



ACCA

AFRICAN COALITION FOR
CORPORATE ACCOUNTABILITY

ACCA'S Submission to the call for inputs on "Business and human rights: towards a decade of global implementation" – UNGP 10+

Background

On November 02, 2020, the African Coalition for Corporate Accountability (ACCA) held the African regional consultation with the UN Working Group on Business and Human Rights (BHR) in the context of the UNGP 10+. About thirty representatives of ACCA members and other civil society organisations attended the consultation. The following inputs are those of the ACCA's Secretariat, representing the Coalition as a whole. It provides answers to the specific question asked by the WG.

1. WHERE HAS PROGRESS TAKEN PLACE IN UNGPS IMPLEMENTATION OVER THE COURSE OF THE LAST DECADE? WHAT ARE THE PROMISING DEVELOPMENTS AND PRACTICES (BY GOVERNMENTS, BUSINESSES, INTERNATIONAL ORGANISATIONS, CIVIL SOCIETY ORGANISATIONS, ETC.) THAT CAN BE BUILT ON?

Africa is known as a continent with abundant natural resources hungered after by business operators worldwide. Against this background, over the last decade or so, the continent has witnessed an increased foreign and local direct investments in key sectors including, natural resource exploitation, infrastructural development, largescale agriculture and manufacturing and production among others. Whereas these are critical in advancing social and economic transformation and as such enjoyment of human rights, most of them have been associated with increased cases of human rights abuses and violations. All these off a backdrop of weak national and regional policy and regulatory framework regarding business and human rights.

In the African context, despite the cautious approach adopted by many stakeholders, including ACCA, the adoption of the UNGPs in 2011 marked a vital milestone in articulating human rights standards in existing human rights instruments for both state and business enterprises. The principles under the UNGPs helped clarify state obligations and corporate responsibilities regarding protection and respect for human rights in the context of business activities. The Principles also set expectations about how to prevent and address

negative impacts on human rights arising out of business activities. The UNGPs triggered critical debates regarding policy and regulatory frameworks needed to address widespread business impunity across the continent.

Broadly, the most significant contribution made by the UNGPs has been the renewed awareness, momentum and a consensual appreciation around the need to advance respect for human rights in business activities and enhancing business accountability. The UNGPs **“Protect, Respect and Remedy”** framework has enjoyed global recognition as its normative contribution lies not in the creation of new international legal obligations but in elaborating the implications of existing standards and practices for States and businesses, –integrating them into a single, logically coherent and comprehensive document and identifying gaps for improvement. In the last 10 years, there has been progress and ACCA strongly believes that this momentum has been critical and must be acknowledged and capitalised for further developments.

This momentum has also been perceptible at the regional level with the AU's involvement. This led to initiatives aiming to set up a normative framework reflecting the need for preventing business-related business-related abuses and the need for accountability. Despite a long delay, the AU develops a [draft policy framework on the BHR](#) modelled after the UNGPs' framework.

The [African Commission's Working Group on Extractives industries, Environment and human rights violations in Africa](#) has intensified its work over the last decade. It is worth recalling that the Working Group was created in 2009, three years before the UNGPs. The Commission's Working Group has developed, for instance, a [State Reporting Guidelines on Articles 21 and 24 of the African Charter on Human and Peoples' Rights Relating to the Operations of Extractive Industries in 2017](#) and a [Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector](#). Both instruments mentioned the UNGPs, although they adopt a more robust approach to the issue of the human rights obligations of business entities.

The work of the Commission's working group on economic, social, and cultural rights also impacts standards-setting on business and human rights. The Working Group has adopted resolutions on [states obligation to regulate private companies in the health and education sectors and most](#) on March 4, 2020, the African Commission on Human and Peoples' Rights adopted [Resolution 434](#), on the need to develop norms on States' obligations to regulate private actors in the provision of social services.

[The Malabo Protocol](#) (on the African Court of justice and human rights) has also marked an unprecedented development regarding business accountability in Africa. Although the protocol is yet to come into force, it provides for corporate criminal liability.

Although efforts to domesticate the UNGPs remain slow and insufficient at the national level, some African countries have taken steps endorsing the UNGPs framework through development of National Actions Plans (NAPs). These NAPs remain an essential means of promoting the implementation of the UNGPs.

To date, **Kenya** is the first and only African country that has adopted a NAP on BHR. **Morocco** has integrated a chapter on business and human rights into its 2018–2022 National Action Plan for Democracy and Human Rights. The first planned measure is to adopt a human rights national action plan through engagement with all stakeholders. Uganda has also undertaken the process of developing a [NAP](#) which is in its final stages awaiting approval from the Cabinet. **Mozambique** has recently launched a business and human rights initiative, including plans to develop a NAP. **Ghana** was the first African country to participate in the Voluntary Principles on Security and Human Rights Initiative for extractive sector companies. The **Nigerian** National Human Rights Institution, Human Rights Commission and Nigerian civil society are leading efforts to develop a national action plan for Nigeria, and a draft plan was produced in 2017. In **November 2017**, Tanzania released a national baseline assessment on the status of implementation of the Guiding Principles, intending to develop a national action plan for business and human rights.

In **South Africa**, civil society members have conducted a "shadow" national baseline assessment of the current implementation of business and human rights frameworks. SA has announced its intention to adopt a NAP. Several public and private initiatives are underway towards the development of a national action plan in Malawi.

Concerning the CSO, due to the daily violations of human rights by business companies, there has been an increasing involvement of CSOs on issues related to BHR. Since its creation in 2013, the ACCA has constituted a driving force in this continent's movement. More than 130 organisations are members of the Coalition. Through its advocacy work and capacity building sessions, ACCA has enormously contributed to awareness-raising in this field.

However, there is still a lot to be done to adopt a comprehensive legal framework to promote business respect for human rights at the continental level. Not only because the voluntary nature of the UNGPs' framework has mostly proved to be ineffective on the continent, but it has failed to address some of the most pressing issues faced by local African communities.

2. WHERE DO GAPS AND CHALLENGES REMAIN? WHAT HAS NOT WORKED TO DATE?

The voluntary nature of the UNGPs remains a huge challenge in their implementation. This has proved a major challenge especially around pillar 3 on access to remedy—especially where state and business actors are in complicit in the abuses and violations.

Other gaps and challenges include;

a. Voluntary Nature of the UNGPs

The UNGPs have mainly remained ineffective on the continent, mainly due to the political will of states and voluntary nature of the UNGPs which has rendered implementation and enforcement ineffective. The most illustrative indication of their lack of effectivity is African states' failure to adopt NAPs to implement the UNGPs at the domestic level.

Although NAPs were not strictly designed as legal instruments, their adoption by states indicates their willingness to take ownership of the new international consensus that the UNGPs were supposed to manifest. It is concerning that in most African countries, the UNGPs' are almost unknown to many stakeholders and are barely referred to. This situation has affected access to remedy by communities.

In that instance, there remains a pressing need for binding obligations regarding business and human rights. The most convincing explanation for the ineffectiveness of the UNGPs lies in their “non-binding character”. The fact that any specific legal consequences are attached to the violation of UNGPs, especially for companies, is undoubtedly one reason for their failure to be effective in Africa. When liability is not provided for under legal instruments, it is hard to imagine any deterrent effect stemming from voluntary measures. It was expected that after the adoption of UNGPs, states would have adopted a coherent legal framework in order to give effect to them. This failure coupled with increasing cases of corporate capture and weak institutional capacities has maintained the status quo and business impunity.

b. Cultural/traditional realities

Some of the most pressing challenges that ACCA has identified pertain to the inadequacy of the existing legal framework. An illustration of that fact is the issue of property rights on the land. Indeed, most business activities on the continent require and depend on the acquisition of large land areas to the detriment of local communities. This is due to the discrepancy between communities' traditional land management system with the state's formal legal system inherited from colonial regimes. In its [recent report](#) (published together with Accountability Counsel), ACCA has pointed out that “Formal legal structures that facilitate investment but conflict with traditional practices and social and environmental protections can impede access to justice at every level, in both judicial and non-judicial settings. This is a complex issue tied to many interrelated challenges, including the alarming rise of 'corporate capture' of state decision making and the weak rule of law that persists in many African countries. The way land is held presents an array of obstacles

for communities seeking access to remedy when land is taken or harmed due to international investment and development projects. The land regime in Africa is not uniform; it is diverse and varies widely from state to state. There are some traditions in which families acquire and retain inter-generational rights to community land by clearing and planting it. Under other African traditions, land is held in trust for future generations under a communal system, and land is not to be destroyed but only used by each generation. The majority of traditional and communally used and occupied land in African nations is formally owned by the state.¹⁷³ Corporate land use, granted by the state, stands in direct contrast to the understanding that traditional local communities have surrounding use of land and resources”.

c. Failure of Pillar 3 on Access to Remedy

One of the most crucial indications that UNGPs have not delivered is the issue of access to remedy. In Africa, the communities and individual whose rights are affected by business-related activities have faced major challenges in accessing timely and effective remedies. The third pillar of the UNGPs, i.e., access to remedy, has failed to achieve the expected results. [ACCA and AC](#) have summarised this situation in their report in unambiguous terms: noting that there is "a wide range of options for remedies but not enough actual remedy." Despite the wide range of avenues communities can pursue, access to remedy for human rights and environmental abuses arising out of business activities remains inaccessible, weak and ineffective. Additional barriers that impede access to remedy include threats and violence against human rights defenders, formal legal structures that fail to protect community rights, lack of access to information, and insufficient advocacy support. In the rare victories where communities' and their advocates' strategies effectively overcome these barriers and result in remedy agreed to on paper, whether or not there was remedy provided that was proportionate to the harm experienced remains unclear.

3. WHAT ARE KEY OBSTACLES (BOTH VISIBLE AND HIDDEN), DRIVERS, AND PRIORITIES THAT NEED TO BE ADDRESSED TO ACHIEVE FULLER REALISATION OF THE UNGPS?

In line with these challenges, ACCA believes that some specific areas should be developed to tackle the most pressing issues that African communities face in the context of business activities and respect for human and environmental rights. The main obstacles to the implementation of the UNGPs in Africa are:

a. The weak legal framework

We have already mentioned this point above. The first step to moving forward in terms of implementation is to take ownership of the UNGPs by incorporating them in domestic systems through not only NAPs but also through clearly binding legislations.

b. Corporate power and the absent rule of law

There is an increasing corporate capture of state institutions that has led to corporate impunity in Africa. Corporations have strong connections with state agencies and affect the democratic role of these institutions. Most of the times, these connections are fueled by corruption. In this context, through their access to the decision-making process by states, corporations can exercise important control over administrative decisions and adjudicatory mechanisms. As a result, they escape the traditional oversight of companies' activities that the state is supposed to exercise. In situations where the state is willing to exercise such an oversight, the overwhelming economic power imbalances between some corporations hinder accountability. It is therefore critical that extraterritorial obligations of states over transnational corporations be strengthened in policy and legal frameworks to ensure effective access to remedy measures beyond national remedial mechanisms.

c. Attacks on Human Rights defenders.

There is shrinking space for most human rights defenders on the continent to operate. Speaking up about human rights and environmental abuses from business activities in Africa is more dangerous and has led to threats of retaliation and even deprivation of life for most human rights defenders. Companies in complicit with some state agencies have been increasing efforts to silence dissent and operate in an environment free from civil society monitoring. However, this is a global crisis for affected communities and the civil society organisations supporting them. This situation is fostered by a proliferation of legislation restricting civil society operations, the media, freedom of assembly in many African countries and worldwide. While these restrictions are neither new nor unique to Africa, there is an urgent need to reverse the trend of closing civic space as defenders are increasingly under threat.

4. WHAT SYSTEMIC OR STRUCTURAL CHALLENGES NEED TO BE TACKLED TO REALISE SUSTAINABLE DEVELOPMENT BASED ON RESPECT FOR HUMAN RIGHTS?

a. Rethinking globalisation; business model and privatisation.

The dominant capitalist system is built on the neo-liberal cult of the free market, which prioritises profits over the wellbeing of the majority of people. The most shared conception of business activities is that business should generate profit for those who engage in it. Although emphasising the human rights and environmental "responsibilities" of business entities, the UNGPs have failed to reverse such a profit-oriented conception. All stakeholders should learn lessons from the current COVID pandemic, which has revealed the global economy's extreme fragility and its profit-at-any-cost model. The globalisation of the world economy has expanded the power of large corporations and the lack of human rights accountability vis-à-vis their operations.

In Africa, austerity measures, including massive wholesale privatisation and structural adjustment policies, have weakened social services. These policies have led to the denial of minimum socio-economic rights, such as the fundamental right to health, to millions of individuals worldwide, exacerbating inequalities in an unprecedented way. As [pointed out](#) by the African Commission on Human and Peoples' Rights, private actors' involvement in the provision of social services has contributed to the low level of enjoyment of economic, social and cultural rights. Any tangible progress in the BHR agenda would have to tackle these structural issues.

b. Mandatory obligations on companies including mandatory human rights due diligence

As pointed out above, voluntary measures have a limited effect on business entities. ACCA has always recommended the adoption of more binding obligations on companies. Any meaningful developments in this context should prioritise the current treaty process led by the Intergovernmental Working Group on Transnational Corporations and other Business Enterprises. In addition to efforts at the international level, states should adopt domestic legislation imposing human right due diligence on corporations. Due diligence must be conducted at any stage of the development of a project. This includes compliance with the highest standards of human rights impact assessments, social and environmental impact assessments and Free Prior and Informed (FPIC principle) in the African context. In the [African context](#), the FPIC principle is not only applicable to indigenous people but also all communities. This includes meaningful engagement with local communities and access to information at all stages of the project. In conflict-affected areas, compliance with due diligence standards may imply disengagement from the business project.

c. Gender-related issues

The UNGPs do not tackle the gendered way in which business-related abuses operate in many countries, including African countries. Social constructs of gender and patriarchal underpinning in traditional societies often mean that women and girls are the least likely

to be consulted about projects that affect their livelihoods yet bear the brunt of impacts such as denial of access to water, food security threats, and physical and sexual abuse. In Africa, there is also the need to stress the technological divide between men and women, affecting access to information.

d. Primacy of Human Rights instruments over Trade and Investment agreements

For a long-time human rights consideration were not included in bilateral investment treaties or investments chapters in trade agreements concluded by African states. This situation has led to the systematic protection of investors rights to make profit to the detriment of human and people's rights. More than 900 investment treaties exist between African states and non-African states. Investors have used these treaties to bring an uncountable number of cases against African States before Investor-states disputes settlement mechanisms such as ICSID. This situation has put into jeopardy the rights of citizens of a host state, i.e., the right to food and right to educations through demanding excessive intellectual property rights protection, right to land, right to decent work and fair compensation, right to a healthy and safe environment, right to life, right to development etc. The rights of investors should not have priority over human and people's rights. Hence the need for pressing binding development on these issues to affirm in strong terms the fundamental character of human rights and their primacy over trade and investments treaties.

5. IN CONCRETE TERMS, WHAT WILL BE NEEDED IN ORDER TO ACHIEVE MEANINGFUL PROGRESS WITH REGARD TO THOSE OBSTACLES AND PRIORITY AREAS? WHAT ARE ACTIONABLE AND MEASURABLE TARGETS FOR KEY ACTORS IN TERMS OF MEETING THE UNGPS' EXPECTATIONS OVER THE COMING YEARS?

In addition to the recommendations already made above, the following actions should be conducted to achieve meaningful progress.

- All stakeholders must promote effective accountability through the promotion of binding obligations

- African states must adopt NAPs and mandatory obligations, including human rights due diligence in all its components.
- All states, especially home countries of TNCs, must enhance their domestic legislation and adopt mandatory human rights due diligence obligations on their companies. They must also clearly extend their jurisdiction on extraterritorial activities of their companies.
- The AU must develop a more comprehensive legal framework on BHR. The current state of the draft policy on BHR is insufficient and only duplicated the UNGPs, which have proven ineffective.
- Regional Economic Communities (RECs) in Africa must develop a specific and progressive BHR agenda. There is a need to look afresh and revise constituent treaties of these RECs to include human rights and environmental challenges.
- There is a pressing need, especially in Africa, to link the BHR agenda with the anti-corruption agenda and the fight against gender-based violence and climate change.
