EASTERN-SOUTHERN AFRICA NATIONAL HUMAN RIGHTS INSTITUTION (NHRI) BUSINESS AND HUMAN RIGHTS PEER LEARNING INITIATIVE SUBMISSION OF VIEWS AND EXPERIENCES TO THE UNGPS +10 / NEXT DECADE PROJECT

10 December 2020

INTRODUCTION

This submission is made in response to the call by the UN Working Group on Business and Human Rights (UNWG) for submissions by organisations and stakeholders on their respective and collective experiences of the United Nations Guiding Principles on Business and Human Rights (UNGPs), under the UNGPs 10+ / Next Decade BHR Project. The project aims to take stock of practice to date, identifying gaps and challenges, and developing a vision and roadmap for scaling up implementation of the UNGPs in the next decade.

The submission has been generated in the context of the Eastern-Southern Africa National Human Rights Institution (NHRI) Business and Human Rights Peer Learning Initiative. The initiative has the aim of fostering peer learning and generation of collective knowledge and engagement on business and human rights (BHR) among the participating NHRIs: Kenya National Commission on Human Rights (KNCHR); Uganda Human Rights Commission (UHRC); Commission for Human Rights and Good Governance (CHRAGG) of Tanzania; Human Rights Commission (HRC) of Zambia; and South African Human Rights Commission (SAHRC) (which made a stand-alone submission to the UNGPs+10 process). The initiative is facilitated by the Danish Institute for Human Rights (DIHR).

RESPONSES TO THE GUIDING QUESTIONS:

1. **Where has progress taken place in UNGPs implementation over the course of the last decade? What are the promising developments and practices (by governments, businesses, international organisations, civil society organisations, etc.) that can be built on?**

Government
- The UNGPs have inspired ongoing efforts by state and non-state actors in Eastern and Southern Africa towards developing National Action Plans on Business and Human Rights (NAPs), in accordance with the framework provided by the UNGPs (e.g. Kenya, Mozambique, Tanzania, Uganda, South Africa, Zambia[1]). The draft Kenyan NAP[2] draws

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[1] See https://globalnaps.org/ Three African states have developed draft National Action Plans on Business and Human Rights (Kenya, Uganda, Liberia). Morocco has included a chapter on Business and Human Rights in its National Action Plan on Democracy and Human Rights. There are six other non-state led processes towards NAP development in six African states. In Zambia, the Human Rights Commission has conducted a National Baseline Assessment on Business and Human Rights, based on the structure and principles contained in the UNGPs.
[2] https://globalnaps.org/wp-content/uploads/2019/07/kenya-bhr-nap-june-2019-finalised-still-to-be-approved.pdf

significantly, both in substance and principles from the UNGPs. Uganda has developed a draft NAP on Business and Human Rights[3], which is awaiting approval by the Cabinet. In Tanzania, the Commission for Human Rights and Good Governance (CHRAGG) has developed a National Baseline Study on Business and Human Rights to support the development of a National Action Plan on Business and Human Rights.[4] In Zambia, the Human Rights Commission (HRC) has developed a National Baseline Assessment on Business and Human Rights as a precursor to the development of a NAP on Business and Human Rights.[5] All these initiatives are centrally guided by the framework and content of the UNGPs.

Business

- There is increased awareness among leading businesses of their human rights responsibilities to avoid, mitigate and remediate human rights abuses with which they are involved.
- There is increased focus on transparency in some businesses in Eastern and Southern Africa, including in respect to their supply chains; environmental, social and human rights impacts. More and more businesses that have signed up to international human rights standards (including through adhering to the United Nations Global Compact or committing to the UNGPs or OECD Guidelines for Multinational Enterprises, etc.) are adopting practices to enhance due diligence, stakeholder engagement, transparency and access to information, among other measures. Multi-national corporations (MNCs) from developed countries have, particularly, emerged as front-runners in this regard.

CSOs

- An increased number of civil society organisations (CSOs) in Eastern and Southern Africa is working to address human rights harms and risks associated with business operations, with the UNGPs providing the normative framework for programme and project planning and implementation.

NHRIs

- There is increased emphasis by NHRIs on addressing BHR, in the last ten years. In Tanzania, for example, the Commission for Human Rights and Good Governance (CHRAGG) has seen an increase in its BHR work.[6]
- Many NHRIs across Africa are advancing the promotion and protection of human rights in relation to business activities through their monitoring and advisory mandates. Their interventions and programmes, including sensitisation and public awareness campaigns as well as technical input in legislative and policy dialogue, are guided by the UNGPs framework.[7] Tanzania's CHRAGG is implementing an improved complaints-handling

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[3] https://globalnaps.org/country/uganda/
[4] https://globalnaps.org/country/tanzania/
[5] http://www.hrc.org.zm/index.php/publications/general-publications/file/156-2016-zambia-national-baseline-assessment-on-bussiness-and-human-rights
[6] Case Studies on Business and Human Rights (Volume 1) 2019, BHRT, CHRAGG, Governance Links, LHRC, IPIS. https://ipisresearch.be/wp-content/uploads/2019/04/1904-Voices-from-Tanzania-Business-and-Human-Rights-WEB.pdf
[7] Examples of NHRI reliance on the language and principles of the UNGPs in their work include: Business and Human Rights Dialogue Report, SAHRC and DIHR (2018) at page 9; Policy Brief - The Right of Workers in the Context of COVID-19 in Zambia, HRC, ZFE, FFTUZ, ZCTU (November 2020); Policy Brief – The Role and Duty of the

mechanism.[8] The Uganda Human Rights Commission (UHRC) has developed a monitoring framework for business and human rights. The Kenya National Commission on Human Rights (KNCHR) through its contribution to the Strategic Environmental and Social Assessment (SESA) in Mining, Oil and gas sectors to assess ways in which environmental governance is currently conducted in a bid to increase integration of human rights and environmental risks.[9]

General
- There is marked growth of interest in BHR in Eastern and Southern Africa, manifesting through an increased tendency towards capacity building and engagement in policy dialogue and academic discourses on BHR, among actors who include: state departments, agencies and institutions; private sector organisations; businesses; rights-holder groups such as community members, cultural and religious leaders, minority groups and others, and their representatives; CSOs; and academia, among others.

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

- The level of knowledge and awareness about the UNGPs in Eastern and Southern Africa remains relatively low. As a result, BHR is less appreciated or accepted by some state, non-state, private sector and rights-holder actors. Due to these low levels of consciousness, interventions, decisions and policies at promoting human rights are not always advanced in a comprehensive and structured manner as through the UNGPs or other BHR standards.
- There is little buy-in and/or awareness of the UNGPs by small, medium micro-level[10] and informal sector businesses in the Eastern and Southern African region.
- Economic challenges in many African countries have contributed to insufficient resourcing for the development, enforcement and monitoring of national laws and policies on BHR. The lack of resources has, for instance, adversely affected the development of NAPs.
- National regulatory frameworks with social, justice and economic consequences do not always provide clear linkages with human rights in principle or in 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.
- Businesses in Eastern and Southern Africa have been slow to accept the concept and practice of human rights as a material issue and consideration in their operations. The tendency is to adopt minimal approaches towards social sustainability, including,

Government of Kenya in Promoting and Protecting Labour Rights in the Context of COVID-19 Pandemic in Kenya, KNCHR (August 2020) - https://www.knchr.org/Portals/0/KNCHR%20Advisory%20on%20Labour.pdf. More information on the work of African NHRIs on BHR can be found in their respective annual state of human rights reports.

[8] https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Weitere_Publikationen/Remedy_in_Business_and_Human_Rights_Cases_NHRI_case_studies_2019.pdf

[9] https://www.igfmining.org/wp-content/uploads/2018/09/Session-5-Kenya-discusses-UNDPs-EGP.pdf

[10] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to Kenya, Human Rights Council, 21 May 2019

corporate social responsibility (CSR), sustainability certification and other value chain sustainability standards, among others, which may not align with the human rights expectations of the UNGPs.

- Because the UNGPs are a soft law framework, some businesses in the Eastern and Southern African region adopt its principles merely as a tick-box exercise and do not follow through on their commitments. In the absence of strong state regulatory frameworks and accountability mechanisms, and/or a lack of monitoring of legislation and policy, businesses are not compelled to act responsibly. As a result, numerous companies continue to abuse human rights with impunity.
- The fact that business activities and operations frequently fall within various sectors of governance and the absence of specific government ministries or agencies with BHR responsibilities makes tracking the impacts of different sectors and human rights abuses associated with specific operations complicated and challenging.
- 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.
- There is limited access to remedy mechanisms – both judicial and non-judicial – by rights-holders who are aggrieved by business conduct in the Eastern and Southern African region. This is most prominent among the most vulnerable rights-holders in business value chains.
- For coherence purposes, it is important that the UNGPs and a binding treaty processes are developed in a manner which advances complementarity for the protection and promotion of human rights in the context of business activities.
- African regional institutions and economic blocs could play a more central role in advancing the protection of human rights in the context of business activities. The African Union mechanism is seldom used by aggrieved parties seeking to uphold human rights abuses that occur in the various AU Member States, owing to factors such as the relative procedural complexities and admissibility criteria, the prohibitive costs involved, the uncertainty over the enforceability of decisions of AU organs, among others. Moreover, the AU has not provided clear policy guidance to states on their respective mandates in developing national laws and policies for domesticating the UNGPs.

3. **What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realisation of the UNGPs?**
4. **What systemic or structural challenges need to be tackled to realise sustainable development based on respect for human rights?**

Obstacles
- There is limited awareness and understanding of the UNGPs and standards on BHR by state and non-state actors in Eastern and Southern Africa, including government actors, businesses, rights-holder groups, CSOs and others.

- There are limited resources, including financial resources and technical expertise, for developing policy and regulatory frameworks for enforcing and implementing the UNGPs in some African countries.[11] For some countries in the region seeking to promulgate NAPs on Business and Human Rights, securing sustainable funding for the process has been difficult. The growing national debt burden, coupled with the economic difficulties occasioned by the COVID-19 pandemic further reduces the opportunities for government funding for the development of NAPs in some African countries. Similarly, the gaps in technical capacity for BHR affect governments, businesses, CSOs and rights-holder groups.
- In some African countries, there is no clearly designated focal point or state department, agency or institution to coordinate the process of developing national policy and overseeing the coordinated integration of human rights into various BHR-relevant laws and policies, or the coordinated implementation of law as relates to the UNGPs.[12]
- The enforcement of human rights in the context of business operations ranks low in the order of priority of many African states owing to the concern on the part of states that it could diminish the inflow of investment and competitive business environment.
- Business ownership and structures remain a complex accountability inhibitor. Shareholders of companies are protected by legal and structural veils of incorporation relating to ownership models and subsidiary governance and ownership structures. This conceals the chain of accountability and responsibility for business abuses of human rights.
- The relative power of businesses and in some instances their influence in government has hindered transparency and accountability and the response by governments to calls for the enforcement of compliance by businesses with human rights.
- In many Eastern African countries, some laws which have a bearing on BHR are not always formulated in a way that is compatible with international human rights commitments. Often, they neither make explicit reference to human rights nor effectively integrate human rights as part of the standards and indicators. This results in the protection of human rights being under-emphasised, especially in trade and investment agreements, inter-governmental treaties and treaties establishing multi-state common economic unions, common markets and socio-political unions.
- The language and practice of human rights are perceived by some state actors and businesses in Eastern and Southern Africa to be activist and potentially disruptive to business objectives. This hinders the development and rolling out of approaches which aim to integrate human rights into the operations of state actors and businesses.
- Because there are few standing learning platforms for states and non-state actors on the respective experiences with the UNGPs across the different African states, the uptake and further development of the UNGPs by African countries has been slow and unstructured.

Drivers
- There are indications that international pressure from bilateral and multilateral development partners on the need to comply with standards on international financing

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[11] DIHR, Kenya National Action Plan on Business and Human Rights: A Case Study on Process, Lessons Learned and Way Forward - https://www.humanrights.dk/publications/kenya-national-action-plan-business-human-rights-case-study-process-lessons-learned

[12] In some African states, including, Nigeria, Ghana, Zambia, South Africa and Mozambique, non-state actors have taken the lead in coordinating processes aimed at rallying national support and dialogue towards the development of NAPs.

has influenced some African states in terms of regulating business conduct, including on human rights.

- Domestic pressure through advocacy against business-related human rights abuses has contributed to improved accountability by businesses for their adverse impacts in the Eastern and Southern Africa region. For instance, NHRIs with a complaints-hearing mandate have increasingly utilised their complaints mechanisms to address grievances related to business activities.
- Some value chain initiatives for enhancing sustainability have contributed to better protection of human rights in the Eastern and Southern Africa region. Some examples of these initiatives include: sustainability certification; sectoral initiatives including the Extractive Industries Transparency Initiative (EITI); sector-based guidance on human rights; and market or retailer standards and consumer advocacy, among others.
- Eastern and Southern African states are increasingly developing frameworks for non-financial reporting by companies – including reporting on human rights – through progressive statutory provisions or compliance guidelines.
- NHRIs are finding avenues for providing technical expertise for integrating human rights into relevant governance and social justice contexts, including in: environmental protection; land management and administration; eviction and resettlement, among others.

Priorities

- There is a need to increase awareness levels of state actors, businesses and rights-holders in Eastern and Southern Africa on the UNGPs.
- Eastern and Southern African states should establish and clearly designate, through legal or administrative action, focal point institutions for addressing human rights in the context of business activities.
- The African Union should conclude the process of adopting a comprehensive and responsive policy framework on BHR to provide guidance to Member States in developing national level regulatory and accountability frameworks on BHR.
- Eastern and Southern African states should allocate sufficient resources for developing and implementing NAPs.
- There should be deliberate collaboration between the global north and south to mobilise and influence MNCs operating in Eastern and Southern Africa to respect human rights in their activities across the region.
- There should be increased advocacy by CSOs, rights-holder groups, NHRIs and businesses globally, for better monitoring of business activities and promotion of a culture of protecting and promoting human rights in national and global supply chains.
- The implementation of the UNGPs in the next decade should include a strong focus on enforceable accountability avenues that are accessible to rights-holders and effective for ensuring businesses are held to account for human rights abuses with which they are involved.
- The implementation of the UNGPs in the next decade should include a focus adopting more specific, direct and unambiguous language, to reduce uncertainty in interpreting the provisions of the UNGPs. For instance, by states further developing the regulatory framework for UNGPs implementation.

- The implementation of the UNGPs in the next decade should include a focus on setting out clear and enforceable obligations on businesses to respect human rights, in a manner that does not lower the accountability thresholds under national and regional legal instruments.
- The implementation of the UNGPs in the next decade should include progressively evolving principles in relation to other national, regional and international accountability and governance frameworks, decisions and best practice.
- The extra-territorial applicability of the UNGPs should be reinforced by integrating human rights considerations into trade and investment agreements and the associated dispute resolution regimes.
- Legislative reform and implementation of existing legislation in line with the UNGPs could contribute to driving responsible business conduct.
- There should be learning and feedback mechanisms to support states and non-state actors in developing, enforcing or implementing frameworks for BHR based on the UNGPs at regional and international levels and to promote ongoing conversations for improving the efficacy of the UNGPs in protecting human rights.

5. **In concrete terms, what will be needed in order to achieve meaningful progress with regard to those obstacles and priority areas? What are actionable and measurable targets for key actors in terms of meeting the UNGPs' expectations over the coming years?**
6. **Is there other information relevant to the UNGPs 10+ project that you'd like to share?**

- BHR objectives and principles should be entrenched in international and regional human rights accountability mechanisms and systems including frameworks which require states to account for business-related human rights abuses. Among these objectives and principles are the need for human rights due diligence by businesses and effective remedy frameworks by state and business actors.
- Functional national-level systems for driving the BHR agenda at national level should be established. These include the set-up of effective BHR-related complaints mechanisms, structures for enhancing participation of rights-holders in decision-making over business-related operations which affect or have potential to affect the rights-holders, among others. Establishing specific institutions and mechanisms that monitor, inspect and address issues of business operations in line with the UNGPs could also contribute.
- Awareness-raising and capacity-building interventions targeting relevant stakeholders, including rights-holders affected by business activities, should be conducted to enhance knowledge and awareness for developing and enforcing BHR-relevant national laws and policies.
- Governments should practice democratic and good governance to lay the ground for the realisation of human rights in the context of business activities.
- There should be increased transparency relating to business ownership models to allow for increased access to information, engagement with interested and aggrieved parties and to enhance accountability across corporate entities.
- To complement the UNGPs, legal instruments at national, regional and/or international levels relating to state and business accountability for human rights in the context of business activities, should be developed and adopted.

- At national level a strong focus on progressing towards the development of binding laws and regulation is needed, to strengthen accountability for businesses for respecting human rights.
- Parent companies should ensure that subsidiaries adhere to human rights standards.
- Governments worldwide should take steps to ensure that companies registered in their jurisdiction but operating abroad are appropriately regulated to ensure they respect human rights throughout their operations.
- There is need to disincentivise the practice by MNCs of deliberately setting up operations in states with relaxed enforcement of laws to avoid accountability for human rights. This may be achieved through international or national value chain advocacy and regulation by states, including through bilateral trade agreement which impose human rights obligations.
- Investment agreements, Foreign Direct Investment (FDI) and multilateral investment frameworks (including associated dispute resolution frameworks) should be framed in a manner that requires business respect for human rights.
- Juridical and practical barriers to accessing effective remedies by victims in national and extraterritorial contexts should be addressed by states and businesses to enhance access to remedy for parties who are affected by business-related human rights abuses. Among the aspects that should be addressed include: the high costs and inordinately lengthy processes involved in litigation; the risks of retaliation by businesses against rights-holders and human rights defenders; the low levels of awareness by rights-holders and BHR practitioners; practical barriers to state enforcement of decisions by states where extra-territoriality is involved, among others.
- Relevant BHR frameworks should include a commitment to free, prior, and informed consent (FPIC), a participatory principle crucial for indigenous peoples' rights.
- BHR frameworks and practice should include attention to intersectionality and gender, which is essential for the progressive development of BHR. Moreover, BHR frameworks should require that human rights considerations are, where relevant, integrated into regulatory domains such as environmental protection, climate change, and land management and administration, among others.
- BHR frameworks and practice must respond to the need to protect human rights defenders, including women human rights defenders, who are at the forefront in the struggle for businesses to respect human rights.
- Constitutional and/or legal provisions establishing NHRIs should imbue NHRIs with a comprehensive mandate to address human rights, independence from the state, institutional autonomy and adequate resources for effectively protecting and promoting human rights, including in the context of business activities.
- NHRIs should execute their mandates with independence, including as they cooperate for purposes of cross-learning, resolving gaps relating to their respective individual NHRI capacities and complementing each other.