to responsible business conduct standards and principles is a noteworthy evolution for these types of agreements, particularly considering that it is the first time China has agreed to such provisions with a trade partner. It demonstrates progress in recognition of the duty of States to protect human rights in a business context. On the other hand, the voluntary framing of expectations towards business falls short of the baseline of the Guiding Principles and inevitably reinforces the obsolete view that the responsibility of business to respect human rights is optional.

Many States are demonstrating a clear move towards more of a “smart mix” of policies but are still largely hesitant to make full use of the available tools.

Overall, many States are demonstrating a clear move towards more of a “smart mix” of policies but are still largely hesitant to make full use of the available tools, overemphasizing voluntary measures such as awareness-raising, training, research, and promotion of good practices.

As a result, the embedding of the Guiding Principles into international economic agreements, or where States act as an economic actor – in State-owned enterprises, in public procurement,⁷⁸ and through sovereign wealth funds and export credits, among other things – has not seen much progress. As noted in Working Group reports,⁷⁹ despite innovative models being deployed in some States, to date, the promise of the Guiding Principles in the State–business nexus and the potential of States to lead by example remain mostly unfulfilled.

Multilateral policy coherence

The Guiding Principles underline the key role that international policy coherence plays in fostering responsible business through multilateral institutions that deal with business-related issues.

As mentioned earlier, while some international financial and development institutions have taken up the standard of human rights due diligence, most remain far behind, both in policy and in practice. This highlights a clear shortcoming on the part of States as members of these organizations.

The same is true for multilateral institutions and forums that do not deal primarily with business-related issues, where the same siloed approach exists. For example, preventing and addressing adverse impacts on people and the planet is the core of the Guiding Principles and the most significant contribution that most businesses can make toward sustainable development.⁸⁰ Yet, despite explicit reference to the Guiding Principles in the 2030 Agenda for Sustainable Development, the key standards of the Guiding Principles have been largely absent from the United Nations-led 2030 Agenda and the corresponding Sustainable Development Goals.⁸¹ Similarly, uptake of the Guiding Principles in the climate change arena, including in the context of the Paris Agreement,

has also been concerningly minimal, particularly as the due diligence standard and the accountability focus make them a valuable framework for practical achievement of a “just transition” to a green economy.⁸²

The same is true with many other debates connected to the role of business in society, such as anti-corruption, the fight against all forms of discrimination, the future of work, artificial intelligence and stakeholder capitalism. Convergence has also been slow in relation to other key reference points for sustainable business, such as environmental, social and governance (ESG) criteria standards in the field of investment, or various initiatives for sustainability more broadly.

The key standards of the Guiding Principles have been largely absent from the United Nations-led 2030 Agenda and the corresponding Sustainable Development Goals.

The value of the Guiding Principles has been established repeatedly.⁸³ Yet, the connections have not been made enough, and the hard reality is that

the global policy coherence necessary for systemic improvement is still a formidable challenge: silos persist, and key standard-setting processes and organizations have not explicitly made the connection with business and human rights.

This clearly shows the need in the next decade to articulate and promote more clearly the solutions that the Guiding Principles provide to address these global challenges. States of course, but also business and civil society, need to fill this coherence gap and devise clearer strategies and tools to ensure that decision makers within States, companies and financial institutions are aware of and use the Guiding Principles.

Coherence at the national, regional and international levels will be fostered in part by the drive towards mandatory corporate human rights due diligence. However, as the first decade has shown, this development needs to be accompanied by the full range of measures envisioned by the Guiding Principles for States and businesses in order to realize better policy coherence overall. Similarly, the experiences of trade unions, civil society organizations and national human rights institutions over the first decade have clearly demonstrated the critical role that they play in advocating for these developments and in eventually making this alignment a reality and operationalizing measures on the ground.





Respect

The Guiding Principles apply to a universe of tens of thousands of transnational corporations and affiliates, and millions of domestic enterprises spanning the full range of political, economic, social and cultural contexts. The fundamental task of attaining corporate respect for human rights is therefore massive. Even for those businesses building internal capacity, meeting the full expectations set out in the Guiding Principles is a complex and ongoing task, particularly where activities or business relationships connect to conflict-affected areas, corruption, criminal activities, atrocities or other situations requiring “heightened” due diligence.⁸⁴

The fundamental task of attaining corporate respect for human rights is therefore massive.

Emerging practices over the course of the past decade demonstrate that meeting the corporate responsibility to respect is possible. Evidence suggests that considerable business uptake has happened, even if it has been uneven and insufficient in both depth and breadth. Trends in business practices to date are discussed below, alongside critical gaps that remain.

Business uptake

Over the past decade, a growing number of companies have publicly committed to the Guiding Principles. Many such enterprises are developing ongoing internal learning and practices for the different aspects of corporate respect for human rights, and to address negative impacts in their operations and across their value chains.⁸⁵

Although data gathered thus far indicates that OECD-based companies are more likely to commit to the Guiding Principles,⁸⁶ a 2019 assessment of the top 50 publicly listed companies in the stock exchanges of Indonesia, Malaysia, the Philippines, Singapore and Thailand found that 37.1 per cent had publicly committed to respecting human rights.⁸⁷ The same trend seems to be emerging in other regions, especially in Latin America,⁸⁸ and also in Africa and in Arab States,⁸⁹ demonstrating an emerging awareness around human rights that did not exist a decade earlier.

Similarly, while the number of companies committed to the Guiding Principles remains low compared to the number of enterprises overall, this should be put in the broader context of companies’ potential reach through their global value chains. For example, industry coalitions committed to responsible business in supply chains, such as Amfori⁹⁰ and the Responsible Business Alliance,⁹¹ cover millions of suppliers. Even a relatively small membership-based organization such as the Global Business Initiative on Human Rights, composed of 22 companies committed to implementing the Guiding Principles, collectively operates in 190 countries and impacts more than 50 industries and over 2 million first-tier suppliers.⁹²

While there is no comprehensive survey on corporate respect for human rights, studies, benchmarks and ratings that have developed over the course of the past decade point in the same direction: progress but room for progress. For example, the 2020 Corporate Human Rights Benchmark assesses the public human rights disclosures of 229 global companies. Its results show that a growing number of companies are taking up the Guiding Principles, with commitments and procedures described as strong and rigorous. However, still too few companies manage their responsibility robustly. For example, 46.2 per cent of all companies assessed in 2020 failed to score any points under the benchmark’s

due diligence indicators.⁹³

Overall, besides a need to expand geographically, a key priority remains driving respect for human rights more broadly across value chains, including among small and medium-sized enterprises that are challenged by limited resources⁹⁴ and few practical tailored tools.⁹⁵ Similarly, there is an urgent need to also tackle the informal economy, which accounts for more than 6 out of 10 workers and four out of five enterprises in the world.⁹⁶

A key priority remains driving respect for human rights more broadly across value chains, including among small and medium-sized enterprises that are challenged by limited resources and few practical tailored tools.

Implementation and coherence challenges

This uptake is encouraging and is an essential starting point for moving faster towards both further breadth and further depth in implementation. Yet, benchmarking initiatives and stakeholder assessments also highlight, in particular, the apparent disconnect between improvements at the policy level and human rights due diligence in practice – both generally and in relation to specific human rights concerns.⁹⁷

This disconnect also underlines the fact that, just as for States, lack of policy coherence in business practice remains a key challenge to realizing effective implementation of the Guiding Principles. As a starting point, human rights due diligence provides businesses with a means to embed respect for

human rights across activities and the management of business relationships.

Human rights due diligence applies to all the activities of a business. After an initial focus mostly on the production of good and services, or their use, as demonstrated for example by the debate about social media companies, attention has shifted more consistently to a broader range of corporate activities. The most notable example of this shift during the course of the decade was an increased focus on the impact of corporate activities on human rights defenders and the need for companies to exercise due diligence in the civic space – a challenge epitomized by some of the most emblematic business-related human rights cases of the decade.⁹⁸

There is indeed a pressing need to address the crackdown on human rights defenders. More than 2,883 attacks on human rights defenders were registered between 2015 and 2020, increasing in each year of this period.⁹⁹ Although the challenge was not new, the Guiding Principles' due diligence standard clearly stipulates that businesses need to ensure – at a very minimum – that their activities, actions and omissions do not lead to retaliation, violence or stigmatization against human rights defenders.¹⁰⁰

While significant challenges remain, several companies, multi-stakeholder initiatives, industry associations, investors and financial institutions have clarified their position on human rights defenders, either through individual statements or policies, or through collective action.¹⁰¹

The same is less discernible in relation to other key elements of business activities, such as social dialogue, legal actions and corporate lobbying. Amid growing business uptake of human rights due diligence, corporate practice in these areas has shown a persistent lack of coherence or proper understanding of what human rights due diligence actually entails. For example, global trade unions have noted that, “where companies have made some first moves to comply with human rights requirements, we often see this twinned with a refusal to engage with worker representatives and

unions”¹⁰²

Whereas social dialogue rests on a century of international labour standards, legal action by companies and corporate lobbying are creating very specific and still poorly addressed challenges. Both are important and legitimate elements of a society functioning under the principles of rule of law and democratic participation. However, both can also be abused to intimidate critics or steer public policies away from the public interest.

In particular, strategic lawsuits against public participation, aimed at silencing corporate critics, are attacks on human rights defenders, and seem to be on the rise, with 339 such cases initiated by approximately 120 companies (and the law firms that brought the cases) in several sectors in all regions since 2015.¹⁰³

Strategic lawsuits against public participation, aimed at silencing corporate critics, are attacks on human rights defenders.

This has led, for example, the Working Group¹⁰⁴ and the OECD Working Party on Responsible Business Conduct¹⁰⁵ to officially express their concern regarding pressure intended to silence those using judicial and non-judicial mechanisms.

Worryingly, too few businesses have recognized that strategic lawsuits against public participation are not only misguided as far as operating on a principled basis is concerned, as such lawsuits are incompatible with responsible business, but also that engaging in them reflects a poor strategic sense, as they destroy any credibility of corporate commitment to respect human rights at large. Human rights due diligence provides a tool for achieving greater coherence¹⁰⁶ and the appropriate balance, also in relation to responsible lobbying or legal activities, and to assessing and ensuring that no negative impacts on human rights will result from them. More guidance and clarification urgently

need to be developed, particularly in the context of the emergence of mandatory human rights due diligence, which will likely see increased lobbying activity.

Business models

While the relationship between business models and the capacity of business to respect human rights is implicitly recognized in the Guiding Principles, the inherent human rights risks connected to business models has become a topic of increased attention in the last decade. “Fast fashion” received attention in the first half of the decade, and more recently the business models of social media and search engine companies have generated debate for depending on business practices which may, even if unintentionally, contribute to online and offline human rights abuses.¹⁰⁷ Although some sectors are more exposed to such risks than others, business models that may have inherent systematic human rights risks exist across sectors and industries.¹⁰⁸

In part, the issue of business models is beginning to be addressed, particularly in terms of purchasing practices¹⁰⁹ or through specific initiatives such as Unilever’s pledge to ensure that everyone who directly provides goods and services to the company earns at least a living wage or income by 2030.¹¹⁰ This could have a transformative impact by improving the lives of millions around the world. It could help break the deadlock on the issue of living wages, which has been stuck in tripartite negotiations at the International Labour Organization for years.¹¹¹ It provides an example of how the exercising of leverage could be built into the business model. The commitment will have to be implemented by suppliers, and by the company buying from them, in order to create the right incentives and to remove barriers to paying a living wage. Therefore, its actual realization will provide interesting lessons about the types of business models that foster – or impede – corporate respect for human rights for a business

Business models that may have inherent systematic human rights risks exist across sectors and industries.

and its partners.

While business models are obviously an issue of corporate governance, the issue of whether a certain business model is compatible with corporate respect for human rights starts with a basic question that has not been asked enough – if at all – by business executives and boards: How does the company's business model, or the way it operates, link to impacts on people? To date, this simple question, which captures the essence of the Guiding Principles' corporate responsibility to respect, and connects closely with long-term company viability, has not made it to the opening lines of companies' sustainability reports.

Financial actors

Financial actors – such as private sector commercial banks, institutional investors, development finance institutions, and other sources of financial capital – have an unparalleled ability to influence companies and scale up progress on implementation of the Guiding Principles. Many are increasingly recognizing their own responsibility under the Guiding Principles and are probing the companies that they finance or invest in about how their business models and decision-making processes integrate respect for human rights – a development supported in part by the increased use of ESG criteria in investment processes.

For example, the Investor Alliance for Human Rights, launched in 2018, was founded with the goal of equipping the investment community with expertise and opportunities to put the investor responsibility to respect human rights into practice.¹¹² Confirming this trend, Principles for Responsible Investment, the largest responsible investors' initiative, with 3,000 signatories and more than \$103 trillion in assets, in 2020 released recommendations and expectations for its members on the integration of human rights into their investment practices, based on the Guiding Principles.¹¹³

There is still a wide margin for improvement to reach the potential of investment institutions and ESG data providers to leverage better human rights performance by companies. For example,

only 16 out of 56 stock exchanges surveyed by the Sustainable Stock Exchanges Initiative referred explicitly to the Guiding Principles in their ESG disclosure guidance.¹¹⁴ A key challenge is that most financial actors fail to connect human rights standards and processes with ESG criteria and investment practices because of a prevailing lack of understanding in the sector that social criteria, and many environmental and governance indicators, reflect human rights issues.¹¹⁵

This is further compounded by the lack of common standards and even understanding of what constitutes ESG practices. While this is clearly a challenge, it is also an opportunity to underline the central usefulness of the Guiding Principles in this field. As articulated in the Investor Alliance for Human Rights' 2020 investor toolkit, the Guiding Principles "provide a management system approach ... that can assist investors with systematically assessing and addressing a broad range of ESG risks and impacts. This approach allows investors to more appropriately focus on credible processes and outcomes rather than often impractical and inefficient 'issue by issue' or 'sector by sector' approaches."¹¹⁶

Most financial actors fail to connect human rights standards and processes with ESG criteria.

This is beginning to be recognized, for instance in Regulation (EU) 2020/852 on the Establishment of a Framework to Facilitate Sustainable Investment, better known as the Taxonomy Regulation.¹¹⁷ Representing a step towards more coherence in the field, this regulation allows businesses' economic activities to qualify as environmentally sustainable only where they are carried out in alignment with the Guiding Principles.¹¹⁸ The corresponding Sustainable Finance Disclosure Regulation requires certain financial actors to disclose information about their human right due diligence, since March 2021.¹¹⁹

This development has great potential for facilitating the alignment of “sustainability” with the Guiding Principles, as regulators and standardization organizations adapt their requirements to align with the Taxonomy Regulation. Above all, this development is a clear signal to business to deal with the issues of sustainability, climate change and human rights as linked.¹²⁰ While welcomed, it is too early to assess the functioning of these requirements in practice. It will be particularly important to avoid the risk of incoherence, when assessing claims by businesses that they are aligned with the Guiding Principles, and also to avoid the risk of reducing respect for human rights to a simple box-ticking exercise.

Movement is slow among financial sector actors overall, however. While there are signs of some progress among some actors, others are hardly moving. The 2019 Human Rights Benchmark study by BankTrack of 50 of the world’s largest commercial banks¹²¹ found that more banks than ever now had human rights policies in place, but also that four out of five banks were meeting fewer than half of the requirements of the Guiding Principles, and that most of those policies covered project lending rather than all the banks’ activities. While falling short of meeting the Guiding Principles standards, some banks have started to address their responsibility, and initiatives such as the Principles for Responsible Banking offer opportunities for progress.¹²² Private equity and venture capital firms are lagging far behind, with no discernible uptake, and require more attention going forward.

Data challenge

For investors and for all other stakeholders, the past decade has highlighted the need to develop clearer data to assess the actual state of play of the corporate responsibility to respect human rights in two different directions.

Firstly, there is a need to get a more granular picture of corporate uptake of the Guiding Principles at the national level. National employer federations and chambers of commerce would be uniquely positioned to support this task, however the

The past decade has highlighted the need to develop clearer data to assess the actual state of play of the corporate responsibility to respect human rights .

potential has not been tapped to date.

Secondly, and more fundamentally, there are still no clear data to assess the human rights performance of businesses. For instance, the number of allegations of negative impacts, commonly used as a performance proxy, is a deeply insufficient indicator to assess performance, not least because of issues of access to complaints mechanisms for affected rights-holders.

This challenge was confirmed by a survey of eight major ESG rankings, ratings and indices, alongside the disclosures of approximately 400 companies. It demonstrated that the vast majority of companies focused on inputs, outputs and activities rather than on outcomes or results.¹²³ These are all important elements; however, measuring inputs, outputs and activities means that companies spend time collecting data that focus on what they are doing, rather than on what they are achieving. In other words, companies do not know whether their human rights policies are being implemented optimally and whether they have responded effectively to the identified human rights impacts.¹²⁴

This challenge is further complicated by a still prevailing misplaced understanding of the relationship between the Sustainable Development Goals and business respect for human rights – that every business makes a contribution to achieving the Sustainable Development Goals by meeting its responsibility to address potential and actual negative impacts on people. However, the reverse,

that by supporting realization of one or more specific Sustainable Development Goals companies automatically meet their responsibility to respect human rights, is not necessarily true. Therefore, indicators relating to the Goals, such as those being developed by the World Benchmarking Alliance,¹²⁵ can be a red flag for potential negative impact if the score is low, however a strong score in terms of contribution to the Goals is not necessarily an adequate measure of corporate human rights performance.

Similarly, while current initiatives such as the Corporate Human Rights Benchmark provide useful indications on awareness or uptake of the corporate responsibility to respect human rights, their methodologies and data sets are not designed to provide adequate information on the actual performance of these companies.

Moving from measuring what is done to what is achieved is without a doubt challenging. It is also

highly necessary, as this lack of performance data affects the ability of business to allocate resources where they are the most needed or efficient. It also affects the ability of investors, civil society organizations and policymakers to identify and assess implementation by businesses that walk the talk compared to those who simply talk¹²⁶ and, in turn, to devise effective strategies and policies.

Bridging these persistent measurement gaps requires support for innovations for measuring performance, such as collective efforts by ongoing initiatives including those of the Climate Disclosure Standards Board, the Global Reporting Initiative,¹²⁷ the International Integrated Reporting Council and the Sustainability Accounting Standards Board, and the updated methodologies of the Corporate Human Rights Benchmark¹²⁸ and the Valuing Respect Project.¹²⁹





Remedy

By emphasizing that greater access to effective judicial mechanisms is “at the core of ensuring access to remedy”, with non-judicial mechanisms as an essential complement, the Guiding Principles have positioned accountability as a central element of the State duty to protect and the business responsibility to respect human rights.

The potential to remedy business-related abuses with the speed, reduced costs and/or transnational reach, and the complementary role of judicial and non-judicial mechanisms called for in the Guiding Principles, exists. Unfortunately, as clearly identified by, for example, the Accountability and Remedy Project launched by the Office of the United Nations High Commissioner for Human Rights in 2014,¹³⁰ many – if not most – of the barriers in accessing both judicial and non-judicial mechanisms identified in the Guiding Principles still largely remain, including for basic issues such as access to information.

Many – if not most – of the barriers in accessing both judicial and non-judicial mechanisms identified in the Guiding Principles still largely remain.

Non-State-based grievance mechanisms

Over the past decade, an increasing number of companies have developed grievance mechanisms with the aim of addressing complaints and allegations of human rights abuse. Companies have developed these individually, with the support of business associations,¹³¹ and/or through

collective initiatives.¹³² These mechanisms have made valuable contributions to accountability and remedy, although limitations remain.¹³³ For example, stakeholders’ assessments indicate challenges relating to lack of trust and effectiveness in design, including in building gender-sensitive and culturally appropriate mechanisms,¹³⁴ and to challenges of effective transparency and monitoring.¹³⁵ Nonetheless, worker-driven social responsibility initiatives,¹³⁶ such as the Coalition of Immokalee Workers’ Fair Food Program, demonstrate the benefits of developing site-level grievance mechanisms and that their usual shortfalls can be avoided by giving workers a leading role in shaping and monitoring these mechanisms. The same could be envisaged for community-driven mechanisms beyond those focused on workers’ rights.

State-based non-judicial grievance mechanisms

State-based non-judicial grievance mechanisms take many different forms.¹³⁷ For example, national human rights institutions have handled business-related complaints by conducting investigations and national inquiries.¹³⁸ At the same time, many national human rights institutions continue to face significant challenges due to insufficient mandates, lack of resources, and limitations on enforcing their decisions or recommendations, especially in cross-border cases.¹³⁹

National contact points under the OECD Guidelines for Multinational Enterprises continue to be one of the most visible mechanisms dealing with business and human rights disputes.¹⁴⁰ Within their mandated or chosen limitations of providing mostly conciliation, some national contact points have improved in effectiveness, despite significant differences between countries. Civil society and OECD itself have underlined that appropriate State support is required to realize the full potential of national contact points.¹⁴¹ The same is true

for national human rights institutions, which underlines the more active role that States should play in supporting these bodies.

Judicial remedies

The number of cases concerning corporate-related abuses that are being heard in courts could indicate better access to remedy for victims at the judicial level.¹⁴² Sadly, victims still face diverse systemic or procedural obstacles to accessing effective judicial remedies.¹⁴³

A major report commissioned by the Working Group examined the reach and impact of the Guiding Principles on the decisions of regional and national judicial and quasi-judicial mechanisms across more than 50 jurisdictions.¹⁴⁴ It found that such references were limited, as judicial bodies adjudicate claims on the basis of domestic laws and the Guiding Principles do not take the form of domestic legislation. Nonetheless, Latin America has been the most active region in using the Guiding Principles, with several national courts, including the Colombian¹⁴⁵ and Peruvian¹⁴⁶ constitutional courts and the Inter-American Court of Human Rights,¹⁴⁷ having made express reference to them in judgments or judicial decisions. More interestingly, the study found that the absence of references by a judicial or quasi-judicial body does not, per se, mean that the Guiding Principles themselves are not being enforced and upheld. Rather, any time that one of these bodies offers an avenue and outcome of redress for a business's failure to respect human rights provisions, it is upholding the Guiding Principles.

This current lack of reference to the Guiding Principles will probably change due to the emergence of legislation that makes explicit reference to them, such as the European Union's upcoming regulations mentioned earlier, or legislation that expressly notes the Guiding Principles as part of their impetus, such as the French Law on the Duty of Vigilance of Parent and Outsourcing Companies. In any case, the Guiding Principles are used as a reference point for applicants to bolster arguments that businesses should be held to account for failing to respect

human rights. Examples of cases where the Guiding Principles were cited by the parties or in amicus briefs were found in English courts,^{148, 149} in courts of the United States of America¹⁵⁰ and in Canadian courts.^{151, 152, 153}

Since 2019, a series of potentially groundbreaking decisions have signalled jurisdictional openness in some States to hold parent companies accountable for the acts of their subsidiaries, including in Canada, the Netherlands and the United Kingdom of Great Britain and Northern Ireland.¹⁵⁴ These decisions could contribute quite fundamentally to changing the legal exposure of companies, even if the fundamental challenges of the imbalance of power in terms of financial and legal resources or political influence remain a serious hurdle to effective remedies.¹⁵⁵

At its core, the issue reflects a more fundamental problem of rule of law, and the trend does not support optimism. Not only do most countries score poorly on the annual World Justice Project Rule of Law Index; the 2020 edition shows that the rule of law has further diminished in a majority of jurisdictions.¹⁵⁶

This further confirms the complementary but essential role of judicial and non-judicial mechanisms and, as previously noted by the Working Group, an "all roads to remedy"¹⁵⁷ approach to realizing effective remedies. To support policy action in this area, the OHCHR Accountability and Remedy Project has delivered workable recommendations for more effectiveness of remedial State and non-State mechanisms.¹⁵⁸ The next step for realizing this critical dimension of the Guiding Principles is to see their uptake by States.

Arbitration

A measure of innovation to lower barriers in accessing remedy has been demonstrated by the Accord on Fire and Building Safety in Bangladesh, created in the aftermath of the Rana Plaza building collapse in 2013. The Accord includes over 200 global brands, retailers, and importers, across 20 countries; eight Bangladeshi trade unions; two

global trade unions; and four non-governmental organizations. It established not only a worker complaint process and mechanism but also an arbitration mechanism where the parties to the Accord, labour unions and companies can submit any dispute to an arbitration mechanism.¹⁵⁹

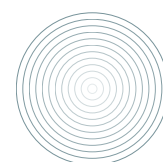
These initiatives may seem surprising, as investment arbitration has long been seen as almost antithetical to human rights. However, international arbitration can certainly be an effective grievance mechanism in line with the Guiding Principles, providing both a mechanism for business and the possibility of a remedy for those affected by business activities if certain criteria are met: that is, if designed with key issues related to business and human rights disputes in mind, such as the potential imbalance of power between parties, the public interest in the resolution of such disputes, and the need for arbitrators with human rights expertise.

In this spirit, the Hague Rules on Business and Human Rights Arbitration, established in 2019, provide a set of procedures for the arbitration of disputes concerning business-related human rights impacts.¹⁶⁰ The Hague Rules are based on the Arbitration Rules of the United Nations Commission on International Trade Law, modified to the context of business and human rights disputes. The Rules specify that arbitration is not a substitute for State-based judicial or non-judicial mechanisms and is meant as a grievance mechanism under the Guiding Principles. Examples where the Rules could apply are numerous,¹⁶¹ for instance for a company seeking to enforce contractual human rights commitments against a business partner; for a business listing arbitration under the Hague Rules as the final port of call under its grievance mechanism; for parties incorporating arbitration into project or project finance documentation; or in a similar way to the Rana Plaza accord or the new Olympic host city contracts, in industry codes of conduct, or accords.

The exact contribution of the Hague Rules in helping to fill access to remedy gaps will be determined by their use over time, including with regard to key challenges such as parties'

consent and enforcement of awards.¹⁶² However, considering the origins of international arbitration and its role in settling disputes between parties who have little trust in each other, and come from different countries, opposing legal traditions, different cultures of belief and quite often deficient judicial systems, it would seem logical, when the necessary safeguards are included, for international arbitration to be considered as one potential option in the range of solutions to improve access to remedy.

Overall, the situation of remedy is well summed up by African civil society organizations who have aptly noted that there is “a wide range of options for remedies but not enough actual remedy”.¹⁶³





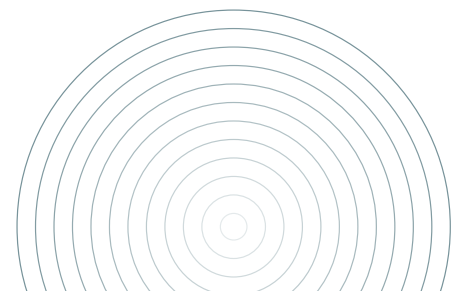
Regionalization



The business and human rights movement recognized from the beginning that a global approach alone would not lead to wide and comprehensive uptake of the Guiding Principles and would need to be complemented by regional platforms, including the different regional forums that have been organized over the years.¹⁶⁴

Going forward, there will need to be attention paid both to maintaining momentum in the regions

that have seen relatively higher levels of activity in the first decade, such as Europe, Latin America and parts of Asia, and to those such as Africa, the Middle East and Central Asia, which have seen much less. Existing efforts have demonstrated that when backed by more serious financial resources, an increase in implementation efforts and peer learning is noticeable.¹⁶⁵





Supporting implementation

Many of the challenges for the next decade of the Guiding Principles show ultimately that the business and human rights movement has gained in speed and coverage, but has not succeeded enough in addressing massive capacity-building needs. It is not a new observation.

This challenge was pointed out as a strategic issue in 2011 in the recommendations of the Special Representative of the Secretary-General on business and human rights on how to move forward at the time.

As the challenge persists, it might be time to reconsider the validity of a fund to support implementation efforts. As proposed in 2011 and elaborated on in 2014,¹⁶⁶ the fund would provide a mechanism for supporting projects developed at local and national levels that would increase the capacity of States to fulfil their obligations in this area and strengthen efforts by business associations, trade unions, civil society organizations and others

seeking to advance implementation of the Guiding Principles. It could be a means to provide support to small and medium-sized enterprises to meet their responsibilities, and to support civil society organizations working with affected stakeholders in monitoring efforts.

Effective capacity-building and support for implementation overall means knowing what works and what does not. Thus, going forward, monitoring progress by businesses as well as States needs strengthening. The universal periodic review has been the platform for examining States' implementation of the Guiding Principles.¹⁶⁷ This needs to be systematized in the context both of the universal periodic review and of the United Nations Forum on Business and Human Rights, as part of the wider architecture to promote protection of and respect for human rights.





Conclusion

Quantifying the “success” of the Guiding Principles is fundamentally a futile exercise: not only is 10 years a blink of the eye in “international time”, but a corporate executive will focus on the many positive developments that have taken place over the decade, whereas the victims who suffer from corporate-related abuse will see the many challenges they still face.

The persistence of business-related abuses is a major concern and a source of deep frustration, and should be a matter of urgent priority attention by States and business. The last decade has underscored the point made in the Guiding Principles: voluntary approaches alone are not enough. The rise of mandatory measures will undoubtedly accelerate both uptake and progress. At the same time, the experience of many decades has demonstrated that legal measures are essential but not sufficient to ensure business respect for human rights.

The persistence of business-related abuses is a major concern and a source of deep frustration, and should be a matter of urgent priority attention by States and business.

The Guiding Principles, and human rights due diligence that is focused first on those most at risk, provide a blueprint for States and business for a responsible recovery from the COVID-19 crisis. Looking beyond the pandemic, at other major global challenges, meaningful progress will require all

stakeholders to continue a systemic approach, and persistent efforts to leverage the multiple actors beyond States that frame policies, practices and indeed regulations that shape business behaviours in a smart mix of measures, which cumulatively will make the difference we need, without hoping for a silver bullet solution.

Ensuring corporate respect for human rights is by no means an easy mission. Efforts to promote implementation of the Guiding Principles to date have enabled broader levels of participation from a wider range of stakeholders, challenging them but also bringing them together to learn from each other and to generate the diversity of responses that the complex nature of business and human rights requires. The upcoming “road map” rests on the common platform that was established in 2011 and will set a course for action by States, businesses and others.

From the efforts of the past decade, both successes and failures, we have started to climb the hill, knowing better what works and what doesn’t, who leads and who lags. The next decade needs to increase the pace, always striving to “achieve tangible results for affected individuals and communities”.¹⁶⁸

The Guiding Principles, and human rights due diligence that is focused first on those most at risk, provide a blueprint for States and business for a responsible recovery from the COVID-19 crisis.

Endnotes

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163 See www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/inputs/acca.pdf.

164 See www.ohchr.org/EN/Issues/Business/Pages/AboutRegionalForumsBHR.aspx.

165 See the Responsible Business Conduct in Latin America and the Caribbean project (of OHCHR, ILO and OECD), at www.ohchr.org/EN/Issues/Business/Pages/JointProjectResponsibleBusinessConduct.aspx; and UNDP B+HR, at <https://bizhumanrights.asia-pacific.undp.org>.

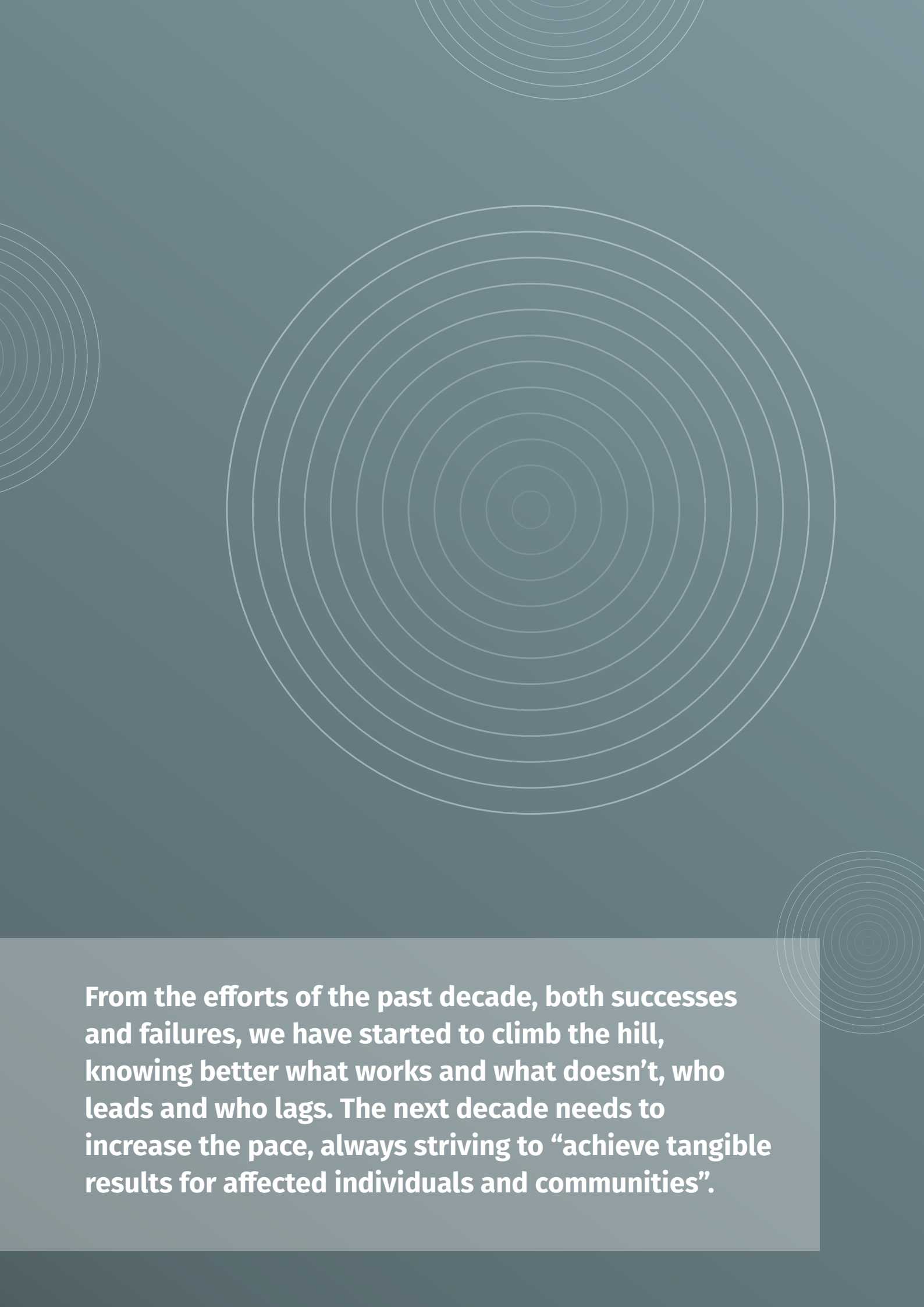
166 See A/HRC/26/20/Add.1.

167 See, for example, www.humanrights.dk/publications/kenya-national-action-plan-business-human-rights-case-study-process-lessons-learned and www.business-humanrights.org/en/latest-news/china-commits-to-un-human-rights-council-to-respect-human-rights-in-its-foreign-investments.

168 A/HRC/17/31, annex.

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From the efforts of the past decade, both successes and failures, we have started to climb the hill, knowing better what works and what doesn't, who leads and who lags. The next decade needs to increase the pace, always striving to “achieve tangible results for affected individuals and communities”.