



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Response to Call for Input: UNGPs 10+ / Next decade of business and human rights action

Submission to the UN Working Group on Business and Human Rights (UNWG)

November 2020

What is the information based on:

Information about the submission: Input is collated from the work of the South African Human Rights Commission, which includes complaints from the public (individuals and groups); collaboration and engagement with the State and civil society organisations, experts etc., research and advocacy.

- 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 organizations, civil society organizations, etc.) that can be built on?**

It has made private sector companies more aware of the fact that they have a human rights responsibilities and that they may, at some point, be held account for violations of rights by State parties and NHRIs. The guiding principles have provided a standard to which private sector companies can be judged and held accountable for a violation of rights and plans/processes/remedies etc., to which the company has agreed.

Promisingly, there has been a greater focus on transparency in companies, in terms of supply chains, environmental and social impacts, and business operations. More and more companies, signing on to the Global Compact, are engaging on issues such as due diligence,

public engagement, transparency, access to information, and more. Civil society and NHRIs can build on these areas.

2. Where do gaps and challenges remain? What has not worked to date?

Because the UNGPs are not legally binding, private companies adopt its principles merely as a paper exercise and do not follow through on their commitments. In the absence of strong state regulatory frameworks and accountability mechanisms, or a lack of monitoring of legislation and policy, companies are not compelled to act responsibly. This happens even when other branches of that company or subsidiaries, do follow the regulatory frameworks in countries that have strong enforcement mechanisms. Essentially, companies do not hesitate to violate rights, when the opportunity arises.

Parent companies do hold their subsidiaries accountable for violations in other regions, countries, or communities and there is often a disproportionate impact on developing countries, particularly those with poor regulatory frameworks and/or poor legal enforcement.

There is very little buy-in and / or awareness of the UNGPs from small, medium and micro companies and local companies.

3. What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realization of the UNGPs?

Explicitly, the UNGPs are not enforceable. As such, multi-national as well as trans-national companies may ascribe to the principles enshrined therein, but do not necessarily intend or do follow them. As mentioned previously, human rights responsibility becomes a check-box exercise and one that looks good on a company's annual report and website. The UNGPs fail to adequately address the victims' rights to an effective remedy as a stand-alone right a principle recognised under international human rights law, and do not provide any tangible mechanisms that would make this right more effectively enforceable.

Hidden obstacles: While the UNGPs were purposely drafted in that way, to make them widely applicable and to limit loopholes, the UNGPs are entirely too broad and allow for an ambiguous reading of them. Furthermore, in certain cases, regional instruments or domestic law is more effective in addressing violations by private sector actors, and the UNGPs to some extent undermine these laws and efforts by setting lower accountability thresholds and due to the UNGPs constituting guidance and not law.

The UNGPs may also lead to law reform efforts being limited, in that accountability mechanisms beyond the UNGPs may not be pursued. Other hidden obstacles relate to the extra-jurisdictional applicability of human rights, and arise in the context of, for example, Foreign Direct Investment, where investment agreements may trump a State's human rights obligations (whether these obligations arise at national, regional or international level).

4. What systemic or structural challenges need to be tackled to realize sustainable development based on respect for human rights? Changes in business models.

Developmentally, strategic environmental assessments and planning should map out land use in particular areas / districts / cities, to ensure that land is used appropriately. Such processes may indicate land uses that differ from the norm of economic development at all cost. This may also solve the issue of competing land needs, e.g. between mining and agriculture.

Structurally, business models must change, to allow for greater integration of business in to communities, with greater transparency, access to information and engagement with interested and affected parties and individuals. There should be a focus on skilling those community members that do not have access to education or employment opportunities.

The imposition of penalties for corporate impunity is essential. Particularly in countries that lack strong enforcement mechanisms. Parent companies must ensure that subsidiaries subscribe to regulatory frameworks. Governments worldwide have consistently failed to oversee or regulate the extraterritorial human rights practices of their companies. The only way forward is to change this.

Related to the issue of extraterritorial human rights practices are Foreign Direct Investment and multi-lateral investment practices. Investment agreements should be explicitly regarded as subsidiary to human rights obligations and best practice. Investor-state dispute settlement (ISDS) tribunals should accordingly defer to human rights standards that prevail at international level.

Victims face a number of barriers in accessing effective remedies, such as juridical barriers and practical obstacles, both at the national and extraterritorial level. This is largely because "victims" are not viewed as rights-holders. It is thus important that "victims" are viewed as rights-holders, as they have a progressive and significant role to play in business.

The UNGPs are only as strong as their corporate members choose to make them, and are useless to companies that do not want to join. While the UNGPs can help to define good human rights practices, enforceable rules are the only way of ensuring real, systematic change.

Furthermore, the UNGPs do not stress the need for free, prior, and informed consent, which is vital in disadvantaged and vulnerable communities.

The UNGPs do not explicitly consider inter-sectional rights and gender, which is essential for the progressive development of human rights and business. The UNGPs do not explicitly protect human rights defenders who are at the fore-front in the struggle for businesses to respect human rights.

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 suggestions listed above, the narrative of companies not investing in countries with strong regulatory and enforcement frameworks must be changed. Companies should not invest in markets where they cannot effectively compete without being complicit in serious human rights abuses. This is essentially bad for business and their reputations. There is therefore an incentive for companies to invest in countries that have strong legislation and enforcement – it is good for the local economy and good for the company's reputation and sustainability. Where countries do not have such frameworks, large corporations should insist that, for example, Bilateral Investment Treaties impose human rights best practice standards on host countries.

6. Is there other information relevant to the UNGPs 10+ project that you'd like to share?

A binding treaty is needed for business and human rights. The binding treaty should unequivocally state that businesses corporations have a legal responsibility to respect human rights. Although a binding treaty is not the panacea, it will force States to report to the relevant committee. Like with other treaty bodies, States will have to collect information for reporting purposes, however damning that information may be and will have to reckon with their failures.

Furthermore, civil society organisations and community-based organisations will have an opportunity to present their experiences at an international level, forcing a State to face allegations and allowing a committee to provide recommendations to which a State must comply.

A treaty body will be is particularly useful in Africa, where systemic abuses and human rights violations by the private sector are far too common, as is the failure by States to hold these companies to account. In addition, State complicity in these human rights violations is also common and a mechanism is required to deal with such corruption.

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