ACCA

AFRICAN COALITION FOR CORPORATE ACCOUNTABILITY

The African Coalition for Corporate Accountability's written submission on the Second Draft Treaty.

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1. Introduction

The African Coalition for Corporates Accountability attaches the utmost importance to the adoption of an international treaty on Business and human rights. As pointed out in its 2013 launch Declaration, the ACCA recognises the *United Nations Guiding Principles on Business and Human rights* (UNGPs) – the so-called Ruggie Principles – as an essential international framework to advance corporate accountability. However, ACCA notes that the UNGPs, as currently framed and understood, do not fully reflect the experiences and concerns of its constituencies and are currently failing to change lived realities on the ground.

It comes as no surprise that ACCA has embraced the treaty process by advocating both at the regional and international level for the adoption of a legally binding instrument on Business and Human rights. Consequently, ACCA supports the progress made by the Open-Ended Intergovernmental Working Group in advancing the treaty process. In that regard, ACCA had previously made contributions to the *Zero draft* (2018) as well as the *First revised draft* (2019 together with CALS).

On 6 August 2020, the *Second Revised Draft* of the treaty was released. ACCA hopes that the current draft will mark an essential step forward and pave the road towards the adoption of a legally binding treaty on Business and Human Rights. The following is ACCA'S written submission, on the *Second Revised Draft* Treaty in preparation for the next session of the intergovernmental

negotiations that will take place in Geneva on 26-30 October 2020. It starts by an overall assessment of the document and further exposes the omissions from the text before focusing on specific areas of improvement including wording suggestions.

2. Overall assessment

ACCA notes with satisfaction that the *Second Revised Draft* has improved from earlier copies. The structure of the text has evolved significantly, and it looks more coherent. Some lengthy provision of the 2019 draft has now been broken into two different provisions[1]. In this sense, the new articles 5 (on the protection of victims) and 7 (on access to remedy) are more than welcomed as they bring more clarity to the internal organisation of the text[2].

Concerning the content, ACCA notes that the general philosophy of the new draft does not depart from the previous text. There is no revolutionary change in the spirit of the provisions of the 2019 draft. In addition to the better look pointed out above, the 2020 draft presents several significant wording changes that are of critical importance. The new draft refers to some issues that are of the most significant importance of civil society organisations and communities in Africa.[3] The text should be improved in order to take into account their concerns.

[1] See for instance article 4 of the 2019 draft on the rights of victims.

[2] See article 5 and 7 of the 2020 draft.

[3] For instance, gender issues or human rights defenders as it appears below.

3. Concerning omissions from the draft treaty

ACCA is generally **concerned about the general language of the treaty.** Indeed, the current draft only creates obligations upon parties and recognises their pre-existing obligations under human rights law. However, the draft remains silent on the precise legal obligations of corporations. Although stating that it "shall apply to all business enterprises"[4], the second revised draft fails to establish obligations relevant to corporations.

ACCA is of the view that the future treaty should employs the language of "human rights obligations" on business enterprises. The second draft has maintained the *linguistic phobia* around the issues of corporate international obligations. ACCA believes that, in order to end corporate abuses and ensure access to remedy for victims, the treaty should provide for direct obligations on companies. While states play a crucial role in giving effect to these obligations, the treaty must speak directly to businesses in reaffirming their directs obligations under international law[5]. As for now, human rights due diligence seems to be the only legal obligation imposed on corporations, and yet it still depends on states will to adopt legislation providing for such an obligation[6].

[4] In its draft article 3(1),

[5] See our statement together with CALS during the 5th session.

[6] See article 6. 1.

Moreover, there is a need for the treaty to acknowledge the strong **link between the issue of corporate accountability and the issues around corruption, illicit financial flows and tax evasion**. These are interrelated issues, the consequences of which have been dramatic for peoples and communities across Africa.

Similarly, strong language is needed on the **human rights obligations of business enterprises throughout the supply chains**. COVID 19 has shown the devastated effect of weak protection systems for thousands of workers in the supply chains.

Finally, ACCA believes that the treaty should provide for an **individual complaint mechanism at the international level**. Relying only on civil and/or criminal liability mechanisms in the domestic level is not enough and will prevent many victims to get access to effective remedy.

4. Specific areas for improvement including textual suggestions

4.1 Preamble

ACCA commend the improvements made in the preamble in comparison to previous draft. However, some paragraphs could still be improved.

Para 4 of the preamble should mention the Rio Declaration on environment and development as well as the Principle of **States permanent sovereignty over their natural resources**. It should further mention, together with Agenda 2030 for Sustainable development, the principle of **Common but**

Differentiated Responsibilities and Respective Capabilities regarding climate change.

4.2. Article 1: Definitions

The definition of victims provided for under Article 1.1 should include, survivors, affected groups and whistle blowers, complainants, witnesses and their representatives.

4.3. Article 2: Statement of purpose

ACCA believes that this provision should use a language that highlights the directs human rights obligations of TNCs. Therefore, the term responsibilities should be replaced by **"obligations".** The concept of business responsibilities as opposed to obligations is one of the mains shortcomings of the UNGPs and their failure to effectively tackle the issue of business-related human rights abuses. ACCA strongly believes that the treaty should depart from this approach.

Article 2. 1. a) could be read as follows:

> *Article 2. 1. a) "To clarify and facilitate effective implementation of the obligations of both States and business enterprises to respect, protect and promote human rights in the context of business activities"*

4.4. Article 3: Scope of the treaty

The issue of the scope of the future treaty has been lengthy debated. While acknowledging the need of preventing any business enterprises to violate

human rights, ACCA believes that, regarding the regulatory gaps, there is a pressing need to primarily address the issue of TNCs.

Article 3. 1 could be read as follows:

> *"This (Legally Binding Instrument) shall apply transnational corporations and other business enterprises that undertake business activities of a transnational character".*

4.5 Article 4: Rights of victims

The wording of some clauses in this provision need improvement.

Article 4.c) could be read as follows:

> *"be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory,* ***appropriate and gender-sensitive*** *access to justice and effective remedy…."*

Article 4.d) could read as follows:

> *"be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and* ***effective*** *non-judicial grievance mechanisms of the State Parties".*

4.6. Article 5: Protection of victims

To avoid too much reliance by states to their domestic law, the last terms of Article 5.3 should be removed.

Article 5.3 could read as follows:

> "State Parties shall investigate all human rights abuses covered under this (Legally Binding Instrument), effectively, promptly, thoroughly and

impartially, and where appropriate, take action against those natural or legal persons found responsible".

ACCA believes that this provision can be used to imposed also direct obligations on corporations. We suggest that in all the paragraphs, the term *"business enterprises"* is added to the term *"States parities"*. This will read as follows: ***"Sates parties and business enterprises".***

4.7. Article 6: Prevention

Article 6 of the new draft focuses on prevention and reaffirm the due diligence principle adopted by the UNGPs. This provision is the place where **Corporates human rights obligations under international law** should be clearly stated.

ACCA'S Suggestion is to remove the first part of **paragraph 2 and amend it as follows:**

> *"Business enterprises, to undertake human rights due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations, as follows:"*

Moreover, there is a need to clarify that business enterprises shall undertake human rights and **environmental assessment which must be conducted before the commencement of a project and throughout their operations.** Therefore, Article 6.3a) could be amended as follows:

> *"Undertaking human rights and environmental assessment before commencing their operation and regularly throughout their operations";*

In addition, although this article speaks on business enterprises conducting human rights due diligence and references consultation with women and communities adversely affected by business activities, it falls short because the ***principle of free prior and informed consent (FPIC)*** is only recognised to indigenous people and for all communities under Article 6. 3 d).

While recognising that this limitation is probably in line with the international standards applicable to FPIC, ACCA want to stress that the African human rights system has developed a more progressive approach to this principle. The African Commission on Human and People's Rights has codified this interpretation of FPIC 2012 Resolution 224 which considers that the personal scope of FPIC includes all communities[7].

ACCA is not trying to impose the African standard to the universal level. However, ACCA believes that the treaty should not lower FPIC standards already applicable in Africa. Limiting community involvement to merely consultation means that unlike FPIC, the parameters and extent of consultation are not defined, leaving room for abuses.

Therefore, ACCA demands that a similar clause to the one contains in article 4.3 should be inserted at the end of Article 6.

[7] See Resolution on a Human Rights-Based Approach to Natural Resources Governance - ACHPR/Res.224(LI)2012.

It could be read as follows:

> *"Nothing in this provision shall be construed to derogate from any higher level of recognition and protection of any human rights of victims or other individuals under regional or national law".*

At any rate, ACCA calls upon all African delegations to the negotiations to reaffirm such an African perspective on FPIC. Should the treaty not contain the clause mentioned above, they should issue interpretative statements expressing the African interpretation of the FPIC principle. Moreover, FPIC should also be understood as *continuous consent* throughout the life cycle of the project.

Another issue stemming from Article 6 lies ***in access to information***. An effective due diligence requires that communities have access to information. In order for "informed consent" to be given, there needs to be information provided. In some legal systems, information is provided at each stage of the life cycle of the project. As it stands currently, the new draft does not seem to guarantee the right to access to information to communities at the commencement of business activities[8]. This is an important dimension that should be reflected in article 6 on prevention.

Article 2.3d) could reads as follows:

[8] Access to information is provided only for victims when pursuing effective remedies under article 4/2/f

"Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent including access to information prior to the commencement of the project".

Moreover, the concept of ***"enhance human rights due diligence"*** as provided for by Article 6/3/g is unclear. ACCA has always advocated for the highest due diligence standards in conflict-inflicted zones. Thus, ACCA believes that it is necessary to define what is meant by *"enhanced."* ACCA considers that the right interpretation could be that *"enhanced"* refers to a *higher standard* imposed on companies operating in conflict zones or in occupied territories. Strict interpretation is required in such cases. In that regard, human rights due diligence may mean that *disengagement* in business activities may be the only way to comply with the due diligence principle in some cases. Since the human rights of communities in conflict-affected zones or occupied territories are easily and/or more abused than in politically stable States, the aspect of "enhanced" could include FPIC for all communities.

Article 6.3g) could read as follows:

"Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas. This highest due diligence standards implies the obligation on the company to disengage when, in light of the circumstances, due diligence measures are not effective".

This article should further include a provision on due diligence in relation to corruption, illicit financial flows and tax evasion. The new provision under **Article 6.3h) could read as follows:**

> *"Undertaking due diligence requirements, to prevent corruption, tax evasion and to any other illicit financial activity in relation to their operations"*

4.8. Article 7: Access to remedy

ACCA think that to avoid any confusion, victims under paragraph 1 of Article 7.1 should include "affected communities".

The provision could read as follows:

> "*States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary jurisdiction in accordance with this (Legally Binding Instrument) to enable victims,* ***including affected communities****, access to adequate, timely and effective remedy".*

Article 7 is concerned with the critical issue of access to remedy, which is at the core of the entire treaty process, according to ACCA. While acknowledging significant progress in the framing of states obligations in this provision ACCA is still concerned by the formulation of Article 7/6. The paragraph reads as follows:

> "State Parties may, consistent with the rule of law requirements, enact or amend laws to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy".

ACCA believes that the ***reversal of the burden of proof*** in civil procedure is of the utmost importance in pursuing a remedy for victims of corporates abuses. Nevertheless, the above formulation is not strong enough to reflect victims and communities' expectations on this issue. It does not impose robust obligations on states but rather recommendations. Too often, the nature of corporate conduct makes it difficult for victims to gather shreds of evidence, especially when victims have no proper resources to engage meaningfully in lengthy and complicated legal procedures. This has contributed, especially in Africa, to corporate impunity.

ACCA demands the most robust language in Article 7/6, moving from ***"may" to "shall".***

Article 7/6 could read as follows:

> *"State Parties shall, consistent with the rule of law requirements, enact or amend laws to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy".*

4.9. Article 8 Legal Liability

ACCA notes that the new draft provides for liability of parent companies for the conduct of their subsidiaries or any business entity which whom they have business relationships.[9] However, the criteria for such liability, i.e. "control" or "supervision" are unclear. ACCA is afraid that these conditions

[9] At para 7.

may be interpreted in a restrictive manner, allowing companies to set up complex institutional structures in other to avoid liability.

Moreover, ACCA is in general concern about the language used in article 8 on criminal liability. There is no express recognition of obligations imposed on companies under *international criminal law*. This is quite striking regarding that such a possibility is recognised in international law has earlier as in Nuremberg. This seems to be a push back in comparison to the 2019 draft.[10] In addition, in the African context, the Malabo Protocol adopted the principle of criminal liability for gross human rights abuses[11].

ACCA's suggestion:

> Article 8.9 should be amended and reference ***international criminal law*** not 'criminal offences under international human rights law'.

4.10. Article 9 adjudicative jurisdiction

ACCA commend the significant signs of progress made by this provision, especially in rending invalid the doctrine of ***forum non-conveniens.***[12] However jurisdiction could be defined in article 9.2 in a broader way to reflects the complexities of some TNCs structures.

Article 9.2 could be complemented by a e) read as follows:

[10] See article 7 of the 2019 draft.

[11] Article 46C of the Malabo Protocol (Yet to come into force)

[12] Article 9/3.

Article 9.2e) "– The place where the predominant assets of the corporation are or where it has 'substantial interests".

Furthermore, ACCA is concerned by the fact that the contemplation of **universal jurisdiction for egregious corporate human rights abuses** lacks in the new draft, as it was in 2019 one. However, such a reference was present in the *Zero draft* with regards to human rights violations pertaining to crimes.[13] In its 2018 submissions, ACCA has pointed out that universal jurisdiction could be a useful tool to tackle impunity in this field especially when peremptory norms of international law are violated.

ACCA suggest that a new paragraph 6 is added to the provision. **The paragraph could read as follows:**

Article 9.6. "Courts shall have universal jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if there is a reasonable ground to believe that the alleged violations concern peremptory norms of international law".

4.11. Article 14 Consistency with international law principles and instruments

Paragraph 1 of this article is unnecessary and even confusing. The principles reaffirmed in this article are already highlighted in the preamble. It should be removed.

[13] See article 10/11 of the Zero Draft.

4.12. Article 15 Institutional arrangements

In its previous written submission on the *Zero* and *First draft*, ACCA had already highlighted that an effective enforcement mechanism for the envisaged treaty would be the establishment, at the international level, of a sort of international court to deal specifically with Business and human rights. While ACCA salutes the establishment of a Committee but remains concerned by the treaty's failure to make provision for a global judicial mechanism. Even a mer**e individual complain mechanism is also lacking in this provision**. Article 15.4. could be complemented by a new provision (f) giving a mandate to committee to consider individual complaints and take decisions on these individuals complaints.