

A BASELINE ASSESSMENT ON BUSINESS AND HUMAN RIGHTS IN AFRICA: FROM THE FIRST DECADE TO THE NEXT

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FOREWORD

Over a decade ago, the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs). As a result, the UNGPs rapidly became the first globally recognized framework for outlining the responsibilities of states and businesses in preventing and addressing business-related human rights abuses. Therefore, it serves as the authoritative framework for all those working to prevent and address these abuses.

With its fast-growing economy, Africa offers many business opportunities to foreign direct investors and private companies. These opportunities are further amplified by the discovery of new natural resource deposits and economic policy reforms. However, increasing private sector involvement in the region's development has not always been accompanied by adequate efforts from States and other stakeholders to ensure that businesses respect human rights, especially in conflict settings, and provide remedies to victims exploited by business activities.

Since the adoption of the UNGPs in 2011, the United Nations Development Programme (UNDP) has been committed to creating a conducive environment for their implementation. This is because of our fervent belief that development is a fundamental human right and that in delivering development, the respect for human rights cannot be compromised. This report, prepared by Scott Martin and Joseph Kibugu under the guidance of Mr. David Omozuafoh and Ms. Victoria de Mello, to whom I am deeply grateful, contributes to monitoring and tracking the progress and challenges encountered in implementing the UNGPs in Africa.

In the first decade of the global recognition of the UNGPs, Kenya and Uganda pledged concrete commitments to adopt them. More than ten other African countries have initiated the development of National Action Plans on Business and Human Rights. However, while we applaud the growing momentum in the continent, the uptake remains low. There is more we, as the international community, can do.

The report calls us into a deeper reflection on the need to push for the implementation of the UNGPs and related instruments with an emphasis on securing access to remedy and justice for victims of business-related abuses in more states in Africa. The UNDP Regional Bureau for Africa and our Country Offices are delighted to continue assisting our partners in fostering inclusive and sustainable growth based on these Guiding Principles, allowing for the success of sustainable business models, promotion and protection of human rights and the advancement of societies where no one is left behind.

Roselyn Akombe

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ABBREVIATIONS

ACCA	African Coalition for Corporate Accountability
AfCFTA	African Continental Free Trade Area
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
COVID-19	Coronavirus Disease
CSOs	Civil Society Organizations
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
GDP	Gross Domestic Product
ILO	International Labour Organization
NAP	National Action Plan on Business and Human Rights
NBA	National Baseline Assessment on Business and Human Rights
NGOs	Non-governmental Organizations
NHRIs	National Human Rights Institutions
OHCHR	Office of the United Nations High Commissioner for Human Rights
SADC	Southern African Development Community
SLAPP	Strategic Litigation Against Public Participation
SMEs	Small and Medium-sized Enterprises
SOEs	State-owned Enterprises
UNGPs	United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

EXECUTIVE SUMMARY

In 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (UNGPs), structured in three pillars. [Pillar I reiterates the States’ duty to protect human rights by adopting policy, legislative and regulatory measures to ensure that businesses do not violate human rights.](#) [Pillar II spells out the businesses’ responsibility to take steps to avoid, mitigate and redress human rights abuses.](#) [Pillar III echoes the necessity for both States and businesses to ensure that victims of business-related human rights harm have access to remedy.](#)

Africa has lagged behind other regions in efforts to implement the UNGPs and advance the business and human rights agenda. As the continent’s economic activity (including foreign direct investment) continues to increase, propelled by the recent launch of the African Continental Free Trade Area (AfCFTA), its businesses have come under scrutiny for their impact on human rights. Accordingly, African Governments, national human rights institutions (NHRIs), civil society organizations (CSOs) and corporations have steadily increased their focus on enhancing corporate accountability frameworks in recent years. As 2021 marks a decade since the adoption of the UNGPs, [UNDP commissioned this report to take stock of the progress and challenges in implementing the UNGPs in sub-Saharan Africa.](#)

[The report devotes a chapter to each of the three UNGP pillars to assess progress in their implementation.](#) [Chapter I is divided into several parts.](#) Part A focuses on the progress made in the development of national baseline assessments (NBAs) and national action plans (NAPs) for business and human rights as a benchmark for UNGP implementation. It finds that only two African countries (i.e. Kenya and Uganda) have concluded and published NAPs since the adoption of the Guiding Principles in 2011, while only 10 African countries have taken initial steps towards developing NAPs, such as Ghana, which carried out an NBA. The low uptake of NAPs in Africa can be explained by a variety of factors, including a lack of awareness and ownership of the UNGPs, a lack of political will to address business-related human rights abuses from Governments seeking to attract foreign investments, a lack of support from donors and development partners and suspicion of the voluntary nature of the Guiding Principles.

Part B of chapter I provides an overview of measures taken by States at the national level, such as the domestication of international human rights treaties. Part C includes a look at the unique role of State-owned enterprises (SOEs) and efforts to ensure both horizontal and vertical policy coherence. Chapter I also features a section on the role

of regional institutions and frameworks in advancing the UNGPs. These include the African Union (AU) Draft Policy on Business and Human Rights, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, regional economic blocks and AfCFTA. The chapter concludes that the AU and its relevant human rights and governance institutions are far from reaching their potential to support UNGP implementation in the region. As a result, the AU should begin by adopting its Draft Policy on Business and Human Rights and the AfCFTA Agreement to catalyse further discussions.

[Chapter II broadly examines the measures taken by businesses to ensure that they respect human rights.](#) The first part of the chapter finds that there is a very low level of adoption and mainstreaming of human rights policies within the operations of businesses in sub-Saharan Africa, owing to a low level of awareness and the lack of an adequate regulatory framework. The report further identifies obstacles facing businesses in implementing the UNGPs in sub-Saharan Africa, including their perception of the high cost of embracing the Guiding Principles in business operations. The second part of the chapter assesses the extent to which businesses have embedded human rights due diligence to assess, avoid and mitigate human rights risks in their operations. Although some promising examples were found, this part concludes that they are very much an exception rather than the rule, nor do they represent a trend. Despite the voluntary nature of human rights due diligence in Africa, developments in many of the European countries that conduct significant trade with African countries could catalyse a movement towards a higher uptake of human rights due diligence. This chapter concludes by finding that countries affected by ongoing conflicts continue to host businesses that appear insufficiently aware of their responsibilities under international human rights law, international humanitarian law or the Guiding Principles to undertake heightened human rights due diligence in these settings.

[Chapter III focuses on pillar III of the Guiding Principles.](#) Part A examines the role played by NHRIs in ensuring that the victims of corporate-related harm have access to remedy. It finds that institutions in the region make contributions by addressing individual complaints, facilitating alternative dispute resolution (e.g. mediation, conciliation, etc.) and launching investigations (prompted by an individual complaint or systemic human rights abuses). NHRIs in sub-Saharan Africa also indirectly facilitate access to remedy by raising awareness; influencing policy and legislation; and conducting monitoring, research and advocacy. Unfortunately, they face numerous obstacles; chief among these are the limited mandate of many NHRIs, a lack of resources, limited knowledge of available remedies and the difficulty in addressing cross-border business-related abuses. Part B of this chapter establishes that only a small percentage of African companies have grievance mechanisms or require their business partners to have them. The chapter concludes by encouraging NHRIs to collaborate with regional and international mechanisms and work with stakeholders to facilitate justice for victims of business-related human rights abuses.

Chapter IV briefly discusses how business operations in the target countries have impacted women, human rights defenders and indigenous communities disproportionately disadvantaged by business operations. While there is growing awareness about this discrimination, it concludes that more must be done to reduce the resulting inequalities, some of which are culturally entrenched. It encourages States to include women, indigenous peoples and human rights defenders throughout the entire process of developing and adopting NAPs. Furthermore, it recommends that businesses should encourage the involvement of vulnerable groups, particularly by holding stakeholder consultations as part of human rights due diligence, and they should apply a rights-based gender lens to corporate activities.

In summary, the report's findings make for sober reading, although they do find some cause for optimism. Some States have initiated the development of NBAs and NAPs, albeit at a slower rate than in other regions. National laws and regulations to prevent abuses by corporations have not been effectively enforced. Businesses do not have human rights policies in place and have not embraced mandatory human rights due diligence. In addition, access to remedies remains elusive owing to procedural and legal barriers. The judicial decisions of regional courts have not been enforced, given the lack of political will. Furthermore, voluntary frameworks have not been effective in promoting respect for human rights by businesses. As a result, there is a need to consider whether mandatory human rights due diligence would be a solution.

The result is that much more must be done as a matter of urgency. Bringing groups on the fringes of the conversation to the centre remains as crucial as ever. Policymakers and other stakeholders must devise innovative ways to include the informal sector—highly prominent in African economies but neglected in official discourse—in these processes. The good news is that the UNGPs are slowly becoming better known in the region; however, experts and activists are wary that commitments and words have not been followed by concrete action and change. It is therefore paramount that States, the AU and civil society receive more support to hold corporations accountable for human rights violations through the strategic entry points identified in the report's conclusion.





CHAPTER ONE

Unless there is a strong political will from States, things will not move. One response might be there is no political will, so let us knock on some other doors. My view is that we need to create political will within States. Knocking on other doors alone will not be enough. We need mandatory rules and regulations. Without that, nothing much will change. Mandatory rules alone will not fix everything, but free-riders have to be punished by different means and responsible companies need to be rewarded. Carrots and sticks together.

– Surya Deva, UN Working Group on Business and Human Rights. Interview. December 2020.

PILLAR I: THE STATE DUTY TO PROTECT HUMAN RIGHTS

Several African countries have experienced fast economic growth in recent times, spurred on by sizeable foreign direct investment across a range of sectors and industries. For example, in the decade prior to the outbreak of its civil war, Ethiopia had emerged as a major destination for the apparel sector, with industrial parks created as special economic zones to drive manufacturing-related job creation. Agribusinesses, including from the global North, have acquired huge tracts of land in Africa with the support of home and host Governments, often in the name of improving local food security. There has been an upsurge in the discovery of natural resources, including gas, oil and minerals in Africa, with a significant amount of exploration work. Governments in the region have invested in infrastructure, and Chinese companies constitute a significant percentage of those constructing roads, railroads, seaports and airports. Technology companies are increasingly viewing Africa as the next frontier for expansion, owing to its large population as well as the current low level of digital penetration.

This growth has the potential to increase tax revenue, creating employment and connecting local businesses to the global supply chain; however, it has frequently come at a significant cost to the human rights of local communities. There have been numerous cases of business operations that have harmed human rights, with local governments unable or unwilling to intervene. Foreign companies operating in Africa are alleged to be among those that cause or contribute to violations of labour and health standards. According to a report by the Business and Human Rights Resource Centre, there were 181 human rights allegations linked to Chinese investment in Africa between 2013 and 2020.¹ Furthermore, while beneficial, investments are often seen as allowing foreign investors to reap the bulk of the benefits while local communities often suffer damaging

¹ Business and Human Rights Resource Centre, “Going Out” Responsibly: the Human Rights Impact of China’s Global Investments (2021).

consequences. For instance, initiatives to promote food security have been criticized as predatory arrangements that disproportionately favour foreign agribusinesses at the expense of local peasant communities.²

These examples have raised the question of the responsibility of African States to address human rights abuses by businesses, be they State-owned, foreign or domestic. Fortunately, the Guiding Principles provide a framework for understanding the State's obligations in this regard. Pillar I of the UNGPs provides that the State has a duty to prevent, investigate, punish and provide redress for adverse human rights impacts caused by business enterprises. States are expected to do this through the promulgation and implementation of effective legislation, regulations, policies and adjudication, as well as through compliant business practices when the State is operating as an economic actor.³

This chapter is divided into six parts. Part A provides an overview of the steps taken by States in sub-Saharan Africa to implement the Guiding Principles through the adoption of NAPs or NBAs. Part B reviews the status of domestic legislation to ensure that States fulfil their duty under pillar I. Part C considers whether SOEs in Africa fulfil their key role of setting a high bar to protect human rights, as required under the UNGPs. Part D examines the contributions of regional and subregional mechanisms to advancing human rights compliance by business enterprises. Part E briefly explores the need to ensure that the practices of businesses operating in conflict-affected areas are consistent with their obligation under the UNGPs to pay greater attention to the human rights impact of their operations. The chapter concludes with recommendations for all stakeholders to improve the implementation of pillar I of the UNGPs.

2 United Nations, *Global Assessment Report on Disaster Risk Reduction*, chapter 10: 'No free lunch: agribusiness and risks to food security' (2013).

3 The State duty to protect human rights is presented in principles 1–10 of the UNGPs. These 10 principles can be broken down into two categories: (i) foundational principles (principles 1 and 2) and (ii) operational principles (principles 3–10). The operational principles are further broken down into specific themes: (i) general State regulatory and policy functions, (ii) the State-business nexus, (iii) supporting businesses respect for human rights in conflict-affected areas; and (iv) ensuring policy coherence. See United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York, 2011).

A. DEVELOPMENT OF NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS

Since the adoption of the Guiding Principles in 2011, the most notable indicator for assessing their implementation in a particular State is to identify whether it has drafted an NBA and/or NAP and whether these documents comprehensively address business and human rights issues. The United Nations Working Group on business and human rights has recommended that States adopt such policy documents to protect against adverse business-related impacts on human rights and also provides guidance in that regard.⁴

NBAs are usually precursors to NAPs and serve “the primary objective of assessing the current level of implementation of the UNGPs in a given State. [They] bring together an analysis of the legal and policy gaps in UNGP implementation with an overview of the adverse human rights impacts of business to identify the most salient human rights issues in a given context.” Importantly, NBAs also “serve to inform the formulation and prioritization of actions in an NAP”.⁵ While NBAs provide a situational analysis, NAPs are policy documents that guide a State’s duty to protect against human rights abuses by business enterprises.⁶

The following paragraphs highlight the notable progress made in developing NBAs and NAPs in some sub-Saharan African countries at the time of writing this report.

Kenya: Kenya was the first African country to commit to adopting an NAP. A draft was completed in June 2019. In April 2021, the NAP was adopted by the Cabinet, but it has not been adopted by Parliament. Further information on the progress (or lack thereof) on the implementation of the NAP can be found in the [case study in box 1](#).

Uganda: Uganda accepted recommendations made by Kenya and Norway during its universal periodic review to develop an NAP and implement the UNGPs in 2016. The Ministry of Gender, Labour and Social Development was subsequently tasked with coordinating its development in partnership with the Initiative for Social and Economic Rights. In February 2019, an inception meeting was held to identify stakeholders and a road map for the NAP process. Consultations were then held to discuss the plan’s contents. The Minister of Gender, Labour and Social Development approved and signed the NAP, signalling its formal adoption as a policy document in August 2021.⁷

Nigeria: The National Human Rights Commission of Nigeria and CSOs were at the

4 United Nations Working Group on business and human rights, *Guidance on National Action Plans on Business and Human Rights* (Geneva, 2016).

5 Danish Institute for Human Rights and International Corporate Accountability Roundtable, *National Action Plans on Business and Human Rights: a Toolkit for the Development, Implementation and Review of State Commitments to Business and Human Rights Frameworks* (2017), p.25.

6 For more information on the importance of an effective NAP, see UN Working Group, *Guidance on National Action Plans on Business and Human Rights*.

7 Uganda, Ministry of Gender, Labour and Social Development, *The National Action Plan on Business and Human Rights* (2021).

forefront of efforts to develop an NAP.⁸ Between 2012 and 2017, CSOs facilitated consultations on corporate responsibility with a range of stakeholders, including businesses, government departments, community members and others. In 2017, in partnership with the Commission, CSOs facilitated a strategic multi-stakeholder forum, which resulted in the creation of a draft NAP. The Commission has highlighted that the draft NAP is a working document and anticipates that it will be updated with further input to reflect varying regional and geopolitical considerations within the country. There has not been any further significant progress in the development of an NAP since then.

United Republic of Tanzania: Through its 2013–2017 Human Rights Action Plan, the Tanzanian Government tasked the Commission for Human Rights and Good Governance with developing an NBA to support the development of an NAP.⁹ In November 2017, the State released its NBA, providing a comprehensive account of the status of protection of human rights with regard to business activities in Tanzania; however, the development of the NAP has stagnated as a result of resource constraints.

Zambia: Zambia published its NBA in 2016.¹⁰ The case study in box 2 considers developments since its publication. The Danish Institute for Human Rights notes: “Efforts to push for the development of an NAP have been led by the Zambia Human Rights Commission, the country’s national human rights institution,” as opposed to the recommended practice in many countries by which a government ministry leads the process.¹¹

Mozambique: The Mozambique NBA was drafted in 2016 by the Ministry of Justice, Constitutional and Religious Affairs and a CSO coalition named Liga dos Direitos Humanos, with support from UNDP. The NAP has not been developed.

Ghana: The Ghana Institute of Management and Public Administration is working on developing an NBA.¹² While it was due to be published in 2020, it has not been publicly disclosed.

South Africa: CSOs have published a shadow NBA; however, there are indications that the Government has prioritized negotiations on a binding treaty. The NBA has therefore not strongly impacted policymaking processes to date.¹³

8 Nigeria, *National Action Plans on Business and Human Rights in Nigeria: Consultative Draft* (2017).

9 Danish Institute for Human Rights, *National Action Plans on Business and Human Rights: Tanzania*. Available at: <https://globalnaps.org/country/tanzania/>.

10 Zambia Human Rights Commission and Danish Institute for Human Rights, *Zambia National Baseline Assessment on Business and Human Rights* (2016).

11 Danish Institute for Human Rights, *National Action Plans on Business and Human Rights: Zambia*. Available at: <https://globalnaps.org/country/zambia/>.

12 Danish Institute for Human Rights, *National Action Plans on Business and Human Rights: Ghana*. Available at: <https://globalnaps.org/country/ghana/>.

13 African Coalition for Corporate Accountability (ACCA), *ACCA's submission to the call for inputs on "Business and human rights: towards a decade of global implementation" – UNGP 10+ (2020)*.

Liberia: The State's Pro-Poor Agenda for Prosperity and Development includes a commitment to develop and implement an NAP. The first step was to include an action point in this regard in the 2013–2018 National Human Rights Action Plan.¹⁴

Morocco: Morocco integrated a chapter on business and human rights into its 2018–2022 National Action Plan for Democracy and Human Rights, which was officially adopted in December 2017. Nevertheless, Morocco does not have a separate NAP.¹⁵

14 Liberia, *National Human Rights Action Plan of Liberia: 2013–2018* (2013), p. 14.

15 Danish Institute for Human Rights, *National Action Plans on Business and Human Rights: Morocco*. Available at: <https://globalnaps.org/country/morocco/>.

Box 1. Case study: Drafting the Kenya National Action Plan

The Kenya National Action Plan process was launched when Kenya accepted the recommendation from Norway during its universal periodic review to develop an NAP. The Government subsequently confirmed that the Department of Justice would spearhead the process, together with the Kenya National Commission on Human Rights. A national steering committee headed by the Department of Justice brought together actors from civil society, trade unions, industry associations and other government departments to manage the process.

The steering committee convened a stakeholders forum, where it was agreed that the Kenya NAP would focus on five priority areas: (i) labour rights, (ii) environmental protection, (iii) land and natural resources, (iv) revenue transparency and (v) access to remedy. Regional and national level consultations were conducted, culminating in thematic working groups for each of the five priority issues. Upon completion of the consultations, validation meetings were held at the regional level. The NAP was then drafted and forwarded to the Cabinet for approval through the Office of the Attorney General. In April 2021, the NAP was adopted by the Cabinet.



Factors that enhanced the development of the national action plan

a. State leadership

Kenya was the first country in Africa to commit to developing an NAP. The leadership of State officials at the highest level, including the Attorney General and the Secretary of the Department of Justice, signalled the Government's commitment and ensured that other stakeholders understood the seriousness with which the Government was undertaking the exercise.

b. Financial and human resources

While some NAP development processes across sub-Saharan Africa have been slowed by a lack of both human and financial resources, that was not the case for Kenya. Where required, the national steering committee drew on external experts. For example, experts on each of the priority issues guided discussions at the thematic working group level.

Lessons learned

While the State's success in producing the first draft NAP in Africa is commendable, there are three issues that posed or continue to pose a challenge to both the content and the process.

a. Lack of broad-based consultation to allow for both the depth and breadth required

Although an effort was made to bring together all stakeholders, the consultations were not thorough enough to capture the varied interests of actors within the same category. For instance, despite the representation of businesses through individual companies and industry associations, the consultations did not provide sufficient representation for special groups, such as informal workers and small- and medium-sized enterprises, which form a significant percentage of the business actors in Kenya. Similarly, some of the affiliate trade unions under the umbrella of the Central Organization of Trade Unions did not have an opportunity to articulate their nuanced issues.

b. Consistency in obtaining the goodwill of political actors

Although the process benefited immensely from the leadership of the Attorney General, there was a perception that the development of the NAP was left to technocrats until the final stages of review. This led to the view that the political leadership, support and goodwill exhibited at the beginning of the process was dissipating.

c. Lack of clarity in the process following drafting

After the drafting process, many stakeholders expressed concern that they had not been apprised of further developments. Regular updates on the process of approval by both the Cabinet and Parliament could contribute significantly to maintaining interest and enthusiasm in the process, which is critical, since the same actors will be needed to implement recommendations.

Source: Danish Institute for Human Rights, The Kenya National Action Plan on Business and Human Rights: a Case Study on Process, Lessons Learned and Ways Forward (Copenhagen, 2020).

1. Potential reasons for the low uptake of national action plans in Africa

It is encouraging to see efforts made to draft NBAs and adopt NAPs in a few African countries. Nevertheless, the percentage of countries that have initiated the process remains relatively small compared to other regions, particularly Western Europe and Asia. To gain further insight, the authors of this report spoke to stakeholders throughout sub-Saharan Africa about the apparent limited progress. The principal explanations offered by stakeholders are described below.¹⁶

a. Lack of awareness of the Guiding Principles

An interviewee working throughout sub-Saharan Africa noted that the implementation of the UNGPs had been “very thin, to say the least”. He emphasized that the lack of progress was most pronounced in Francophone countries, noting that “in this part of the world, most of the time the UNGPs do not even exist”. As an example, he noted that in Burkina Faso, stakeholders in business and human rights are still discussing corporate social responsibility and not the UNGPs. According to him, “nobody [even] refers to the UNGPs” and “only a few know about their existence”. He finally noted that the lack of awareness was not a reflection of the commitment of CSOs in the region but rather that of government officials.

An international expert with vast experience throughout sub-Saharan States attributed the lack of awareness to a “complete disengagement” between Geneva, where diplomatic representatives from sub-Saharan Africa are often based, and capitals throughout sub-Saharan Africa. He believes that while members of the diplomatic corps in Geneva have been actively participating in UNGP-related events, at best this may have led only to increased awareness within their United Nations missions but not in State Governments.

Another participant was of the view that the reason for limited UNGP awareness over the past 10 years may be related to their voluntary nature. The soft law framework may have increased uptake for some since many multinational companies favoured such an approach, but it has also limited uptake and awareness among others, including States. In a world of numerous legal obligations and requirements, voluntary requirements may—at least at times—receive less attention.

Lastly, one international expert believed that the lack of implementation of the UNGPs was due, in part, to a lack of “peer support” within the international community. He suggested that, given the advanced capacity and more comprehensive implementation of the UNGPs by some States (i.e. within the European Union (EU)), an informal obligation ought to exist to assist States with more limited domestic capacity or that have made less progress in implementing the UNGPs.

It is evident that there is a disconnect between the stakeholders responsible for advancing policies and those impacted by them. For example, there are many cases in which the secretariats of industry associations, such as the Global Compact, engage with external constituents about the UNGPs; however, their members are not involved and, in some cases, are unaware of the existence of the Guiding Principles. This is part of the larger issue, identified by interviewees, of a general lack of awareness of the UNGPs among States, companies and other stakeholders.

¹⁶ Unless otherwise noted, quotations are from interviews conducted by the authors of this report. See [appendix A](#) for more information.

b. Lack of African 'ownership' of the Guiding Principles

One stakeholder noted that country leadership could be one of the most useful tools to ensure that guidance on the UNGPs is provided. He specifically noted that the NAP process in Kenya was launched by then-Attorney General Githu Muigai, which signalled the Government's commitment to the process.

The Eastern-Southern Africa National Human Rights Institutions Business and Human Rights Peer Learning Initiative recently underscored the importance of State body leadership to promote UNGP implementation. It advocated for the establishment of legally mandated "focal point institutions for addressing human rights in the context of business activities".¹⁷

Another expert consulted for this report noted that the lack of implementation among sub-Saharan countries was due to the perception that the UNGPs are a set of Western notions or otherwise do not embody the African identity. This expert commented that while Professor John Ruggie had held inclusive consultations in drafting the UNGPs, certain reflections and recommendations may not have been incorporated in the final text.¹⁸ Additionally, the stakeholder noted that more regional consultations in West, East, Central and Southern Africa would have "brought it home [all] the more" and could have increased African ownership.

The relatively slow uptake of the UNGPs is reflective of the situation of other international instruments. Africa has historically been cautious about embracing international instruments without first considering the ramifications for the continent. The fact that a significant number of African countries are active in deliberations for a binding treaty on business and human rights suggests that they may not necessarily view the non-binding nature of the UNGPs as sufficient in promoting responsible businesses, especially by multinationals.¹⁹

The claim that the UNGPs reflect a Western notion of the responsibilities of States and businesses for human rights abuses could be countered by reflecting on the way in which the Guiding Principles were developed. First, the UNGPs were unanimously endorsed by all members of the Human Rights Council, which included representatives from African States. Second, African institutions have expressed support for the UNGPs and are committed to implementing them. This includes the AU, which has expressed its support for the UNGPs as a "globally agreed standard on how to make business and human rights work together".²⁰ Third, whereas the United Nations Working Group on business and human rights has issued guidelines to develop NAPs, it has not dictated their content. That is left to local stakeholders, ideally led by State agencies. Fourth, the UNGPs do not add any new responsibilities for the State; they simply

17 Office of the United Nations High Commissioner for Human Rights (OHCHR), *Responses to the UNGP 10+ / Next Decade BHR 'Have your Say' Questionnaire*, p.7.

18 The late Professor John Ruggie of Harvard University served as the United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises from 2005 to 2011.

19 For a detailed discussion on the proposed binding treaty, see Business and Human Rights Resource Centre, Binding Treaty. Available at: <https://www.business-humanrights.org/en/big-issues/binding-treaty/>.

20 OHCHR, UN and AU Commit to Advance Business and Human Rights Agenda in Africa. Available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15053&LangID=E.

restate the State's obligation to protect human rights. Nevertheless, they introduced businesses' responsibility to conduct human rights due diligence and ensure that victims of corporate-related harm have access to remedy. Most African States have ratified international instruments that recognize these duties and have implemented some of the elements present in AU human rights treaties. Lastly, the fact that the AU Draft Policy on Business and Human Rights bears a strong resemblance to the UNGPs, mirroring the three-pillar structure, suggests that there is significant acceptance of the role of the UNGPs as a road map to ensure that businesses respect human rights.²¹ Despite the AU Draft Policy being an African document, it has yet to be adopted. This suggests that the perceived lack of acceptance of the UNGPs (as demonstrated by the failure of African States to adopt NAPs, for instance) may have little to do with the UNGPs not being 'African' enough.

c. Marginalization of the informal sector

According to the International Labour Organization (ILO), informal employment accounts for 89.2 percent of all employment in sub-Saharan Africa.²² It covers "all genders, age groups, sectors ... as well as essential economic activities, such as public transport operations, market centres and food processing".²³

Despite the importance of the sector to the economy, efforts to create awareness of the UNGPs in the region have primarily focused on big enterprises. This is also reflected in the participation in policymaking and the membership of industry associations. A stakeholder with wide experience working throughout sub-Saharan Africa noted that the limited implementation of the UNGPs over the past 10 years was because of the failure to sufficiently address the informal sector. A representative of the SMEs in Kenya views the high fees charged by industry associations, which are key actors in discussions on responsible business, as the main barrier to participation for those in the informal economy.

The failure to engage the informal sector is partly attributable to the Guiding Principles' lack of attention to the dynamics of the informal sector in the developing world, including Africa. Although the UNGPs apply to all businesses, the reality is that the structural exclusion of the informal sector from mainstream policymaking through industry associations, as well as the failure to integrate it in decision-making, is reflected in the lack of conversations about its human rights responsibilities. It is imperative that stakeholders devise innovative ways to include the informal sector in conversations, such as by tapping into their existing welfare associations as points of convergence.

d. Lack of implementation due to the voluntary nature of the Guiding Principles

While this may not be the case throughout the continent, a South African stakeholder opined that the lack of implementation has arisen because of the voluntary nature of the UNGPs. Given their consequent perceived weakness as an instrument for regulating the impact of businesses on human rights, States are either opposed to the UNGPs

21 The AU Draft Policy on Business and Human Rights will be covered in more detail in section D.1 of this chapter.

22 ILO, *Women and Men in the Informal Economy: A Statistical Picture* (Geneva, 2018), p. 29.

23 Egan Daniel and Camilla Sacchetto, 'COVID-19 and informality in sub-Saharan Africa: containing an economic crisis', International Growth Centre, 20 October 2020.

or less concerned with their implementation and focused on negotiations for a binding international instrument to regulate business activities.

To support this argument, one needs only to examine the voting patterns of African States for the 2014 Human Rights Council resolution to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights to draft a legally binding instrument.²⁴ Sub-Saharan African States (and members of the Human Rights Council at that time) voting in favour of the resolution to establish the working group included Benin, Burkina Faso, Côte d'Ivoire, the Democratic Republic of the Congo, Ethiopia, Kenya, Namibia and South Africa. Other members, including Botswana, Gabon and Sierra Leone, abstained. No sub-Saharan African State voted against the resolution.

In addition, sub-Saharan States commented on the revised draft of the binding instrument. Burkina Faso, Ethiopia, Mozambique, Namibia and Senegal all submitted general comments, and Mozambique and Namibia commented on particular articles. For example, in a statement on behalf of the African Group, Burkina Faso noted that the Group “remains committed to the letter and spirit of the Human Rights Council resolution” creating the working group and “is of the view that the revised draft represents a significant improvement as compared to the previous one”.²⁵ Specifically, it noted: “the draft should seek to fill the existing gap in international law in regards to the human rights abuses and violations by [transnational corporations] and provide reparations and remedies to victims.”

The perceived dichotomy between the UNGPs and the proposed international legally binding instrument on transnational corporations and other business enterprises with respect to human rights denies African States an opportunity to advance respect for human rights by businesses. The instrument can be treated as complementary to UNGP pillars I and II, contributing to the advancement of a human rights culture by States and businesses and their obligations to protect and respect human rights, respectively. The binding instrument would then be broadly viewed as strengthening pillar III on access to remedy. The compartmentalization of the two initiatives is also risky if current efforts to agree on a binding instrument do not produce results.

e. Lack of resources and the nature of donor funding cycles

A stakeholder working at an African NHRI attributed the failure to adopt the UNGPs to a deficit of resources and the consequent impact on implementation. The concern about

24 United Nations Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9, 2014. The Working Group's mandate includes “elaborat[ing] an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.

25 The African Group is a regional grouping of 13 African States elected within the 47 States of the Human Rights Council every three years. The seats for each regional group are distributed in line with equitable geographical distribution. Statement by Burkina Faso on behalf of the African Group during the sixth session of the open-ended intergovernmental working group for the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Resolution A/HRC/26/9, delivered 26 October 2020, pp. 1–2. Available at: www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/session6/session6. The statement further noted: “The draft should stick to the regulation of the activities of [transnational corporations and overseas business enterprises], with respect to human rights, instead of placing many obligations to States, even though the African Group acknowledges the letters’ primary duty to respect, protect, uphold and realize human rights of their peoples.”

limited resources was echoed by the Eastern-Southern Africa National Human Rights Institutions Business and Human Rights Peer Learning Initiative in its submission to the 'UNGPs 10+' project. It provided: "Economic challenges in many African countries have contributed to insufficient resourcing for the development, enforcement and monitoring of national laws and policies" on business and human rights.²⁶ A representative of the Zambia Human Rights Commission noted that, because of complications and costs surrounding the coronavirus disease (COVID-19) pandemic, it was very unlikely that domestic resources would be prioritized for the implementation of the States' NBA or the completion of an NAP. Another stakeholder noted that NHRIs are often financed by donors who run on four- to five-year cycles; however, in her view, it may take up to 10 or 15 years for their work to become institutionalized.

An assessment of countries that have advanced the business and human rights agenda reveals that, in most cases, there has been a dominant donor agency or international human rights organization providing technical and material support. Where local CSOs have led the process, they have benefited from grants from external donors. Civil society groups in East Africa, at both the national and grass-roots levels, have repeatedly cited the lack of donor funding as a constraint in pursuing respect for human rights by businesses. This has worsened in the last few years as a result of funding constraints occasioned by the COVID-19 pandemic.

f. Perceived dichotomy between economic development and human rights compliance

As African countries compete to attract foreign direct investment, there is often a notion that businesses' observance of human rights is antithetical to attracting investment. For example, in Uganda, a top government official threatened activists who were lobbying for the improvement of working conditions.²⁷

This perception was confirmed by one of the interviewees for this report, who noted that insistence on respect for human rights is seen as interfering with the ease of doing business in sub-Saharan Africa. The perception is that more regulation, policies and the accompanying costs may decrease a State's willingness to ensure respect for human rights by businesses. A survey conducted by the Eastern-Southern Africa National Human Rights Institutions Business and Human Rights Peer Learning Initiative revealed that human rights considerations are a low priority for many African States and are seen as diminishing the inflow of capital and reducing a country's competitiveness in doing business.

The dichotomy between economic development and compliance with human rights standards is a false one. The fulfilment of the State's duty to protect business and human rights is good for its citizens. It means decent jobs, respect for communities' property rights and compensation where necessary, as well as shared prosperity. Stakeholders responsible for advancing the UNGPs should debunk this myth and advance the ethical and business case for ensuring that investment is made in a rights-respecting culture.

²⁶ OHCHR, *Responses to the UNGPs 10+ Questionnaire*.

²⁷ Isaac Khis, 'Poison at Dutch flower farm', *The Independent*, 5 December 2016.

Box 2. Case study: Zambian national baseline assessment on business and human rights

In 2016, the Zambia Human Rights Commission, in collaboration with the Danish Institute for Human Rights, drafted the State's national baseline assessment, which provided a comprehensive account of the status of human rights protections regarding business activities.

Key findings from the national baseline assessment include:

- No statutory body guides companies on the implementation of the UNGPs or other international business and human rights standards or frameworks.
- There is a failure to ensure that businesses share proceeds from natural resources with local communities.
- Economic, social and cultural rights are not justiciable under the Zambian Constitution.
- The legal framework contains procedural obstacles that allow businesses to deprive communities of their land without adequate consultation and compensation.
- There are significant gaps in working conditions, including the failure to recognize the informal sector, which accounts for over half of employees; casualization of labour, including in the mining sector; and a lack of protection for freedom of expression and from gender discrimination in employment.
- Most State agencies are underresourced to prevent and address human rights abuses. While the law complies with international standards, weak enforcement means that human rights abuses may occur without sufficient investigation.
- The privatization of the delivery of public goods, such as health and education, has been undertaken without assessing the potential human rights impacts of such a course of action and without ensuring that these services are carried out in line with relevant national and international standards.

Since the completion of the national baseline assessment, there has been no further significant progress towards the development of a national action plan. Although the Government of Zambia accepted a recommendation to develop such a plan during the 28th session of the universal periodic review in 2018, few steps had been taken to give effect to these commitments by 2020.

According to an interviewee for this report, the lack of resources is the main reason for the delay in adopting a national action plan. Additionally, the plan is being championed by the Ministry of Commerce, Trade and Industry, which could also significantly hinder its progress since the Ministry's primary focus is to attract investment.

Source: Zambia Human Rights Commission and Danish Institute for Human Rights, Zambia National Baseline Assessment on Business and Human Rights (2016); Human Rights Commission of Zambia and Danish Institute for Human Rights, The Corporate Responsibility to Respect Human Rights: the Case of Mining and Agriculture Sectors in Zambia – a Supplement to the Zambian National Baseline Assessment on Business and Human Rights (2020).



B. MEASURES AT THE NATIONAL LEVEL

The Many African countries have ratified regional and international human rights instruments that protect from human rights abuses by third parties, including corporations (see appendix B). Effective regulation of corporate activities to ensure that they do not violate human rights is an essential first step in fulfilling the State duty to protect human rights. Nevertheless, the real test to determine whether the law serves its purpose is the extent to which the public is confident that the regulatory authorities will protect their interests. Some countries have imposed human rights obligations on businesses. For instance, the Kenyan Constitution imposes human rights obligations on businesses by stating that they are bound to respect the bill of rights. As a result, a growing number of victims of ongoing or anticipated corporate harm have obtained redress from local courts. For example, a Kenyan court ordered a lead-smelting factory to compensate a local community for pollution that led to the loss of lives and other adverse health impacts.²⁸

One increasingly important aspect of national measures to protect human rights is to ensure that those who defend human rights for aggrieved communities are protected from harassment, including malicious lawsuits brought by Governments and companies. In 2021, a South African court dismissed a suit brought by a mining company against a human rights defender who was supporting community advocacy against the operations of the company.²⁹

Despite the multiplicity of laws offering protection for victims of business-related abuses, there is a gap in enforcement. For instance, despite some Kenyan courts providing redress for victims and the State having a constitution that is considered progressive, there are a number of cases in which victims aggrieved by corporate conduct in Kenya have resorted to filing extraterritorial lawsuits.³⁰

Indeed, there are a growing number of cases of extraterritorial litigation for human rights abuses committed in Africa. While the existence of this avenue—if remote—possibility for victims, it serves as a reminder of the low confidence of litigants in local judicial systems, as well as the procedural and legal barriers to securing justice. In other cases, individuals and communities aggrieved by business conduct have resorted to suing the institutions meant to protect them for prolonged dereliction of duty. These include a non-governmental organization (NGO) in South Sudan that has sued the Government for failing to control oil waste management, allegedly leading to health damages that include congenital disabilities and the death of humans and livestock.³¹ In Kenya, members of a residential estate have sued the national environmental regulatory agency for allegedly failing to protect them from the health and environmental impacts of a steel plant on the estate.³²

28 Christabel Ligami, 'Kenyan coastal community defeats lead polluter in court', *Africa Renewal*, 21 December 2020.

29 Sheree Bega, 'High court gives Australian mining company a big SLAP(P)', *Mail & Guardian*, 10 February 2021.

30 For example, the case filed in the United Kingdom against Camellia for human rights concerns arising from its Kenyan subsidiary.

31 Nyamilepedia, 'South Sudan faces lawsuit over oil waste mismanagement', 28 June 2021.

32 *Business Daily*, 'Syokimau residents sue Nema over steel milling pollution', 21 June 2021.

Developments at the national level have been mixed. On the one hand, there are cases in which regulatory, judicial and quasi-judicial organs of the State have unequivocally supported local communities harmed by corporate conduct. On the other hand, there are reports of impunity by corporations where local communities have no confidence in public institutions. The latter points to the need to strengthen domestic measures to guarantee meaningful protection for human rights by States.

1. Vertical policy coherence

The State has an obligation to ensure that vertical policy coherence is achieved by establishing laws and policies to secure its obligations under international law. One way of demonstrating such coherence is by submitting periodic reports to the relevant human rights treaty bodies. In these reports, States indicate the way in which the substantive rights enshrined in a particular treaty are being protected.

Concluding observations are also issued by various treaty bodies after considering State reports. States recommendations and concluding observations increasingly encourage States to comply with the UNGPs and other standards to protect human rights against violations by businesses.

TABLE 1. Examples of recommendations and/or concluding observations regarding the Guiding Principles on Business and Human Rights

State	Treaty/process	Recommendation/concluding observation
Côte d'Ivoire	Convention on the Rights of the Child	<p>The Committee [on the Rights of the Child] is concerned about:</p> <ul style="list-style-type: none"> a. The lack of clear regulations and of a specific mechanism for monitoring the activities of private sector actors in sectors where children are employed; b. The negative effect of the dumping of toxic waste in 18 localities of Abidjan in 2016 on children's health and their well-being, and the delay in compensation paid to the victims. <p>Recalling its general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights and the Guiding Principles on Business and Human Rights [NB: emphasis added by the authors], endorsed by the Human Rights Council in 2011, the Committee recommends that the State party:</p> <ul style="list-style-type: none"> a. Adopt and implement regulations to hold the business sector accountable for complying with international standards, including on labour and the environment, that are relevant to children's rights.

Ghana	Convention on the Rights of the Child	<p>In the light of its general comment No. 16 (2013) [on State obligations regarding] the impact of the business sector on children's rights, the Committee recommends that the State party:</p> <ul style="list-style-type: none"> a. Establish clear regulations and a nation-wide legislative framework, including through the adoption of agreements between private enterprises and the State party at the local level, requiring companies operating in the State party to adopt measures to prevent and mitigate adverse child rights impact of their operations in the country; b. Require companies to undertake child rights assessments, consultations and full public disclosure of the environmental, health-related and child rights impacts of their business activities and their plans to address such impacts and promote the inclusion of child rights indicators and parameters for reporting and; c. Be guided by the United Nations "Protect, Respect and Remedy" Framework, accepted unanimously in 2008 by the Human Rights Council, while implementing these recommendations.
Nigeria	Universal periodic review	<p>Accelerate the regulatory process aimed at reducing the negative impact of company activities on the enjoyment of human rights (Algeria)</p> <p>Finalize the national action plan on business and human rights [NB: emphasis added by the authors], and consider sharing best practices in that regard (Namibia);</p> <p>Consider setting up a follow-up mechanism to implement the national plan of action on business and human rights (United Arab Emirates).</p>

Sources: United Nations, Committee on the Rights of the Child, Concluding observations on the second periodic report of Côte d'Ivoire, CRC/C/CIV/CO/2, paras. 15–16; United Nations, Committee on the Rights of the Child, Concluding observations on the combined third to fifth periodic reports of Ghana, CRC/C/GHA/CO/3-5, para. 20; United Nations, Human Rights Council, Report of the Working Group on the Universal Periodic Review: Nigeria, A/HRC/40/7, paras. 148.95, 148.99 and 148.101.

An interview participant observed that the core human rights treaties and the fundamental conventions of the ILO have mostly been incorporated into domestic legislation throughout sub-Saharan Africa (see appendix B). Nevertheless, she believed that the gap lies in enforcing existing legislation to deter corporations from abusing human rights and holding offenders to account.

The Eastern-Southern Africa National Human Rights Institutions Business and Human Rights Peer Learning Initiative recently noted that in African subregions: "National regulatory frameworks with social, justice and economic consequences do not always provide clear linkages with human rights in principle or content. For instance, national laws on environmental protection, climate change and aspects of land management and administration do not always invoke protections provided by the human rights-based approach, thereby limiting the scope for protection of aggrieved parties from human rights abuses by businesses."³³ In many East African countries, some laws do not explicitly reference human rights or effectively integrate human rights in standards and

³³ OHCHR, *Responses to the UNGPs 10+ Questionnaire*, p. 4.

indicators. This includes trade and investment agreements, intergovernmental treaties and treaties establishing common economic unions.

2. Horizontal policy coherence

The State responsibility to ensure horizontal policy coherence means that States must support and equip departments and agencies mandated with shaping business practices in understanding the State's human rights obligations. This includes corporate law and securities regulation, investment, export credit and insurance, trade and labour.³⁴

An expert interviewed for this report noted that the Guiding Principles were somewhat known within ministries of justice and foreign affairs in sub-Saharan African States. Beyond those institutions, she did not believe that State bodies had the required awareness of the UNGPs, including ministries of trade, finance, labour and others.

C. ROLE OF STATE-OWNED ENTERPRISES IN SUB-SAHARAN AFRICA

SOEs in sub-Saharan Africa have systemic implications for public finances and State economies. As of 2020, based on a representative sample of 14 countries, SOEs accounted for a significant share of public sector balance sheets, with assets of approximately 32.5 percent of gross domestic product (GDP) and liabilities at 20 percent of GDP. These enterprises also play a significant role in public investment. For example, in 2017, SOEs accounted for 31 percent of infrastructure project investment in sub-Saharan African countries.³⁵

According to the UNGPs, States should fulfil their international human rights law obligations when they own or otherwise control a business enterprise and when contracting with a business or conducting commercial transactions.³⁶ The underlying idea is that States must lead by example by operationalizing the requirement to adhere to human rights in their own business operations.³⁷

A Kenyan stakeholder found that, in her experience, Kenyan SOEs still require capacity-building and greater awareness of the UNGPs. In her view, the State should use its regulatory power to mandate that SOEs and those receiving public funds follow the Guiding Principles. This issue is of growing importance, especially given the expansion of SOEs in the region, to ensure that they do not commit abuses elsewhere. For example, the SEO Kenya Electricity Generating Company (KenGen) was recently invited to support energy production in Djibouti.³⁸

³⁴ United Nations, *Guiding Principles on Business and Human Rights*, pp. 10–11.

³⁵ Jason Harris and others, 'Government support to State-owned enterprises: options for sub-Saharan Africa', Special Series on COVID-19, International Monetary Fund, 15 June 2020.

³⁶ To economize space in this report, a particular focus has been placed on principle 4 as related to State-owned enterprises and their need to conform to the strictures of the UNGPs.

³⁷ United Nations, Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises: Note by the Secretariat*, A/HRC/32/45, para. 52. The UN Working Group on business and human rights has identified a range of steps that government entities charged with exercising ownership rights for part or all of an SOE should take to ensure that sufficient respect is shown for human rights. See *Ibid.*, para. 58.

³⁸ Business Daily, 'KenGen Signs Sh709 million geothermal deal in Djibouti', 11 February 2021.

Another stakeholder stressed that States operating SOEs must improve UNGP implementation before private businesses follow suit. Failure to do so may partly explain businesses' reluctance to adhere to the UNGPs. In the end, if the Government is not leading on business- and human rights-related matters in their own business operations, companies may not feel compelled to do so either. In this stakeholder's view, SOEs were some of the worst violators of the UNGPs and other human rights standards. In such cases, the State can become compromised by virtue of its own business activities and therefore lose the legitimacy to require appropriate conduct by other businesses.

Lastly, another international expert took a critical view of SOEs, noting that it was difficult for them to provide leadership on the UNGPs because they have the unfortunate reputation of being "vehicles for corruption ... the biggest on the continent". Within this context, it is difficult for States to promote greater UNGP implementation, since businesses may not believe that a State will comport itself similarly in operating its SOE. Furthermore, States may not want the burden of implementing the UNGPs in SOEs, as they may perceive the financial costs of conducting human rights due diligence as prohibitively high. This stakeholder noted that the United Nations Working Group on business and human rights, UNDP and others should take this situation into consideration when pursuing reform efforts.

Box 3. Case study: State-owned enterprises in Ghana and their obligation to conform with human rights in the context of their business operations

According to a 2018 report by the Ministry of Finance of Ghana, 50 percent of the State's assets are controlled by State-owned enterprises (SOEs), particularly in the energy sector.

In 2015, the United Nations Working Group on business and human rights released its report on SOEs and the steps they should take to ensure human rights compliance in the context of their business operations. In this connection, the Government of Ghana had responded to a questionnaire disseminated by the Working Group, in which it noted that it had not enacted any government policies, regulations or guidance directing SOEs to specifically demonstrate respect for human rights in their business operations. Nevertheless, the Government emphasized that the Constitution of Ghana forbids SOEs from conducting business activities that violate fundamental freedoms and human rights. In addition, Ghanaian business enterprises controlled by the State are to comply with provisions for human rights due diligence relating to their activities in other jurisdictions in which they operate. The Government stated that Ghanaian SOEs follow the country's labour laws and are expected to observe the international human rights instruments that Ghana has ratified.¹ SOEs must follow all legal requirements, including conducting environmental impact assessments.

Since submitting this questionnaire, Ghana has accepted a recommendation made during the 2017 universal periodic review to incorporate the UNGPs into its domestic legislation (including principles relating to SOEs). Subsequently, the Commission on Human Rights and Administrative Justice has been working with the Ghana Institute of Management and Public Administration and the Danish Institute for Human Rights to develop a national baseline assessment to precede the development of the national action plan.

Source: Ghana, Ministry of Finance, 2018 State Ownership Report, p. 46; Claire Methven O'Brien, 'Addressing business-related human rights challenges in Ghana', Danish Institute for Human Rights, 22 November 2019.

¹ Ghana has signed but not ratified the International Convention for the Protection of All Persons from Enforced Disappearance. See appendix 1, table 1.



In conclusion, SOEs have an opportunity to model respect for human rights by businesses, including in their recruitment and procurement policies as well as the way in which they address communities impacted by their operations. There is no evidence to suggest that SOEs in Africa have embraced human rights principles any better than private businesses, despite the pivotal role they occupy as potential models of human rights-respecting businesses.

D. REGIONAL HUMAN RIGHTS FRAMEWORKS AND INSTITUTIONS

The Constitutive Act of the African Union references human rights as one of its aims, providing that AU member States “promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments”.³⁹ The African Charter, the flagship human rights treaty under the AU, sets out core human rights commitments that all individuals and groups of people are entitled to enjoy and is overseen by the African Commission on Human and Peoples’ Rights. There are several regional bodies and frameworks that could be leveraged to support member States in fulfilling their duty to protect human rights. Some, such as the African Court on Human and Peoples’ Rights, have an explicit human rights mandate. Others, such as subregional economic zones, have a trade promotion mandate but could play a pivotal role if they embedded human rights in their thematic issues.

Regional bodies and frameworks are under the auspices of the AU. Frameworks include the Policy on Business and Human Rights and the Africa Mining Vision. In addition, the AU can rely on its legal and judicial bodies that address human rights issues, principally the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, to ensure that businesses comply with human rights in their operations. The following section discusses each of these bodies and frameworks and their potential to be leveraged to support States members of the AU and the United Nations in fulfilling their obligation to protect human rights.

1. African Union Draft Policy on Business and Human Rights

In light of Africa’s fast-growing economies and its potential to attract further investment, the AU recognized the need for its own business and human rights policy. The policy, which has been drafted but not yet adopted, aims to promote UNGP implementation while also addressing concerns specific to Africa. According to the Acting Director of the Governance and Conflict Prevention Directorate of the Department of Political Affairs, Peace and Security of the AU Commission, the Policy is positioned to address some of the essential problems that come with this sort of growth, particularly the tendency for the disregard for human rights.⁴⁰

³⁹ Organization of African Unity, *Constitutive Act of the African Union*, art. 3(h).

⁴⁰ Ololade Bamidele, ‘AU set on making African businesses more responsive to human rights’, *Premium Times*, 24 March 2017.

According to an interviewee, the AU conducted several consultations with various stakeholders and is now focusing on partnering with its member States to promote the Policy's implementation and adoption. Once adopted, the AU Policy on Business and Human Rights can work alongside Agenda 2063, a development road map that the AU is committed to promoting.

2. Africa Mining Vision

In 2009, the AU created the Africa Mining Vision policy framework to ensure that the continent utilizes its mineral resources strategically for broad-based, inclusive development. It also promotes the principle of free, prior and informed consent for mining-affected communities and addresses the social and environmental impacts of mining. Furthermore, it calls for large-scale industrial mining operations to provide tangible benefits to workers and communities and protect the environment. The Vision's 2012 Action Plan envisages a number of steps for various stakeholders, which include assisting member States in implementing business and human rights frameworks related to mining.⁴¹

Critics are of the view that the Africa Mining Vision, despite holding much promise, has failed to fulfil its potential. Oxfam identified several obstacles, including the Vision's voluntary nature, a lack of resources, a lack of political will and the failure to sufficiently promote women's rights and gender justice in its action plan.⁴² Oxfam further points to the lack of awareness among key stakeholders, as well as the failure to achieve policy coherence with regional and international trade agreements and bilateral treaties.

3. African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights was established under the African Charter on Human and Peoples' Rights. The Commission achieves its mandate through special rapporteurs, working groups and missions; its communication procedure; the friendly settlement of disputes; State reporting (and NGO shadow reports); and urgent appeals. One of the Commission's recent landmark rulings was in 2017, where it required the Democratic Republic of the Congo to compensate families of local community members killed by government security agents with the alleged complicity of the company Anvil Mining.⁴³ The Government has yet to implement the Commission's decision, including the criminal prosecution of Anvil Mining staff members for providing logistical support to government security agencies.

The Commission can establish working groups empowered to address matters related to business and human rights. In 2009, it created the Working Group on Extractive Industries, Environment and Human Rights Violations, the principal objective of which

41 AU Commission and others, *Building a Sustainable Future for Africa's Extractive Industry: from Vision to Action – Action Plan for Implementing the AMV* (2011).

42 Oxfam, 'From aspiration to reality: unpacking the Africa Mining Vision', Briefing Paper, March 2017, pp. 24–25.

43 AU, 'Communication 393/10: Institute for Human Rights and Development in Africa and Other v. Democratic Republic of Congo', 2016; RAID, 'DR Congo: rectify failure to compensate Kilwa massacre victims', 28 June 2021.

is to strengthen regional responses to human rights issues in the extractive industries in Africa. Some of the significant activities of the Working Group relating to the impact of businesses on human rights include:

- A 2019 advisory note to assist the African Group in Geneva in negotiations on and in favour of a binding instrument on business and human rights.
- The 2017 State Reporting Guidelines on Articles 21 and 24 of the African Charter on Human and Peoples' Rights Relating to the Operations of the Extractive Industries. Article 21 recognizes peoples' right to dispose of wealth and natural resources, the right to the lawful recovery of property and adequate compensation in case of spoliation and others.
- A set of guidelines on the role of States in protecting human rights from harm by other actors, including private actors.⁴⁴

4. African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights complements the protective mandate of the African Commission, issuing binding judgments that are not subject to appeal. States have given the Court jurisdiction to rule on cases.

To empower individuals and NGOs to file petitions with the Court directly, States must submit a declaration. To date, eight States have done so.⁴⁵ Absent such a declaration, the individual application must be first submitted to the Commission, which may then decide to refer the case to the Court. The Rules of the Court require the exhaustion of local remedies in connection to the applications received.

⁴⁴ International Federation for Human Rights, *Corporate Accountability for Human Rights Abuses: a Guide for Victims and NGOs on Recourse Mechanisms*, 3rd ed. (2016).

⁴⁵ The eight States that have deposited the declaration are: Burkina Faso, the Gambia, Ghana, Guinea Bissau, Malawi, Mali, the Niger and Tunisia.

Box 4. Subregional bodies and business and human rights

In addition to regional bodies, there is a range of subregional mechanisms in sub-Saharan Africa. These include the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC).

This section briefly discusses each of these bodies and their contribution or potential contribution to supporting member States in effectively protecting human rights.

i. Common Market for Eastern and Southern Africa

The COMESA Treaty imposes on its member States the obligation to observe human rights in accordance with the African Charter, and the legal framework addresses the promotion of women in businesses. It establishes the Federation of National Associations of Women in Business to promote the effective and equal participation of women in COMESA trade and development activities.

Member States reference the Guiding Principles in the Revised Investment Agreement for the COMESA Common Investment Area, adopted in 2017 by the COMESA Authority. The Agreement requires investors and their investments to observe the United Nations Guiding Principles on Business and Human Rights with modifications necessary for local circumstances; however, as of April 2020, no member State has ratified the Agreement.

To ensure the consistent interpretation and application of the Treaty, COMESA established a Court of Justice. Nevertheless, the court does not have general competence to hear individual complaints of alleged human rights violations.

ii. East African Community

According to the EAC Protocol on Environment and Natural Resource Management, member States are required to observe the principle of environmental impact assessment and environmental audit and monitoring. EAC has also concluded standards on environment and natural resource management that indirectly relate to business conduct. In 2017, Parliamentarians from the East African Legislative Assembly, one of the organs of EAC, and chairs of national parliaments within EAC attended a workshop in Kigali, Rwanda, to assess model mining and agricultural laws aimed at advancing sustainable development.¹

The East African Court of Justice is the adjudicative body of EAC responsible for the interpretation of the Treaty. In November 2020, a coalition of NGOs filed a lawsuit against the Governments of Tanzania and Uganda and the EAC Secretary-General to block the construction of the 1,445-kilometer East African Crude Oil Pipeline by Total E&P Limited. The lawsuit alleges that the Secretary-General (under its mandate to ensure compliance with the EAC Treaty) and both Governments have violated environmental laws, human rights obligations and regional agreements by agreeing to the construction of the pipeline without complete and adequate environmental and social impact assessments having been conducted by Total E&P Limited.² The case is pending before the court.

iii. Economic Community of West African States

In 2009, the ECOWAS Commission developed a Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector. The Directive aims to ensure that all States and



mining industries (inclusive of oil and gas) are respecting a high level of responsibility to promote human rights, transparency, social equity and to protect local communities and the environment. It requires States to put in place a complaint mechanism and secure free, prior and informed consent from local communities before exploration and throughout each subsequent phase in the mining cycle.

ECOWAS has also been engaged with the African Minerals Development Centre on various policy, research and capacity-building activities to implement the Country Mining Vision, an instrument required for the full implementation of the Africa Mining Vision.

The Community Court of Justice is the adjudicative body of ECOWAS. It has been operational since 2000 and has adjudicated several significant cases relating to business and human rights. In 2012, the Court ruled against Nigeria in Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria, finding the Government responsible for failing to regulate oil companies whose oil extraction activities degraded the Niger Delta. Although SERAP warned the Government of Nigeria in 2013 that it might be at risk of regional sanctions from ECOWAS for its failure to implement the judgment, there is no record of Nigeria having done so or of any subsequent sanctions.³

More recently, the Court held Guinea responsible for the death of six villagers and the illegal arrest, injury or torture of 15 others during a 2012 protest near an iron ore project owned by Vale in the case of Kolie v. Guinea.⁴ It ordered the State to pay the plaintiffs 4.56 billion Guinean francs (US\$463,000) in total damages, as well as litigation costs.

iv. Southern African Development Community

In 2018, SADC adopted the Ministerial Declaration 'Horizon Decent Work: Advancing Coherence, Connectivity and Inclusivity' by the SADC Ministers for Employment and Labour and Social Partners, pledging to undertake to explore the full implementation of the UNGPs in order to address decent work issues in all work circumstances, including cross-border supply chains. A desk review of the SADC website and other online sources did not yield any updates beyond this pledge.⁵

Source: Authors.

¹ International Institute for Sustainable Development, 'Sustainable Investment in Agriculture and Mining in East Africa', 1 March 2017.

² Natural Justice, 'Natural Justice joins legal challenge against the East Africa Pipeline', 25 November 2020.

³ Sharon Oremichen, 'Federal Government risks sanctions for undermining ECOWAS judgments: SERAP – Nigeria', Business and Human Rights Resource Centre, 1 August 2013.

⁴ Vale S.A. is a Brazilian multinational diversified metals and mining corporation and one of the largest logistics operators in Brazil.

⁵ An email was sent to the SADC management to confirm that there was nothing publicly available that furthered this Ministerial Declaration; however, no response was provided by the time of publication of this report.

5. African Continental Free Trade Area

On 15 June 2015, negotiations were launched to establish AfCFTA.⁴⁶ On 1 January 2021, trading under the agreement began, officially creating a market of 1.2 billion people with a combined GDP of US\$3 trillion.⁴⁷ As of 1 February 2021, 54 of the 55 AU member States have signed the AfCFTA Agreement, and 36 have deposited instruments of ratification. The speed with which AfCFTA was negotiated and ratified (the second-fastest instrument to be ratified since the establishment of the AU) illustrates that AU member States have prioritized it as a tool to facilitate greater continent-wide economic growth and opportunity.

The liberalization of trade can have differential impacts on various socio-economic groups owing to unequal access to assets, credit and economic opportunities. Women and informal cross-border traders face particularly acute challenges to participate in welfare-enhancing trade. Different types of workers can face the differential impacts of trade liberalization, depending on their skill level or sector of employment. A recent report noted that discussion around AfCFTA thus far has paid “minimal attention to the important human rights implications of [AfCFTA], which are likely to be significant”.⁴⁸

Despite this structural shortcoming, due attention must be paid to the implementation of the AfCFTA Agreement to ensure that it complies with the human rights and environmental commitments that member States have made under various international legal instruments. Prioritizing policy coherence in domestic legal regimes must be considered as important as the implementation of the Agreement’s liberalizing trade mandate. Furthermore, achieving the ambitions of Agenda 2063 and the 2030 Agenda for Sustainable Development cannot be accomplished without taking a multi-dimensional approach. States must be free to enact legal measures that commit to implement such protections without fear that the strictures delineated in the AfCFTA Agreement unduly restrict such responsibilities.

E. STATE DUTY TO PROTECT HUMAN RIGHTS IN CONFLICT-AFFECTED AREAS

There are several conflict and post-conflict situations in Africa where business operations are ongoing. The prevalence of conflicts presents real challenges for States throughout sub-Saharan Africa, as foreign direct investment and other economic growth opportunities are threatened by the danger of operating a business in such areas. States

46 Due to space and time limitations, a comprehensive discussion on bilateral investment treaties and regional trade agreements has not been considered in this report. Nevertheless, similar to AfCFTA, it is imperative that they promote trade and investment in a human rights-compatible manner.

47 UNDP, ‘AfCFTA and UNDP announce new partnership towards inclusive growth in Africa’, 30 March 2021.

48 United Nations Economic Commission for Africa, *The Continental Free Trade Area (CFTA) in Africa: a Human Rights Perspective* (Geneva, 2017) p. 3.

have a heightened obligation to identify, assess, prevent, address and mitigate human rights violations by business enterprises in conflict-affected areas. This includes taking steps to prevent or limit human rights violations by business enterprises in advance of or during conflicts (e.g. by ensuring that the correct legal measures and policies are in place) and after conflicts (e.g. by taking punitive steps if a violation takes place, including by withdrawing financial support, initiating criminal action, etc.). An interviewee noted that efforts to reform the way businesses operate in conflict areas had not yielded any significant results on the ground, especially for communities affected by conflicts.

Concerns have been expressed about the complicity of businesses in either causing or exacerbating conflicts, particularly with regard to private security companies. For example, a recent report by Amnesty International has accused a South African security company hired by the Mozambican Government of failing to respect the right to life and rules of war after it allegedly indiscriminately fired on a group of unarmed civilians.⁴⁹ In another example, there has been a history of human rights abuses, including child labour and safety concerns,⁵⁰ in the Democratic Republic of the Congo. The State is an important source of minerals, including those required to transition from fossil fuels to renewable energy, such as copper, cobalt and manganese. Amnesty International has documented the failure of the Government to protect people from human rights abuses related to the mining sector.⁵¹

One of the most significant developments in this area of law focuses on curbing the trade in 'conflict minerals'. In this respect, the consultations reaffirmed the positive effect, inter alia, of adopted legislation, including the Dodd-Frank Act in the United States of America and the EU Conflict Minerals Regulation, as well as initiatives such as the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas of the Organisation for Economic Co-operation and Development.

Reports of human rights violations by businesses in conflict areas point to a failure by Governments to protect human rights, including the Governments of States in which businesses along the supply chain operate (e.g. where the final commodity is traded, in relation to mining). This may be due to either complicity or a lack of resources; either way, it is incumbent upon these Governments to protect human rights by curbing business-related abuses in conflict-affected areas.

49 Business and Human Rights Resource Centre, 'Mozambique: Report accuses private military contractors of taking part in the killing of civilians; includes company comments', 4 March 2021.

50 Aaron Ross, 'Send in the troops: Congo raises the stakes on illegal mining', *Reuters*, 17 July 2019.

51 Amnesty International, *"This is What We Die for": Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Conflict* (London, 2016).

F. KEY FINDINGS AND RECOMMENDATIONS

Given the importance of Africa as an emerging foreign direct investment destination with rapidly growing economies, it is imperative that the AU member States promote investment that respects human rights, is pro-poor and contributes to the reduction of existing inequalities. The AU and relevant African human rights and governance institutions and frameworks have the potential to implement the UNGPs to a greater extent. In recent years, the gradual increase in the awareness of business and human rights has also been effectively reflected in the human rights protection mandate of the AU. Its Draft Policy on Business and Human Rights should therefore be adopted and implemented.

Nevertheless, challenges remain as to the enforceability of findings by the African Commission and the African Court on Human and Peoples' Rights. In addition, the Court's jurisdictional reach is dependent on the ratification of its Protocol, which, to date, pertains to 33 AU member States. While the States parties could recognize the standing of individuals and NGOs before the Court through a separate declaration, the number of States that have submitted such a declaration to date demonstrates the inadequacy of such an option in practice.

Member States' failure to implement the Commission's recommendations relating to the compensation of victims of corporate-related abuse may deter potential litigants from petitioning the Commission in other compelling cases, thereby frustrating access to remedy.

Regional economic blocs, with a primary mandate to promote economic cooperation, have been slow to embrace human rights frameworks; however, there is room for a more robust application of their treaty obligations to ensure that trade policies respect human rights. The Court of Justice of the Economic Community of West African States constitutes a promising example. It is the only regional judicial body with explicit jurisdiction over cases of human rights violations within its member States, and it has the competence to receive individual applications. It is therefore clear that, with appropriate institutional frameworks in place, most of the regional mechanisms have the potential to play a greater role in reinforcing human rights protection in the region, including in the intersection of business and human rights.

The effectiveness of these regional bodies is impeded by their failure to embrace human rights and the lack of political will to implement their decisions. In order for those institutions to be meaningful avenues to promote the protection of human rights by member States, there must be a paradigm shift to embrace, protect and respect human rights as a guiding principle.

1. Key findings

- **Adoption of NAPs and NBAs has been slow.** Uganda and Kenya are the only countries that have formally adopted an NAP. Ghana, Mozambique and others have made efforts to develop NBAs and require support to turn them into fully fledged NAPs.

- **Awareness of the UNGPs is low across the region.** A lack of awareness of the UNGPs remains prevalent across the continent, alongside a lack of peer support from more advanced States in UNGP implementation. The lack of awareness is particularly notable among businesses; however, Governments and civil society are also inadequately informed about the content and implications of the UNGPs.
- **Lack of ownership of the UNGPs is plaguing their implementation.** There is a perception that African States and constituents might not have been adequately consulted in the development of the UNGPs. This belief may have compromised efforts to disseminate the Guiding Principles and use them as a framework that can complement other initiatives to promote respect for human rights by businesses.
- **The informal economy is underrepresented in the discourse around the UNGPs.** The informal economy, which represents 89.2 percent of all employment in sub-Saharan Africa, has largely been sidelined in the conversation on the UNGPs, including in the development of NAPs in those States that have embarked on the process.
- **Ratification of core human rights treaties and ILO fundamental conventions is a strong suit of African States.** Many countries have ratified international human rights treaties that obligate them to protect various groups against harm, including harm by corporations. In addition, States have established laws and regulatory bodies to protect individuals and communities from human rights violations caused by businesses. Nevertheless, there are major gaps in the enforcement of these laws.
- **AU institutions have not been used to their full potential.** AU institutions and policies carry the potential to catalyse the dissemination and understanding of the UNGPs among their member States. This potential could manifest itself primarily through the passage of the AU Policy on Business and Human Rights and the work of the African Commission on Human and Peoples' Rights (including its working groups and communications procedure). However, the existence of unimplemented treaties suggests that the AU can only be meaningful if there is political will. The jurisprudence of the African Court on Human and Peoples' Rights can also contribute to advancing human rights in relation to business activities.
- **The potential of subregional mechanisms is similarly underused.** Despite their economic focus, subregional mechanisms can also contribute to advancing understanding of the UNGPs, as well as business and human rights more generally, if there is political will. Unfortunately, such efforts have not borne fruit to date.
- **SOEs are not leading by example.** In many cases, SOEs are seen as conduits of corruption by State agents. This significantly impacts the State's credibility to demand better conduct from businesses.
- **The UNGPs have not been sufficiently implemented in conflict-affected areas.** With many ongoing international and non-international armed conflicts in sub-Saharan Africa, States must carefully regulate and provide guidance to businesses in order to protect against human rights violations in the context of their operations. The current mechanism has largely been unsuccessful in protecting human rights.
- **AfCFTA could drive horizontal policy coherence.** The recent launch of AfCFTA has the potential to drive sustainable economic development throughout the African continent, so long as it is accompanied by respect for human rights and environmental protections, particularly with regard to women and youth, in line with international commitments.

2. Recommendations

(a) Recommendations for States

- **Prioritize the drafting of NBAs and NAPs.** To fully implement the UNGPs, developing NBAs and NAPs in a participative manner is an important first step. In undergoing a consultative, informed drafting process, States can take incremental steps to implement the UNGPs.
- **Identify business and human rights and UNGP focal points.** As is the case in Kenya, it is important to designate a focal point for all matters regarding UNGP implementation, including the development of the NAP. The focal point should remain the same throughout the process. Promoting greater involvement of key leaders in sub-Saharan African Governments (as well as within regional and subregional institutions, as described below) will promote a new generation of leaders who are well placed to facilitate change regarding business and human rights.
- **Improve African ownership of the UNGPs.** One potential solution is for African regional institutions and economic blocs to play a more significant role in promoting human rights compliance in business operations (see the recommendations below).
- **Provide increased resources and peer support.** Not all States throughout sub-Saharan Africa have sufficient resources to promote and oversee UNGP implementation. States should seek support from international organizations, regional bodies and development agencies. In addition, States with a more advanced understanding of how to implement the UNGPs should provide peer support to those with less-developed knowledge.
- **Increase and incentivize human rights compliance.** As NAPs are completed going forward, they should include incentives for companies to comply with the UNGPs and other good business practices. For example, tax incentives may improve overall compliance. The inclusion of human rights compliance in corporate reporting can also increase compliance and accountability.
- **Focus on the informal economy.** Focus time, funding and other efforts on promoting UNGP implementation, and business and human rights notions more generally, in the informal economy.
- **Aim to register and incorporate the informal sector into the formal economy.** Create a registration process that includes awareness-raising on the UNGPs and incentives for informal businesses to adhere to them.
- **Pay particular attention to regulating artisanal mining, among other informal sectors.** In doing so, consider best practices such as designating land for the practice, consulting local communities, educating miners and ensuring that the gendered impacts of any regulation are taken into account.
- **Consider a 'smart mix' of measures.** A smart mix of coercive and voluntary measures should be relied upon to promote human rights compliance through the implementation of the UNGPs. States should begin by adopting laws requiring businesses to practice human rights due diligence and by reviewing their legislation, including company law, to ensure that it is compliant with the UNGPs.
- **Encourage greater leadership by example for SOEs to comply with the UNGPs.** Businesses are less likely to comply with the UNGPs if SOEs fail to do so.
- **Accede to regional and international human rights instruments.** The sub-Saharan African States should accede to regional and international legal instruments to increase the jurisdiction of the African Court on Human and Peoples' Rights.

- **States should adhere to international standards related to 'conflict minerals'.** As highlighted by the United Nations Working Group on business and human rights, one of the most significant developments is focused on curbing the trade in conflict minerals. In this respect, consultations have reaffirmed the positive effects of legislation and other adopted documents, including the Dodd-Frank Act, the EU Conflict Minerals Regulation (effective from 1 January 2021) and the Voluntary Principles on Security and Human Rights.

(b) Recommendations for regional and subregional institutions in sub-Saharan Africa

- **Involve and empower regional and subregional mechanisms.** A good starting point would be the adoption of the AU Draft Policy on Business and Human Rights. Furthermore, Secretariat staff, expert working groups and remedial bodies within such mechanisms can promote, regulate and adjudicate on business- and human rights-related matters, which presents an opportunity for marked advancement of such principles throughout the continent.
- **Enhance the mandate of the adjudicative bodies.** Regional and subregional mechanisms should have explicit jurisdiction to adjudicate cases of human rights violations.
- **Improve the enforceability of judgments.** Regional and subregional adjudicative mechanisms must have a more effective system to enforce their judgments, which requires resources and political will from member States.
- **Address the underemphasis of human rights in trade and investment.** In trade, investment and economic treaties, human rights should be integrated more effectively and prioritized at a level similar to economic goals and objectives.
- **Take steps to guarantee domestic policy coherence within the AU member States concerning AfCFTA.** While the promotion of AfCFTA can provide significant economic benefits for all AU member States, it must not do so to the detriment of human rights and environmental protections. Further steps must be taken to protect against such an eventuality.



A group of children are running on a dirt path in a rural setting. The child in the foreground is wearing an orange shirt and green shorts. Other children are visible in the background, some wearing school uniforms. The scene is set against a backdrop of trees and foliage. A large blue circular graphic is on the right side of the page.

CHAPTER TWO

PILLAR II: THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

Pillar II of the Guiding Principles contains a set of principles that outline the responsibility of business enterprises to respect human rights.⁵² These principles apply even to cases in which businesses operate in a country lacking effective law enforcement and regardless of whether domestic legislation requires such conformity. Pillar II prescribes several measures that businesses should take to meet their responsibility to respect human rights. These are:

- Ensuring that they have a human rights policy and embedding human rights in their operations.
- Conducting human rights due diligence to identify, prevent, mitigate and account for the way in which they address actual and potential adverse human rights impacts.
- Providing remedies to victims of harm suffered as a result of their actions or decisions.
- Businesses operating in conflict situations also have an essential obligation to take special care to ensure that they do not exacerbate or become complicit in the conflict. The following section explores the extent to which businesses operating in Africa are implementing these measures.

⁵² Principles 11–24 can be broken down into the following categories: (i) foundational principles (11–15) and (ii) operational principles (16–24). The operational principles are further broken down into specific themes: (i) drafting human rights policy statements (16), (ii) conducting human rights due diligence (17–21), (iii) providing remediation when causing or contributing to an adverse human rights impact (22) and (iv) Addressing contextual issues concerning business compliance with internationally recognized human rights (23–24).

A. ADOPTION OF HUMAN RIGHTS POLICIES

A human rights policy is “a company’s public expression of its commitment to meet its responsibility to respect internationally recognized human rights standards. At a minimum, this means the rights set out in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.”⁵³ Such a policy serves a number of purposes, which include providing a basis for embedding the responsibility to respect human rights throughout all business functions, building trust with stakeholders, identifying processes to respond to human rights risks, fostering in-house learning and demonstrating international good practices. The policy should also include a clear statement.⁵⁴

Most of the surveyed businesses with human rights policies are African-based subsidiaries of companies based in the global North, where the parent company has a human rights policy. Nevertheless, there are some cases of African businesses that have adopted a human rights policy. One such example is the policy adopted by Cityscape Trends Services, a Kenyan SME in the cleaning business.⁵⁵ Although it makes broad commitments to respect human rights, it does not provide a detailed set of guidelines as to what standards are used or how they are put into practice. As this example shows, the policies of African businesses surveyed do not necessarily reflect the UNGPs and do not reference relevant standards, such as the International Bill of Human Rights. In general, the slow uptake of human rights policy statements across all sectors may be attributed to several factors.

1. Low level of awareness among businesses of their human rights responsibilities

As discussed in chapter I, there is a low level of awareness of human rights standards, including the UNGPs, at both the government level and among businesses. There are cases in which businesses have responded to human rights concerns by adapting their corporate social responsibility initiatives, which indicates that there may be confusion about the difference between corporate social responsibility and human rights.⁵⁶

2. Lack of mandatory human rights conduct

Like other societal entities, businesses respond to policy and legislative requirements. For example, the requirement to conduct environmental impact assessments, which was introduced in many countries in the last two decades, has at least increased an awareness of the environmental obligations of businesses.

53 Lucy Amis, *A Guide for Business: How to Develop a Human Rights Policy* (United Nations Global Compact and Office of the United Nations High Commissioner for Human Rights, 2015).

54 For a more comprehensive description of this requirement, see principle 16 of the UNGPs and its accompanying commentary.

55 Cityscape Trends, ‘Our policy’. Accessed on 1 September 2021. Available at: <http://cityscapetrends.co.ke/our-policy/>.

56 In a response by Seyani Brothers to human rights concerns, the company stated: “We strongly believe our Company is substantially, if not fully, compliant with generally accepted principles of Corporate Accountability (CA). According to us, [corporate social responsibility] and CA are not mutually exclusive, but are very closely inter-twined with one another.” Business and Human Rights Resource Centre, ‘Seyani Brothers says it strives to “ensure protection of human rights”’, 22 November 2016.

A human rights defender interviewed for this report stated that, instead of publicly disclosing the human rights effect of their operations and the steps taken to demonstrate respect for human rights, some companies announce a perfunctory commitment to human rights accompanied by what ostensibly appears to be a “pay-off” to the community in which they operate (e.g. building a school or digging a well). He challenged the relevance of such a gesture when compared to actual human rights compliance and noted the need to change such practices. Another stakeholder noted that the failure to draft a human rights policy statement was due to a lack of will, whether in corporate boardrooms or corporate offices.

Although small businesses might find it technically challenging to adhere to mandatory legal obligations to embed human rights, enacting such a policy for larger businesses (e.g. with a threshold based on either turnover or the number of employees) would undoubtedly be an incentive to adopt—and hopefully implement—a human rights policy.

3. Different practices by multinational corporations depending on the location of operations

According to an expert from the Eastern-Southern Africa National Human Rights Institutions Business and Human Rights Peer Learning Initiative: “Parent companies, especially those domiciled in States where human rights are more stringently enforced, rarely hold their subsidiaries operating in jurisdictions where human rights are less stringently enforced to similarly high human rights standards. This results in rights-holders in developing countries frequently experiencing a disproportionate burden of adverse human rights impacts, particularly those living in countries with poor regulatory frameworks and/or poor legal enforcement.”⁵⁷

While this initial challenge may be partially cured through wider dissemination and awareness-raising internally of a company’s human rights policy, the same expert noted a more serious concern with what he characterized as multinational companies having “multiple personalities”. On the one hand, the human rights policy statement, crafted in full conformity and pursuant to its commitment to comply with the UNGPs, may be impressively reflected in European, North American and/or Australian business operations. On the other hand, the same company’s African operations may be held to a decidedly lower human rights standard. In short, it seems that the company’s interest in maximum economic return in Africa dictates corporate philosophy, relegating human rights requirements to a lower level of importance or ignoring them altogether.

According to the South African Human Rights Commission, some multinational companies may ascribe to the principles enshrined within the UNGPs, but “do not necessarily intend or do follow them ... Human rights responsibility becomes a checkbox exercise and one that looks good on a company’s annual report and website.”⁵⁸

This trend is revealed by the cases in which subsidiaries of parent companies with human rights policies have been accused of human rights violations in Africa. For example, Glencore’s subsidiary was alleged to be complicit in poor working conditions

⁵⁷ OHCHR, *Responses to the UNGPs 10+ Questionnaire*, p. 5.

⁵⁸ *Ibid.*, p. 12.

in the Democratic Republic of the Congo.⁵⁹ In addition, Kakuzi, a subsidiary of United Kingdom-based Camellia, recently settled a claim for human rights violations in Kenya.⁶⁰

4. Human rights policy statements treated as a 'checkbox' exercise

There are many parent companies with human rights policies that have subsidiaries in Africa. In assessing the operations of these subsidiaries, CSOs have expressed concern that some companies have fallen short in ensuring that human rights policies are embedded in their operations. For example, concerns have been expressed about the role of Total E&P Limited in the proposed East African Crude Oil Pipeline that will transport crude oil from oil fields in Uganda to the Tanzanian coast. Total has a publicly available human rights statement, which includes a commitment to the Sustainable Development Goals.⁶¹ Nevertheless, there are reports that the project will cause harm to individuals, communities and the environment by compromising food security, land rights and ecosystems, among other concerns.⁶² Two separate lawsuits have been filed by NGO coalitions to block construction of the pipeline.

On 23 October 2019, a case was filed by a coalition of two French and four Ugandan organizations with the Nanterre High Court in France, based on the French duty of vigilance law.⁶³ The organizations claimed that Total had breached its duty of vigilance since its vigilance plan for the pipeline project contains no specific measures to prevent or mitigate the risks identified to prevent potential human rights violations.⁶⁴ On 10 December 2020, the Versailles Court of Appeal found in favour of Total and remanded the case to a commercial court (after the Nanterre High Court declared itself incompetent to rule on the case). It did not issue a ruling on the merits of the case. On 15 December 2021, the Supreme Court of France ruled in favour of the claimants and, therefore, rejected the jurisdiction of the commercial courts. The Paris Civil Court will now examine the case on its merits. This case constitutes the first legal action in France based on the law governing the duty of vigilance of transnational corporations.⁶⁵

On 6 November 2020, in a separate proceeding, a coalition of four NGOs filed a lawsuit with the East African Court of Justice against the Governments of Tanzania and Uganda,

59 IndustriALL Global Union, 'DRC: IndustriALL mission finds Glencore gravely mistreating workers at cobalt mines', 22 February 2018.

60 Business and Human Rights Resource Centre, 'Kenya: Camellia settles claims of abuses incl. killings & sexual violence at Kenya's subsidiary', 15 February 2021.

61 Total, *Human Rights Briefing Paper Update* (2018), p. 29.

62 International Federation of Human Rights, *New Oil, Same Business? At a Crossroads to Avert Catastrophe in Uganda* (2020); Les amis de la terre France and Survie, *A Nightmare Named Total: an Alarming Increase in Human Rights Violations in Uganda and Tanzania* (2020).

63 The French organizations are Friends of the Earth France [Les amis de la terre France] and Survie [Survive]. The Ugandan organizations are Africa Institute for Energy Governance (AFIEGO), CRED, Navigators of Development Association (NAPE)/Friends of the Earth Uganda and Navigators of Development Association (NAVODA).

64 Les amis de la terre France and Survie, *Total Uganda: a First Lawsuit Under the Duty of Vigilance Law – An Update* (2020), p. 5.

65 Business and Human Rights Resource Centre, 'Total lawsuit (re failure to respect French duty of vigilance law in operations in Uganda)', 23 October 2019.

as well as the Secretary-General of the East African Community.⁶⁶ The organizations also alleged that neither of the assessments conducted by Total included an assessment of the project's impact on human rights or climate change.⁶⁷

B. HUMAN RIGHTS DUE DILIGENCE

One way for businesses to identify, prevent, mitigate and account for the way in which they carry out their human rights practices is by conducting human rights due diligence. This process should cover all actual and potential impacts that a business enterprise may cause or contribute to in its operations, as well as the impacts of those with which it has a business relationship. Human rights due diligence should preferably be conducted prior to the commencement of operations.

Unfortunately, many sub-Saharan companies have not embedded human rights due diligence. A survey of banks financing mining companies in southern Africa revealed that only a small percentage have engaged in this process. There are also several cases in which businesses conduct human rights due diligence only following public pressure surrounding the human rights impacts of their operations. For example, Kakuzi launched a human rights impact assessment process after its parent company was sued in the United Kingdom for violations in Kenya.⁶⁸

1. Factors attributed to the widespread failure of businesses to conduct human rights due diligence

(a) Lack of awareness of processes and practices

The lack of awareness about the human rights due diligence process is a reflection of the lack of awareness of the UNGPs generally, as discussed previously. First, there is a lack of awareness about the due diligence requirement and when it is necessary. An interview participant noted that most companies were not aware that this process should be applied preventively and therefore did not do so.

Second, interviewees believe that there is a lack of guidance on the contours of a human rights due diligence exercise. One interviewee with significant experience in human rights due diligence processes noted that, in conducting their human rights risk assessments, companies see such risks only in relation to their own business operations and not the actual or potential effect their operations have on other stakeholders who may be adversely affected by that risk. In other words, companies are unaware that the main purpose of human rights due diligence is the prevention of risks to people, not businesses.

66 The NGOs include Center for Food and Adequate Living Rights, Africa Institute for Energy Governance, Natural Justice and the Center for Strategic Litigation in Tanzania.

67 Natural Justice, 'Natural Justice joins legal challenge against the East Africa Pipeline', 25 November 2020.

68 Kakuzi, 'Kakuzi PLC press statement', 11 February 2021. Available at: www.kakuzi.co.ke/2021-kakuzi-plc-press-statement.

Third, a significant percentage of businesses do not understand the long-term reputational and potential financial value of a due diligence exercise. A civil society leader interviewed noted that companies view due diligence exercises as a “favour to the community” and a means of achieving greater publicity and visibility. Lastly, a proprietor of an SME who was interviewed observed that her peers in the sector view the costs of human rights due diligence as prohibitively high.

(b) Failure to make human rights due diligence obligatory

Most businesses are keen on complying with legal requirements, which explains why some businesses have conducted environmental impact assessments before they receive authorization to operate. Since human rights due diligence is voluntary, businesses have been reluctant to embrace it. In some cases, they view it as an inconvenience.

A mandatory legal requirement would therefore significantly increase the number of companies carrying out human rights due diligence. In support of this view, one interviewee observed that, in his experience, many businesses operating in areas in which human rights due diligence is not mandatory tend to undertake due diligence only after a human rights violation takes place and they have been exposed, either through the media or litigation.

Despite the voluntary nature of human rights due diligence in Africa, developments in its many European trading partners may catalyse a movement towards mandatory human rights due diligence on the continent. For example, the Kenya NAP recommends that the Government consider enacting a mandatory human rights due diligence law in the near future.

C. BUSINESS OPERATIONS IN CONFLICT-AFFECTED AREAS

As discussed in the previous chapter, conflict and post-conflict situations pose a unique challenge for businesses. There are three principal ways that businesses can contribute to an armed conflict. First, business operations could exacerbate the preconditions for armed conflicts, such as poverty or feelings of exclusion, when local communities perceive that they are not benefiting from local resources. Second, business operations may provide funding to parties to the conflict. Third, businesses may act as accomplices, especially when they benefit from the conflict.⁶⁹

Several businesses in sub-Saharan Africa have been mentioned in a negative light in relation to their operations in conflict situations. A few are highlighted here:

1. Oil firms operating in South Sudan have come under scrutiny in the United States for business activities that allegedly financed the conflict.
2. The case of *The Prosecutor v. Michel Bagaragaza* at the International Criminal Tribunal for

⁶⁹ Hugo Slim, ‘Business actors in armed conflict: towards a new humanitarian agenda’, *International Review of the Red Cross*, vol. 94, No. 887 (Autumn 2012).

Rwanda illustrates an example in which a business was allegedly complicit in a conflict situation.⁷⁰ Mr. Bagaragaza was the Director-General of OCIR-Thé, the Government office that controlled the tea industry in Rwanda. During the conflict, Mr. Bagaragaza substantially contributed to the killing of over 1,000 members of the Tutsi ethnic group, demonstrating his complicity in genocide. His contribution included providing vehicles and fuel from the tea company to transport members of the Interahamwe for genocidal attacks. Furthermore, attackers were provided with heavy weapons, personnel from the factories participated in the attacks and Mr. Bagaragaza gave permission for company assets such as vehicles and fuel to be used by the perpetrators.

3. In 2018, the Swedish Prosecution Authority received approval in principle to indict the Chief Executive Officer of Lundin Energy for allegedly aiding and abetting war crimes that occurred between 1999 and 2003 in current-day South Sudan. On 11 November 2021, the Swedish public prosecutor brought formal charges.⁷¹
4. Survivors of the 2007/2008 post-election violence in Kenya who worked at Unilever's subsidiaries have filed a complaint against the company with the United Nations Working Group on business and human rights. They allege that the company failed to take reasonable measures to protect them from ethnically motivated attacks following the disputed election.⁷²

Several multi-stakeholder initiatives seek to address the issue of businesses exacerbating human rights violations in conflict situations. These include the Voluntary Principles on Security and Human Rights and the Kimberley Process.

1. Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights promote the implementation of a set of principles that guide companies on providing security for business operations while respecting human rights. The principles were a reaction to accusations against businesses in the extractive industry that hired security services complicit in human rights abuses in the communities in which they operated.⁷³

The Voluntary Principles focus on: (i) conducting political, economic, civil and social risk assessments; (ii) ensuring that public security providers act in conformity with international human rights principles; and (iii) taking steps to ensure policies and practices involving private security providers conform to the law and international guidelines.

Companies working in the extractive sector have stated that they rely on the Voluntary Principles to guide their operations. For instance, in 2019, Chevron said it conducted training through the NGO Leadership Initiative for Transformation and

70 United Nations, International Tribunal for Rwanda, *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-S, Sentencing Judgement, 17 November 2009.

71 Business and Human Rights Resource Centre, 'Lundin Energy lawsuit (re complicity in war crimes, Sudan)', 11 November 2021.

72 Ginger Hervey, 'Kenyan tea workers file UN complaint against Unilever over 2007 ethnic violence', *The Guardian*, 1 August 2020.

73 Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, 1999, cited in Scott Jerbi, 'Assessing the roles of multi-stakeholder initiatives in advancing the business and human rights agenda', *International Review of the Red Cross*, vol. 94, No. 887 (Autumn 2012), pp. 1033–34.

Empowerment-Africa for approximately 100 government security forces personnel who had been assigned to Chevron facilities in Nigeria.⁷⁴ In Tanzania, mining companies have responded to claims of complicity in alleged killings, beatings and torture of local community members by State security agents and private security personnel by stating that they are guided by the Voluntary Principles.⁷⁵ Despite the good intentions behind the Voluntary Principles, some of the stakeholders interviewed for this report believe that the desired goal has not been achieved as a result of design flaws, particularly their voluntary nature and the lack of credible sanctions for businesses that breach the standards.

2. Kimberley Process

The Kimberley Process was established to prevent trade in rough diamonds from directly or indirectly financing armed conflicts, primarily in sub-Saharan Africa. The initiative seeks to remove 'conflict diamonds' (defined as rough diamonds used to finance wars against Governments) from the global supply chain, creating an international certification scheme that regulates trade. In doing so, it focuses on the transparency and traceability of traded diamonds, bringing together Governments, industry and civil society.

Businesses continue to operate in conflict zones in a way that has raised questions about the credibility of the numerous initiatives to promote responsible conduct. It is imperative that businesses adopt more credible measures to ensure that they are not complicit in human rights violations, which often go unredressed, primarily owing to a lack of confidence in the public justice system in conflict areas.

D. KEY FINDINGS AND RECOMMENDATIONS

1. Key findings

- **There is little awareness of the Guiding Principles among businesses.** While some businesses in Africa are aware of the existence of the UNGPs, a significant number are unfamiliar with them or lack guidance on the practical steps to take to effectively fulfil their responsibility to respect human rights.
- **There are challenges facing SME participation.** SMEs constitute a high percentage of employers and drivers of the economy from the private sector, but many have not understood or embedded human rights principles in their business operations. This is partly due to a lack of information on standards and principles, such as the UNGPs, and partly due to the perceived cost of adopting such measures.
- **Human rights policies are often seen as a public relations activity.** Human rights policy statements are seen by some businesses as a 'checkbox' exercise undertaken with a focus on public relations and not human rights.
- **Human rights due diligence is not typically conducted.** Only a small percentage of businesses have internalized or mainstreamed human rights due diligence or adopted operational-level grievance mechanisms.

⁷⁴ Chevron, *The Voluntary Principles on Security and Human Rights: 2020 Update Report* (2020), p. 3.

⁷⁵ For example, see Barrick Gold Corporation, *2019 Annual Report to The Voluntary Principles on Security and Human Rights* (2020).

- **Due diligence processes face several hurdles.** Stakeholders have provided their view that many business enterprises in sub-Saharan Africa are not aware of the importance of human rights due diligence. There is a need to improve the overall awareness, mandate and contents required in human rights due diligence processes. Even those businesses that do possess such awareness may not include or incorporate important content within their processes. The cost considerations of due diligence and/or an unwillingness to incur such costs are also a factor.
- **Special care is needed when operating in conflict-affected areas.** Despite many voluntary and mandatory measures to regulate business operations in conflict-affected areas, countries affected by ongoing conflicts continue to host businesses that appear insufficiently aware of their responsibilities under international human rights or humanitarian law.
- **Multi-stakeholder initiatives have not fulfilled their promise.** Despite the efforts made, these initiatives have failed to guarantee respect for human rights, possibly owing to their voluntary nature. Multi-stakeholder initiatives should be complemented with mandatory measures to bring their full potential to bear.

2. Recommendations

- **Companies should bridge their internal knowledge gaps.** Companies should work towards bridging the gap between those working in sustainability, corporate social responsibility and/or human rights departments and those working in business operations in order to increase capacity and awareness of human rights risks in the context of business activities.
- **Governments and companies should support the introduction of mandatory human rights due diligence.** Although some businesses may balk at the introduction of new requirements, forward-looking companies should back the introduction of mandatory human rights due diligence legislation, which would provide them with a level playing field. Companies that fail to meet their responsibilities would no longer have a competitive advantage. In addition, it would future-proof their operations, reducing their legal and reputational risks. Lastly, businesses in the supply chains of European companies would be able to meet current or future obligations imposed by mandatory human rights due diligence legislation enacted by European countries, as well as legislation expected to be adopted by the EU in the second half of 2022.
- **Universities and other relevant institutions should bridge the gap between business and human rights education.** There is a need for the Guiding Principles to be taught in law schools and business programmes throughout sub-Saharan Africa in order to promote a greater understanding of the role of human rights in business operations and allow persons working across business enterprises to become familiar with the UNGPs.
- **Multinationals should apply the same standards of respect for human rights to their subsidiaries as to their parent companies.** The level of respect for human rights should not depend on whether host Governments have the resources to ensure compliance with international human rights standards.
- **Governments, chambers of commerce, NHRIs, universities and civil society should sensitize business enterprises to due diligence.** It is imperative to continue to build businesses' capacity to understand that human rights risk in their business operations carries legal and reputational risk. Moreover, companies should understand that their enhanced respect for human rights impacts is related not only to the performance of their company but also to tangible benefits and protections to other stakeholders.
- **Governments, chambers of commerce, universities and think tanks working on business and human rights should simplify the language of due diligence for SMEs and companies in the informal economy.** This will lead to much greater compliance, as human rights due diligence remains an amorphous notion for some. Simplifying the language, particularly for small companies, can improve buy-in and awareness.





CHAPTER THREE

PILLAR III: ACCESS TO REMEDY

Pillar III of the Guiding Principles reiterates the need for an appropriate and effective remedy to be provided in the event of a human rights violation by a business enterprise. There are three forms of remedial mechanisms provided for by the UNGPs: (i) State-based judicial mechanisms, (ii) State-based non-judicial mechanisms and (iii) non-State grievance mechanisms.

There are many legal and procedural obstacles to access to remedy for victims of human rights violations by corporations in Africa. These range from the high cost of litigation and physical access to courts to the lack of technical capacity needed to prove wrongdoing by businesses in complex cases such as environmental-related litigation. Victims of human rights violations lack sufficient resources to hire a lawyer; have a shortage of experienced lawyers to choose from, particularly in rural areas; and face judicial systems that are politicized, understaffed, underresourced and susceptible to corruption.⁷⁶

In certain instances, victims of human rights violations have been required to seek redress extraterritorially owing to a lack of effective remedies at home. Regional human rights mechanisms such as the African Commission or the African Court on Human and Peoples' Rights lack effective enforcement mechanisms, limiting their credibility as avenues for redress.⁷⁷ In some cases, States are reluctant to comply with judgments in favour of victims. For example, members of the Ogiek community in Kenya have waited for many years for the Government to honour a judgment of the African Court on Human and Peoples' Rights.⁷⁸

76 Accountability Counsel and ACCA, *Accountability in Africa: Harm from International Financial Flows and Strategies for Supporting Community-led Access to Remedy* (2020).

77 Ibid, p. 43. The report also documents challenges in obtaining effective remedy from the international accountability mechanisms of international financial institutions, Organisation for Economic Co-operation and Development National Contact Points and other voluntary initiatives and codes of conduct.

78 ESCR-Net, 'African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017)'. Accessed on 3 September 2021.

NHRIs are growing more relevant in supporting victims to access remedy. According to the Network of African National Human Rights Institutions, there are 44 African countries with an NHRI. Given their quasi-judicial nature, they have significant potential not only in promoting the protection of human rights by States but also in securing access to remedy. This chapter discusses contributions made by NHRIs, the steps they can take to provide remedies for business-related human rights abuses and the challenges they face in providing these remedies.

A. CONTRIBUTIONS OF NATIONAL HUMAN RIGHTS INSTITUTIONS TO ACCESS TO EFFECTIVE REMEDIES

NHRIs that have the jurisdictional remit, mandate, resources and expertise to address human rights violations by business enterprises can play a positive role in providing effective access to remedy throughout sub-Saharan Africa. These institutions should be independent from the State and thereby insulated from the vacillating and transient nature of politics and politicians' concomitant priorities. This status should facilitate their ability to effectively investigate allegations of human rights violations committed by businesses in the context of their operations.

NHRIs can facilitate access to an effective remedy via individual complaints filed with the institution itself, alternative dispute resolutions (e.g. mediation and conciliation) and investigations prompted by an individual complaint or systemic human rights abuses. Institutions may also indirectly facilitate access to remedy by raising awareness; influencing policy and legislation; and conducting monitoring, research and advocacy.⁷⁹ They can also collaborate with other actors and mechanisms, including judicial and remedial mechanisms, government officials, industry associations and CSOs. The extent of their role depends on the mandate provided by the respective enabling legislation.

In 2019, at the request of the United Nations Human Rights Council, the United Nations Working Group on business and human rights launched a project on the role of NHRIs in facilitating access to remedy for business-related human rights violations.⁸⁰ The Working Group disseminated questionnaires to NHRIs and other stakeholders requesting further information on their operations. Côte d'Ivoire and Kenya were among those that responded. Table 2 compares the mandates of the NHRIs in Côte d'Ivoire and Kenya in dealing with grievances of corporate harm.

⁷⁹ Nora Götzmann and Sébastien Lorion, *National Human Rights Institutions and Access to Remedy in Business and Human Rights: Part 1 – Reviewing the Role and Practice of NHRIs* (Copenhagen, Danish Institute for Human Rights, 2020), pp. 24–26.

⁸⁰ See United Nations, Human Rights Council, *Resolution adopted by the Human Rights Council on 6 July 2018, A/HRC/RES/38/13*, 2018, para. 8, in which the Working Group is requested "to analyse further the role of national human rights

TABLE 2. Comparison of the mandates of the national human rights institutions of Kenya and Côte d'Ivoire to address business-related human rights violations

Function	Kenya National Commission on Human Rights	Côte d'Ivoire National Human Rights Council [Conseil national des droits de l'homme]
Mandate to handle complaints	The Commission has a mandate to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.	The Council has an explicit mandate to conduct non-judicial inquiries and all necessary investigations into the complaints of human rights violations referred to it.
Other access to remedy mechanisms	Conciliation, mediation or negotiation, inter-agency referral mechanism.	Conciliation, referral mechanism.
Mandate to investigate, conduct inquiries and adjudicate individual cases	Mediation, public interest litigation and public inquiry. Additionally, the Commission uses an inter-agency referral mechanism when a complaint falls outside its mandate.	Non-judicial inquiries and all necessary investigations into the complaints referred to it. This provision is applicable to all human rights violations, including those committed by companies.
Indirect measures to facilitate access to remedy	The Commission plays a key role in influencing policy and legislation and is entrusted with verifying compliance with international law. It is also mandated to formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of citizens under the Constitution. The Commission also submits shadow reports or collaborates on State reports submitted to various international reporting mechanisms.	The Council raises awareness among industrial unions and civil society. For example, it has carried out capacity-building activities to strengthen the capacities of civil society organizations and local communities regarding remedies and risk assessment on human rights in the mining sector.
Collaboration with other judicial or non-judicial remedial mechanisms	The Commission is an active member of the Court Users Committees, ^a several referral platforms and/or mechanisms that would enhance efficient and effective access to justice, as well as several task forces emanating from legislative and legal obligations.	The Council provides assistance and information to applicants and refers cases to the relevant mechanism in the event of alleged human rights violations. It therefore collaborates with all judicial and non-judicial mechanisms with a mandate to support or facilitate the satisfactory treatment of registered complaints.
Treatment of complaints concerning parent and subsidiary companies or the supply chain	Extraterritorial issues remain a weak point in addressing business-related human rights issues, since the Commission has no mandate to deal with matters or actors outside the jurisdiction of Kenya. Nevertheless, in meetings with other NHRIs, proposals have been made to collaborate on resolving cross-border human rights violations.	The processing of requests does not usually require recourse to parent companies. Complaints submitted to the Council were settled directly with the national representatives of the mining companies.

Source: Kenya, The Kenya National Commission on Human Rights Act, 2011: No. 14 of 2011; and Côte d'Ivoire, Loi n° 2018-900 du 30 novembre 2018 portant création, attributions, organisation et fonctionnement du Conseil national des Droits de l'Homme [Act No. 2018-900 of 30 November 2018 on the creation, attributions, organization and function of the Côte d'Ivoire National Human Rights Council].

^a Court Users Committees provide a platform for actors in the justice sector at the local or regional level to consider improvements in the operations of the courts, coordinate the functions of all agencies within the justice system and improve the interaction of these stakeholders.

1. Obstacles to the role of national human rights institutions as a pathway to an effective remedy

Despite the potential of NHRIs to secure access to remedy for corporate-related harm, several obstacles hamper them from fulfilling this role, including constraints in their mandate, a lack of resources, limited understanding of the way to intervene in certain cases and complications arising from the cross-border operations of businesses within their jurisdiction.⁸¹ Each of these is highlighted below.

(a) Limited mandate

According to the Nigerian National Human Rights Commission, many business-related grievances concerning economic, social and cultural rights are not justiciable under the Constitution.⁸² Both the NHRIs in Côte d'Ivoire and the Niger have highlighted their inability to enforce decisions due to their quasi-judicial status.

An interviewee working for one NHRI noted that its mandate is strictly national. This limits cooperation and increases the challenges of working outside the country because it is difficult to draw mutually beneficial linkages with other NHRIs and stakeholders.

(b) Lack of resources

The timeliness of decision-making by a judicial or quasi-judicial body is a good indicator of its effectiveness, whether within NHRIs, companies or in the justice system. Unfortunately, timeliness is often hampered by inadequate resources. One interviewee for this report stated that aggrieved persons she worked with had waited 10 years for their case to be heard by an NHRI. In this particular situation, the delay was more serious, since the victims were likely to die as a result of the human rights violation suffered and, consequently, the business enterprise would never be held to account.

NHRIs in Kenya, Tanzania and Uganda have few staff members working on business and human rights issues, despite the important role they continue to play not only in devising remedy pathways for victims of corporate harm but also their crucial involvement in the development of NAPs. The National Human Rights Council in Côte d'Ivoire noted that it had insufficient financial resources to carry out large-scale awareness-raising and capacity-building campaigns.⁸³ This challenge was also cited by the NHRIs in the Niger, Nigeria and Uganda. The Nigerian National Human Rights Commission noted that human rights impact assessments and monitoring of business activities entail rigorous fieldwork, which is not possible without sufficient funding. The Uganda Human Rights Commission also cited financial constraints, particularly in view of the heavy workload.

One interviewee attributed this challenge to the financing arrangement, noting that some NHRIs in sub-Saharan Africa are financed by donors who run on 4–5 year cycles;

81 Nora Götzmann and Sébastien Lorion, *National Human Rights Institutions and Access to Remedy in Business and Human Rights: Part 2 – Four Comparative Case Studies from Africa* (Copenhagen, Danish Institute for Human Rights, 2020).

82 Ibid., p. 42.

83 Ibid.

however, it may take up to 10–15 years for work on a specific project in an institution to really materialize. As a result, the financial support risks going to waste. After the donor cycle passes, the NHRI may move onto other priorities for which it is receiving new support, without institutionalizing gains from the previous project.

(c) Limited knowledge of available remedies

The National Human Rights Council in Côte d'Ivoire noted the lack of deep and real knowledge of existing remedies among its population, suggesting building the capacity of NHRI staff and local NHRI representatives to improve such knowledge.⁸⁴ The National Commission on Human Rights and Fundamental Liberties in the Niger stated that its staff members were not adequately trained on contemporary issues regarding business and human rights. For example, its Working Group on economic, social, cultural and environmental rights had only two staff members, despite its broad mandate.⁸⁵

This challenge is tied to the level of commitment of NHRI leadership teams to business and human rights matters. An interviewee for this report noted that the level of engagement on business- and human rights-related matters is dependent upon leadership priorities. This becomes particularly problematic when leadership changes, since priorities may also change and all progress could be lost. As noted by another stakeholder, focal points also play an important role, and the knowledge gained at the NHRI could be lost when they leave.

(d) Complications with cross-border dimensions

The National Human Rights Commission of Nigeria noted that parent-subsidiary relationships present particular challenges from an extraterritorial jurisdiction perspective. Parent companies frequently have the greatest financial resources but are harder to reach, since they are based in foreign countries. As such, in order to challenge parent companies, the subsidiary must first be challenged.⁸⁶ The National Human Rights Commission of Mozambique expressed concerns about extraterritorial matters, identifying among the significant issues conflicting laws in different countries, barriers to information access, procedural default and difficulties in identifying the competent court in which to file the complaint.⁸⁷ With Africa-based businesses expanding their regional reach, it is imperative to consider expanding the jurisdiction of NHRIs to enable them to make extraterritorial interventions in order to ensure that there is no accountability gap.

⁸⁴ Côte d'Ivoire, National Human Rights Council, *Responses to the questionnaire on the role of national human rights institutions in facilitating access to effective remedy for business-related human rights abuses* (2019), p. 5. Available at: www.ohchr.org/Documents/Issues/Business/Remedy/ConseilNationaldesDroitsdelHomme_C%C3%B4te_dIvoire.pdf.

⁸⁵ Nora Götzmann and Sébastien Lorion, *National Human Rights Institutions and Access to Remedy* (Part 2), p. 33.

⁸⁶ *Ibid.*, p. 42.

⁸⁷ Mozambique, National Human Rights Commission, *Responses to the questionnaire on the role of national human rights institutions in facilitating access to effective remedy for business-related human rights abuses* (2019). Available at: www.ohchr.org/Documents/Issues/Business/Remedy/National_Human_Rights_Commission_Mozambique.docx.

B. BUSINESS-LED GRIEVANCE MECHANISMS

The Guiding Principles require business enterprises to establish grievance mechanisms, which provides employees, nearby communities and other affected stakeholders an avenue for seeking a remedy for human rights violations caused by a company's operations, products or services. The incorporation of this requirement in the UNGPs stems from the recognition that adopting human rights policy commitments and conducting human rights due diligence cannot always prevent a company from causing or contributing to human rights violations. If such a situation occurs, the company must have a grievance mechanism in place to remediate any adverse impacts.

Although it was difficult to collect extensive data, the information gathered in the course of this research suggests that businesses have not prioritized the establishment of grievance mechanisms in sub-Saharan Africa. They also do not require their business associates to establish such mechanisms, even in sectors that are likely to have many cases of abuse. For instance, a survey of 30 banks that finance mining companies in southern Africa revealed that only 23 percent require projects to have grievance mechanisms in place. Field data collected by the Legal and Human Rights Centre in Tanzania showed that 63 percent of companies fail to have internal grievance mechanisms in place to address community complaints related to company operations.⁸⁸ For those that do, the Centre's survey found: "The majority of community members are not happy with the grievance mechanisms [available], which makes it difficult for them to access effective remedy."⁸⁹

Furthermore, for companies with a grievance mechanism in place, there is a perceived lack of impartiality and independence to decide fairly upon a matter. A 2018 event hosted by CSOs and the NHRIs in Kenya and Tanzania addressed barriers to accessing remedies for corporate violations of human rights. In discussing challenges in Kenya, Mozambique, Tanzania and Zambia, participants from each State stated that company-led, operational-level grievance mechanisms were seen to lack the impartiality necessary to rule appropriately on an alleged violation.⁹⁰

Project-level grievance mechanisms may encounter problems due to the perception of conflict of interest and a lack of fairness and transparency.⁹¹ Victims of abuse are reluctant to bring a complaint against the same entity that will be assessing ultimate responsibility for the alleged violation. In addition, employees are not comfortable bringing an action against the leadership of the company in which they work.

88 Legal and Human Rights Centre, *Human Rights and Business Report 2018/2019: Tanzania Mainland* (2019), p. 188.

89 Ibid.

90 Danish Institute for Human Rights and others, 'Business and human rights: addressing human rights impacts of business in Eastern and Southern Africa', *Workshop Report* (2018), pp. 13–14.

91 Accountability Counsel and ACCA, *Accountability in Africa*, p. 49.

C. KEY FINDINGS AND RECOMMENDATIONS

1. Key findings

- **Domestic mechanisms face numerous challenges in delivering remedy.** Remedies for human rights and environmental abuses arising out of business activities remain largely inaccessible, weak and ineffective in sub-Saharan Africa. In domestic legal systems, victims of human rights violations lack sufficient resources to hire a lawyer; have a shortage of experienced lawyers to choose from, particularly in rural areas; are hindered by a lack of technical expertise among lawyers and judges; and face judicial systems that can be politicized, understaffed, underresourced, susceptible to corruption and overwhelmed by backlogs.
- **Regional mechanisms are hampered by a lack of enforcement power.** In regional commissions and courts, the lack of enforcement power makes it difficult to achieve adequate redress. Regional courts have handed down numerous decisions to secure redress for victims of business-related abuses that have not been enforced.
- **NHRIs in sub-Saharan Africa face financial, legal and other obstacles in fulfilling their roles.** NHRIs are key contributors to promoting access to effective remedy for victims of alleged human rights abuses. African NHRIs have identified deficiencies in their mandate and practices that hamper their ability to guarantee an effective remedy for victims of human rights violations. These include:
 - A lack of sufficient financial, material and logistical resources to carry out their mandate.
 - A lack of sufficient capacity of NHRI staff concerning business and human rights.
 - Enforcement and justiciability concerns regarding human rights in relation to business activities. This includes decision-making within NHRI complaint mechanisms.
 - A lack of extraterritorial jurisdiction to address cross-border human rights violations.
 - Delays in providing justice to victims of human rights abuses.
 - Insufficient attention paid to the Guiding Principles by NHRI leadership.
- **Extraterritorial litigation is a promising but complementary tool.** In select cases, communities with grievances against subsidiaries of foreign companies have filed lawsuits in the parent company's country. These cases face significant obstacles owing to claimants' lack of resources but have shown promise as a result of factors that include more expansive home country laws (e.g. the French duty of vigilance law) and changes in jurisprudence. For example, the UK Supreme Court recently ruled that under certain conditions, the parent company owes a duty of care for the activities of its subsidiary.⁹²
- **Corporate grievance mechanisms are non-existent or inadequate.** Only a small percentage of African companies have established grievance mechanisms or require their business partners to have done so. For instance, a survey of 30 banks that finance mining companies in southern Africa revealed that only 23 percent require projects to have grievance mechanisms in place.

⁹² Business and Human Rights Resource Centre, 'Commentary: "Supreme Court allows appeal against Shell and Nigerian subsidiary"', 15 February 2021.

2. Recommendations

- **Improve domestic and regional access to effective remedy.** Although the above-mentioned developments in extraterritorial litigation are welcome, they apply only to limited cases in which legal services are available to support claimants and the parent company is based in a jurisdiction that admits such claims. Given the numerous obstacles to access, extraterritorial litigation should only be an auxiliary avenue for redress, complementing domestic State-based and non-State-based remedies, as well as corporate grievance mechanisms. Domestic remedies remain the key avenue and should therefore be strengthened.
- **Enhance cooperation among NHRIs,** including documenting best practices in addressing grievances against businesses. Increased peer support between NHRIs, through the Network of African National Human Rights Institutions and the Global Alliance of National Human Rights Institutions, would promote greater capacity development.⁹³
- **Encourage NHRIs to seek full compliance with the Principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).** States must establish a strong NHRI accredited by the Global Alliance of National Human Rights Institutions with 'A' status (indicating full compliance with the Paris Principles). Such an accreditation would indicate that an effective remedial system has been established within the NHRI to assist alleged victims of a human rights violation.
- **Institutionalize knowledge of the UNGPs and business and human rights within the NHRI** to respond to the high turnover of specialist staff and ensure that the business and human rights agenda is not dependent on individual staff members at any given time.
- **Work with other stakeholders in the public justice system to remove legal and procedural barriers to justice** for victims of corporate-related abuses.
- **Improve access to justice,** particularly by investing in the development of effective systems to provide free legal aid.
- **Increase resources committed to NHRIs.** This will enhance the capacity and capabilities of staff to protect against adverse human rights impacts by businesses.
- **Improve NHRI mandates to include actively engaging and collaborating with State regulatory bodies.** Improve the various methods for addressing complaints: coercive powers (e.g. subpoenas, etc.), the binding nature of decisions and the right of the NHRI to initiate a case on behalf of victims.
- **Increase collaboration by NHRIs with regional and international human rights mechanisms and actors.** This would include universal periodic review processes, the AU, the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, other regional and subregional mechanisms, the United Nations Working Group on business and human rights and other relevant United Nations special procedures, with a view to ensuring that issues concerning business-related access to remedy are captured in these processes.

⁹³ The Eastern-Southern Africa National Human Rights Institutions Business and Human Rights Peer Learning Initiative noted that because there are few existing learning platforms for State and non-State actors on their respective experiences with the UNGPs across various African States, the uptake and further development of the UNGPs has been slow and unstructured. OHCHR, *Responses to the UNGPs 10+ Questionnaire*, p. 6.





CHAPTER IV

STAKEHOLDERS DISPROPORTIONATELY HARMED BY BUSINESS ACTIVITIES

Certain groups of people are disproportionately and negatively impacted by business activities and require a higher standard of consideration by both Governments and businesses. This chapter highlights these groups, the ways in which they have been impacted and the measures that can be taken to ensure that business operations do not compromise their rights.⁹⁴

A. WOMEN

Business activities affect women and girls differently and often disproportionately. Accordingly, a core objective of the United Nations Working Group on business and human rights includes the integration of a gender perspective throughout the work of its mandate.

In the booklet ‘Gender Dimensions of the Guiding Principles on Business and Human Rights’, the United Nations Working Group on business and human rights posited that States must take all appropriate steps to ensure that businesses within their jurisdiction respect women’s rights. This includes, inter alia, that States: (i) address the root causes of discrimination against women, (ii) revise legal measures and policies to protect against discriminatory effects on women’s rights, (iii) encourage and incentivize businesses to achieve gender equality throughout their operations, (iv) mandate gender equality as a cross-cutting issue in all decisions, (v) guarantee the participation of women and women’s organizations in implementing the UNGPs, (vi) integrate a gender perspective in human rights due diligence laws and (vii) ensure effective remedies for gender-related human rights abuses.⁹⁵ In practice, however, very few States and businesses have taken the steps outlined by the Working Group. Women have disproportionately

94 Due to space and time limitations, this chapter is unable to address all stakeholders that are affected by business activities. Other stakeholders include persons and communities affected by land displacement, children, the elderly, persons with disabilities, migrants, refugees and others. These groups should be consulted, and their specific issues should be taken into account by States in, inter alia, the drafting of NBAs and NAPs. Businesses should also consult these groups in drafting human rights policies and conducting human rights due diligence, and they should have the right to use company-level grievance mechanisms.

95 UNDP, *Gender Dimensions of the Guiding Principles on Business and Human Rights* (2019), pp. 9 and 17.

suffered various kinds of harm from business-related operations, which are explored in the following sections.

1. Sexual and gender-based violence

Women are especially vulnerable to sexual violence in extractive industry settings.⁹⁶ Evidence suggests that sexual and gender-based violence may be prevalent in communities affected by extractive industries for a variety of reasons, including the influx of disposable income and the arrival of migrant labour. At the same time, there have been numerous cases of members of security forces engaged to protect extractive operations acting as perpetrators of such violence.⁹⁷

2. Introduction of commercial practices such as agribusinesses that deprive women of livelihoods

For example, Mende women in Sierra Leone lost their traditional fishing livelihoods when mining companies replaced natural shallow pools with artificial reservoirs that did not contain fish.⁹⁸ Such situations are exacerbated by the lack of women's participation in decision-making stemming from cultural prejudices. Women do not often participate in community consultation processes within the extractive industries, which fail to seek their free, prior and informed consent in consultations as a result of discriminatory social constructs and the patriarchal setting of the local culture.⁹⁹

3. The high percentage of women in the informal sector

The prevalence of women in the informal sector disproportionately exposes them to a lack of protections, such as low wages and a lack of social security. Women are more exposed to informal employment in over 90 percent of sub-Saharan African countries, with the highest gender gaps occurring in the Gambia (14.3 percent), Zambia (12 percent), the Democratic Republic of the Congo (10.6 percent) and Liberia (10.5 percent).¹⁰⁰ This discrepancy risks furthering gender disparities based on social norms and gender stereotypes. Women are often found in the most vulnerable situations, as domestic workers, home-based workers or family workers. Women in informal economies face additional adversities, such as an increased risk of stigmatization and violence and harassment at work. Their specific needs, such as child care, are not addressed, given the absence of social security nets in informal economies. Furthermore, women in informal economies, particularly those working from home, have very little voice.¹⁰¹

⁹⁶ Danish Institute for Human Rights, *Towards Gender-responsive Implementation of Extractive Industries Projects* (2019), p. 33.

⁹⁷ Ibid.

⁹⁸ Danish Institute for Human Rights, *Towards Gender-responsive Implementation of Extractive Industries Projects*, pp. 22 and 24.

⁹⁹ Danish Institute for Human Rights, *Towards Gender-responsive Implementation of Extractive Industries Projects*, pp. 14–15.

¹⁰⁰ Organisation for Economic Co-operation and Development and ILO, *Tackling Vulnerability in the Informal Economy*, (Development Centre Studies, 2019), p. 132.

¹⁰¹ Marlese von Broembsen, 'Informality: how to approach the elephant in the room?', presentation to the 2020 United Nations Forum on Business and Human Rights, 17 November 2020.

There have been cases in which Governments and businesses have responded to these obstacles by taking steps to narrow the gap. For example, Safaricom, a telecommunications company, has gradually increased its percentage of women employees, including at the management level.¹⁰² The Treaty Establishing the Common Market for Eastern and Southern Africa established the Federation of National Associations of Women in Business, which aims to develop women entrepreneurship to promote the effective and equal participation of women in trade and development activities within the Common Market. In addition, since 2015, an initiative in Côte d'Ivoire by Nestlé in partnership with the Fair Labor Association has sought to improve conditions for women working in the cocoa supply chain by providing them with training in farming, finance and leadership to increase their participation in income-generating activities and leadership positions.¹⁰³

B. HUMAN RIGHTS DEFENDERS

Human rights defenders play a critical role in protecting individuals and groups against adverse human rights impacts caused by business activities. Their advocacy provides a range of assistance that contributes to improving the human rights situation in a particular community. First, they assist victims when there is often no other help available. Filling this gap is critical, as victims of human rights violations perpetrated by businesses tend to be ill-equipped to pursue and achieve sufficient remedial action to address such a violation.

Second, human rights defenders can support individuals and groups by providing consultative advice to businesses concerning the potential adverse human rights impacts of their operations. This is provided for in principle 18 of the UNGPs and is a productive, cooperative way for human rights defenders to offer a different point of view while protecting potential victims and assisting businesses at the same time.

Third, cooperation with human rights defenders can help businesses promote the 'business case' for human rights compliance. This idea was advanced by the United Nations Working Group on business and human rights in 2017 when it affirmed that less space for civil society (including human rights defenders) weakens the rule of law, which negatively impacts business operations.¹⁰⁴ Lastly, human rights defenders play a crucial role as 'first responders' to human rights risks, pre-emptively addressing impending risks, which benefits not only the rights-holder but also the business itself.

Consistent with the unfortunate trend seen in other parts of the world, human rights defenders protecting communities and individuals from adverse impacts of business operations have faced threats and intimidation and have also been victims of strategic litigation to frustrate their advocacy efforts.

¹⁰² Ng'ang'a Mbugua, 'Collymore: what we're doing to empower women at Safaricom', *Business Daily*, 9 May 2019.

¹⁰³ Every Woman Every Child, 'Nestlé', 9 August 2019.

¹⁰⁴ UN Working Group on business and human rights, 'Human rights defenders and civic space: the business and human rights dimension', *Informal Background Note*, 2017, p. 3

1. Killings, threats and intimidation

There are well-documented cases of human rights and environmental defenders in Africa and around the world who have been killed, threatened or intimidated for speaking up.¹⁰⁵ For example, in the Democratic Republic of the Congo: “Local communities affected by Feronia palm oil plantations and activists are facing violence and harassment as they speak out to demand justice for land rights violations dating back to the early twentieth century. Tragically, in July 2019, Joël Imbangola Luneza, a member of the Congolese land rights CSO RIAO-RDC, was murdered by a security guard employed by Feronia.”¹⁰⁶ In December 2019, a group of families from the country launched landmark legal action against Apple, Google, Tesla, Microsoft and Dell, claiming: “they aided and abetted the deaths and injuries of their children, who were working in mines that they say were linked to the tech companies.”¹⁰⁷ William Amanzuru of Uganda has also faced harassment and intimidation for advocating against the removal of the protected status of a local forest reserve to pave the way for a sugarcane plantation.¹⁰⁸

2. Strategic litigation against public participation

Businesses have been taking punitive and retaliatory actions against human rights defenders by initiating civil action to silence dissent.¹⁰⁹ Strategic litigation against public participation, known as SLAPP lawsuits, has been an all-too-common response to human rights advocacy. Recent examples in sub-Saharan Africa include a defamation case filed by Mineral Commodities Limited, an Australian mining firm, and its South African subsidiary against six environmental activists, including two attorneys working for the Centre for Environmental Rights. The High Court of South Africa concurred with the human rights defenders’ defence, characterizing the case as a SLAPP lawsuit, and ruled that the case constituted an abuse of the Court’s process.¹¹⁰ The South African firm is planning to appeal the judgment. Another example is the improper criminal defamation charges against Rafael Marques for exposing abuses in the Angolan diamond industry.¹¹¹ Civic space is also shrinking as a result of the proliferation of legislation restricting civil society operations, the media and freedom of assembly in many African countries and worldwide.

¹⁰⁵ Accountability Counsel and ACCA, *Accountability in Africa*, p. 23.

¹⁰⁶ Ibid.

¹⁰⁷ Annie Kelly, ‘Human rights activist “forced to flee DRC” over child cobalt mining lawsuit’, *The Guardian*, 10 March 2020.

¹⁰⁸ Business and Human Rights Resource Centre, ‘In-depth interview with William Leslie Amanzuru - Friends of ZOKA (Oct 2019)’, 10 February 2020.

¹⁰⁹ UN Working Group on business and human rights, ‘Scaling up initiatives to protect human rights defenders’, Consultation Summary Note, 30 November 2017, p. 3.

¹¹⁰ Business and Human Rights Resource Centre, ‘S. Africa: Court slams mining giant for attempting to use a SLAPP suit to silence criticism and environmental activism’, 10 February 2021.

¹¹¹ Business and Human Rights Resource Centre, ‘Angola: Journalist Rafael Marques faces defamation charges over work exposing abuses in diamond industry’, 26 March 2015.

C. INDIGENOUS PEOPLES

Globally, indigenous peoples are critical stakeholders in business and human rights, as their rights “are among those more seriously violated in the context of business operations, particularly by extractive industries operating in their land and territories”.¹¹² Even with the adoption of the Guiding Principles, indigenous rights groups have not fully realized the rights to which they are entitled. The International Work Group for Indigenous Affairs recently noted: “Indigenous peoples continue to be among the groups most affected by the adverse human rights impacts of business activities.”¹¹³

Although there have been limited positive developments in sub-Saharan Africa, a few are worth noting. For example, the Kenya National Commission on Human Rights included various stakeholders, including indigenous peoples, in the process of drafting its NAP. Additionally, the South African Human Rights Commission has “engaged in strategic impact litigation to advance principles of business and human rights on cases concerning the rights of indigenous peoples and vulnerable communities”.¹¹⁴

The International Work Group for Indigenous Affairs identifies certain notable legislative achievements in Kenya as well, such as the Community Land Act No. 27 of 2016, which allows for the registration of indigenous land.¹¹⁵ However, as of February 2021, only two communities have successfully registered their land.

On the application of the principle of free, prior and informed consent, the African Commission on Human and Peoples’ Rights has issued a positive decision on behalf of indigenous persons. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, the African Commission emphasized that in situations where projects will have a major impact on indigenous peoples, the State duty is “not only to consult with the community, but also to obtain their free, prior and informed consent, according to their customs and traditions”.¹¹⁶ The case represents the first legal recognition of African indigenous peoples’ rights over traditionally owned land and is also the first case in the world to find a violation of the right to development. Nevertheless, while certain aspects of the Commission’s decision have been implemented, the Kenyan Government has mostly failed to comply with the recommendations.¹¹⁷

Some of the ways in which indigenous peoples are negatively impacted by business operations in Africa are detailed in the following sections.

112 José Aylwin and Johannes Rohr, *The UN Guiding Principles on Business and Human Rights and Indigenous Peoples: Progress Achieved, the Implementation Gap and Challenges for the Next Decade* (International Work Group for Indigenous Affairs), p. 9.

113 Ibid, p. 52.

114 Ibid, p. 40.

115 Ibid.

116 African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision, 4 February 2010, para. 291.

117 ESCR-Net, ‘The Endorois case’, 5 June 2018.

1. Lack of representation due to historical marginalization

The lack of representation and integration of indigenous peoples in the mainstream political process has led to the promulgation of laws that do not address their needs. For example, laws on eminent domain, often relied upon by public officials to claim the land of indigenous persons, thwart the promise and protections of free, prior and informed consent.¹¹⁸ The African Coalition for Corporate Accountability notes a further challenge in the monitoring and evaluation of processes governing such consent. The long-term impacts on the livelihood of affected communities often go unreported and can be dire when there are no follow-up processes or adequate oversight measures of the free, prior and informed consent process. For example, the Ogiek community was evicted by the Kenyan Government without consultation.¹¹⁹

2. Characterization of communal land as public

When communal land is characterized as public land, it can be appropriated without adequate compensation. A report prepared by Working Group on Indigenous Populations/Communities and Minorities in Africa, under the African Commission on Human and Peoples' Rights, identified several pervasive trends in the context of natural resource exploitation on the land of indigenous communities.¹²⁰ It also determined that the customary institution of communal land ownership prevalent among indigenous populations is not safeguarded by legislation. The report further revealed that indigenous populations and communities are having land appropriated, often violently and without their free, prior and informed consent. For example, the Oakland Institute has warned about the planned eviction of approximately 80,000 people, most of them indigenous, in Tanzania.¹²¹

3. Access to remedy

Access to an effective remedy by indigenous peoples has sometimes been a challenge, including cases in which there was a positive judicial ruling. Companies and the Government on many occasions move ahead with projects in defiance of judicial orders to suspend them. This impunity can extend to killing and other forms of violence perpetrated by State agents or company actors. In fact, indigenous leaders who may be opposed to certain projects—or at least demand to be consulted or asked for their free, prior and informed consent—are often faced with criminal charges for advocating on behalf of their communities.

118 Ibid.

119 African Court on Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgment, 16 May 2017.

120 African Commission on Human and Peoples' Rights, *Extractive Industries, Land Rights and Indigenous Populations/Communities' Rights: East, Central and Southern Africa*, (2017), p. 37.

121 Oakland Institute, *The Looming Threat of Eviction: the Continued Displacement of the Maasai Under the Guise of Conservation in Ngorongoro Conservation Area* (2021).

D. KEY FINDINGS AND RECOMMENDATIONS

1. Key findings

- **There are several groups whose rights are particularly negatively affected by business operations in Africa**, including women, human rights defenders and indigenous groups.
- **Women have disproportionately suffered various kinds of harm from business-related operations**, including sexual and gender-based violence, discrimination, overrepresentation in the informal sector and threats to their livelihoods as a result of expanding sectors such as agribusiness.
- **Human rights defenders are under threat** and have faced killings, threats, intimidation and strategic lawsuits against public participation.
- **Indigenous groups have faced difficulties** owing to a lack of representation and integration in political processes, a lack of access to remedy and the characterization of their communal land as public, which has led to appropriation without compensation.

2. Recommendations

- **States should include women, indigenous peoples and human rights defenders** in the development of NAPs throughout the entire drafting and adoption stages.
- **Companies should integrate a gender perspective in business practices.** Businesses must integrate a gender perspective in their human rights policy commitments, conduct human rights due diligence and remediate any adverse impact that may cause or contribute to human rights violations.
- **States should protect human rights defenders**, including those taking up courses that may be seen as threatening the State's development agenda. Instances of killings, torture and death threats in response to the advocacy of human rights defenders must be investigated and prosecuted.
- **Legislatures should prohibit SLAPP lawsuits.** Business enterprises must be made to refrain from seeking punitive actions against human rights defenders by initiating civil action against them to silence dissent. States must put an end to strategic litigation brought by businesses to silence human rights defenders who challenge a company's business activities.¹²²
- **All stakeholders should prioritize indigenous rights.** The Guiding Principles have not contributed substantially to guaranteeing respect and protection for the human rights of indigenous groups. These groups have not generally been involved in drafting NAPs (except in Kenya); have not given sufficient free, prior and informed consent in advance of land expropriation; and face legal barriers to exercising their core rights, whether through inadequate legal measures or remedial mechanisms.
- **Businesses should consider vulnerable groups in core UNGP processes.** Business enterprises should ensure that sufficient protection and promotion of the rights of the above groups is included in their human rights policy statement. These groups should also be included in the human rights due diligence process and should be allowed to use the operations-level grievance mechanism.



CHAPTER V



CONCLUSION AND RECOMMENDATIONS

CONCLUSION

Communities in Africa suffered harm from corporate-related activities and tried to seek redress even before the adoption of the Guiding Principles. Examples include numerous attempts by farmers in Nigeria to obtain compensation from Shell for alleged oil spills, the Trafigura case in Côte d'Ivoire, attempts to hold South African companies legally accountable for complicity in apartheid and an attempt to obtain reparations against companies for their complicity in colonization.¹²³ As elsewhere in the world, the adoption of the UNGPs and the growing number of treaty body recommendations provide opportunities to galvanize States, businesses, international institutions, CSOs and individuals and communities impacted by businesses to seek common approaches to promote respect for human rights in the private sector.

The previous decade has seen a rise in reported cases of States and businesses working to protect human rights and improve access to remedy for those aggrieved by business operations. For example, States have been adopting NAPs. Businesses are gradually becoming aware that failure to respect human rights comes with reputational, financial and legal risks. Communities and individuals are pursuing innovative ways to seek remedies in local, regional and extraterritorial judicial bodies.

Nevertheless, the progress can barely match the reported negative footprints of business operations. Communities in conflict and post-conflict areas, which also have a governance deficit, continue to suffer harm without access to effective remedies. The pace of the adoption of NAPs is much slower compared to other regions. Additionally, the conversation surrounding mandatory human rights due diligence could be better coordinated to ensure that it responds to the realities on the continent. Multinationals

¹²³ Amnesty International, 'Niger Delta negligence: how 3,500 activists are taking on two oil giants'. Accessed on 15 August 2022; BBC News, 'Trafigura found guilty of exporting toxic waste', 23 July 2010; Business and Human Rights Resource Centre, 'Apartheid reparations lawsuits (re So. Africa)', 17 June 2002.

with human rights policies continue to be linked to abuses in Africa. Many victims who have been successful in local and regional courts have not been compensated, owing to a lack of political will and a lack of enforcement powers for institutions such as the African Commission on Human and Peoples' Rights.

More efforts must be undertaken as a matter of urgency. The victims of corporate-related harm cannot wait. The following section makes recommendations to both States and businesses to advance respect for human rights by businesses within the UNGP framework in the next decade. It also highlights strategic entry points for UNDP to catalyse respect for human rights by businesses.

A. RECOMMENDATIONS

1. Recommendations for States

To fulfil their duty to protect against human rights abuses by businesses, States should:

- Accelerate the development, adoption and dissemination of NAPs.
- Mainstream the involvement of SMEs and the informal sector in the implementation of the Guiding Principles.
- Utilize increasingly popular virtual channels of communication to promote the dissemination of the UNGPs.
- Strengthen regional institutions so that they can play a more effective role in the business and human rights agenda.
- Reconsider foreign direct investment throughout sub-Saharan Africa. While sustainable economic development is a necessary priority for every Government in the region, it is important to consider whether all types of foreign direct investment contribute to the economic betterment of society. In certain industries, much of the revenue earned is kept by foreign multinational companies who remove the money from the country to invest at home. The contribution to developing the domestic economy is ultimately limited to the relatively low number of people employed by the company and the tax revenue earned by the Government.
- Consider the enactment of mandatory human rights due diligence laws to require certain businesses and sectors to conduct regular, credible and public human rights due diligence.

2. Recommendations for businesses

To honour their obligation to respect human rights, businesses and their associations should consider the following:

- Adopt human rights policies and conduct human rights due diligence, even when it is not a legal requirement.
- Lower the barrier of entry to federations and industry associations for SMEs to ensure that they participate in consultations, such as the development of NAPs.
- Promote the creation of regional events to facilitate peer learning with all relevant business and human rights stakeholders.

- Increase the participation of sub-Saharan representatives at international events, such as the United Nations Forum on Business and Human Rights.
- Take measures to ensure that human rights defenders are not harassed or intimidated through SLAPP lawsuits and violence by State agents.

B. STRATEGIC ENTRY POINTS FOR THE UNITED NATIONS DEVELOPMENT PROGRAMME

There are several strategic entry points to effectively promote the business and human rights agenda in sub-Saharan Africa over the next 10 years. They include the following:

- Rely on ongoing conversations about the NAPs and the binding treaty to advance the business and human rights agenda. This is likely the best entry point for all discussions on UNGP implementation. Significant political and diplomatic efforts should be focused on developing and adopting the NAP process, as well as encouraging State participation.
- Articulate the business case for complying with the Guiding Principles. Businesses and States are reluctant to embrace human rights because of the perceived negative implications on the cost of doing business. Nevertheless, a growing body of research shows that, while this may be true in the short term, embracing human rights makes sense from a business and ethical perspective in the long term.
- Support business groups such as Business Africa and the Africa chapter of the International Organization of Employers. Industry associations in Africa have an opportunity to learn from their peers in other regions, which are also increasingly committing to human rights principles. For example, with the growing private capital in Africa, the Investor Alliance for Human Rights and other investor associations have been calling for mandatory human rights due diligence and could require future investments to comply with human rights standards.
- Work with stakeholders to bring groups on the fringes of the conversation to the centre. SMEs and the informal economy have been excluded from the conversation on UNGP implementation. UNDP should work with State and non-State actors to creative innovative solutions to deliver the human rights message to these groups and encourage respect for human rights without an unduly heavy financial burden.
- Support the AU, the African Commission on Human and Peoples' Rights and other regional and subregional mechanisms in implementing the business and human rights agenda. Many of these mechanisms have addressed business- and human rights-related matters, with some specifically referencing the UNGPs. Their regional and subregional nature provides for the likelihood of enhanced consistency, uniformity and predictability of policies among States, as well as enhanced experience-sharing.
- Identify key players with a keen interest in the UNGPs or business and human rights, including those that may not self-identify as working in that field.

APPENDIX A: METHODOLOGY OF THE REPORT

A. SCOPE

This report has adopted the UNGP three-pillar framework to assess the progress and obstacles in implementing the UNGPs in target countries. Owing to time limitations, the authors have adopted a narrower focus in relation to some pillars. Most notably, the section on pillar III does not include an analysis of the performance of judicial mechanisms, which is an important aspect of access to remedy. This is particularly true in view of the growing cases of extraterritorial litigation, which suggests that local remedies may not be effective or that victims do not have confidence in public justice institutions in those circumstances.

B. SOURCES OF INFORMATION

The authors relied on both primary and secondary sources of information.

- Primary sources: The authors conducted stakeholder consultations with individuals knowledgeable about UNGP implementation in East, West and Southern Africa.
- Secondary sources: The authors conducted a literature review of previous reports and research by Governments, international organizations, NGOs, industry associations and others.

C. TARGET STATES

Throughout the report, there is an emphasis on 12 sub-Saharan African States. This is reflected in the case studies throughout the report, tables presenting analytical data and the overall focus of research. These States were selected because they have the potential political will to promote the UNGPs in-country, have evinced a willingness to promote business and human rights in the treaty review process (i.e. universal periodic reviews), have business activities with material human rights impacts and/or have an active stakeholder community promoting business and human rights (e.g. NHRIs, CSOs and international organizations). These States are:

- West Africa: Côte d'Ivoire, Ghana, Liberia, Nigeria and Sierra Leone
- East Africa: Ethiopia, Kenya, Tanzania and Uganda
- Southern Africa: Mozambique, Zambia and Zimbabwe

D. CHOICE OF INTERVIEW PARTICIPANTS

The study used semi-structured questions and targeted 25 participants. Interviewees were non-randomly sampled, given their knowledge of business and human rights developments in Africa, participation in processes such as the adoption of NAPs and their work with institutions instrumental in the business and human rights discourse. They were drawn from NHRIs, ministries of justice, academia and international and local CSOs. The interviews were conducted between January and February 2021 via Skype.

Given the current travel restrictions occasioned by the COVID-19 pandemic, the consultations were conducted virtually. All participants consented to being recorded, and all interviews are on file with UNDP. To encourage an open discussion, stakeholder contributions are not attributed specifically to the expert offering their opinion on a particular matter, and participants have been anonymized to protect from reprisals.

E. LIMITATIONS

Owing to time constraints, the report did not cover countries where there are no publicly available data on UNGP implementation. The non-random sampling of the cases may have excluded cases with good practices or others in which businesses are perpetrating abuses. The information provided here is from stakeholders and publicly available sources and is not exhaustive.

APPENDIX B: RATIFICATION OF KEY INTERNATIONAL TREATIES AND CONVENTIONS

TABLE 1: Ratification or accession to core international human rights instruments

State		UDHR ^a	ICCPR	ICESCR	CEDAW	ICERD	CAT	CRC	CRPD	ICPPED	ICRMW
		International Bill of Human Rights			Other core international human rights treaties						
West Africa	Côte d'Ivoire		1992	1992	1995	1973	1995	1991	2014		
	Ghana		2000	2000	1986	1966	2000	1990	2012	2007	2000
	Liberia		2004	2004	1984	1976	2004	1993	2012		2004
	Nigeria		1993	1993	1985	1967	2001	1991	2010	2009	2009
	Sierra Leone		1996	1996	1988	1967	2001	1990	2010	2007	2000
East Africa	Ethiopia		1993	1993	1981	1976	1994	1991	2010		
	Kenya		1972	1972	1984	2001	1997	1990	2008	2007	
	Tanzania		1976	1976	1985	1972		1991	2009	2008	
	Uganda		1995	1987	1985	1980	1986	1990	2008	2007	1995
Southern Africa	Mozambique		1993		1997	1983	1999	1994	2012	2008	2013
	Zambia		1984	1984	1985	1972	1998	1991	2010	2011	
	Zimbabwe		1991	1991	1991	1991		1990	2013		
		Note: The years in the boxes correspond to the year of ratification/accession to the treaty									
		Green = Ratified/acceded Yellow = Signed, but not ratified Red = Not ratified, acceded or signed Grey = Not applicable									

Abbreviations: UDHR, Universal Declaration of Human Rights (10 December 1948); ICCPR, International Covenant on Civil and Political Rights (16 December 1966); ICESCR, International Covenant on Economic, Social and Cultural Rights (16 December 1966); CEDAW, Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979); ICERD, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966); CAT, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984); CRC, Convention on the Rights of the Child (20 November 1989); CRPD, Convention on the Rights of Persons with Disabilities (13 December 2006); ICPPED, International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006); ICRMW, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990).

^a The Universal Declaration of Human Rights is not a treaty and therefore has no ratification date; instead, it is seen as the foundation of all international human rights law and is reflective of customary international law.

TABLE 2: Ratification or accession to the fundamental conventions of the International Labour Organization

State		Association and Assembly	Collective Bargaining	Forced Labour (No. 29)	Forced Labour (No. 105)	Minimum Age	Child Labour	Remuneration	Discrimination
West Africa	Côte d'Ivoire	1960	1961	1960	1961	2003	2003	1961	1961
	Ghana	1965	1959	1957	1958	2011	2000	1968	1961
	Liberia	1962	1962	1931	1962		2003		1959
	Nigeria	1960	1960	1960	1960	2002	2002	1974	2002
	Sierra Leone	1961	1961	1961	1961	2011	2011	1968	1966
East Africa	Ethiopia	1963	1963	2003	1999	1999	2003	1999	1966
	Kenya		1964	1964	1964	1979	2001	2001	2001
	Tanzania	2000	1962	1962	1962	1998	2001	2002	2002
	Uganda	2005	1963	1963	1963	2003	2001	2005	2005
Southern Africa	Mozambique	1996	1996	2003	1977	2003	2003	1977	1977
	Zambia	1996	1996	1964	1965	1976	2001	1972	1979
	Zimbabwe	2003	1998	1998	1998	2000	2000	1989	1999
		Note: The years in the boxes correspond to the years of ratification/accession to the treaty							
		Green = ratified/acceded Red = Not ratified, acceded or signed							

Note: The full titles of the treaties are as follows: Association and Assembly – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Collective Bargaining – Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour (No. 29) – Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); Forced Labour (No. 105) – Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age – Minimum Age Convention, 1973 (No. 138); Child Labour – Worst Forms of Child Labour Convention, 1999 (No. 182); Remuneration – Equal Remuneration Convention, 1951 (No. 100); Discrimination – Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

