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# *Legal and policy frameworks governing business and human rights to health in east and southern Africa*

*Businesses can have both positive and negative impacts on health, through their practices, policies and influence on public sectors, as commercial determinants of health (CDoH). This brief provides information to support an understanding of the obligations of states and responsibilities of business enterprises to respect, protect and fulfil the right to health in east and southern Africa (ESA). The brief explores the extent to which international, regional and national standards on business and health rights are protected and implemented in the ESA region. It outlines the standards that should apply, the extent to which they have been domesticated in law in specific ESA countries, and how these standards have been used in the region, including through public interest litigation on health rights violations. The brief identifies gaps in ESA laws and standards that need to be addressed to meet international standards on business and human rights and recommends steps to better protect health in business practices through setting, raising awareness on, and implementing standards and through sharing learning across ESA countries on their implementation.*

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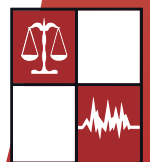
## **Introduction**

Business enterprises encompassing private sector activities and bilateral and transnational trade agreements can impact positively or negatively on health through their processes, products and influence on public sector. That this is recognised is reflected in the fact that over 75% of the world's governments now have trade agreements that include human rights provisions (Cline, 2023).

In June 2011, the United Nations (UN) Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights: implementing the United Nations 'Protect, Respect and Remedy' Framework (UN, 2011). It sets three guiding principles to state parties including; i. states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; ii. the requirement for business enterprises to comply with all applicable laws and to respect human rights; and iii. the need for rights and obligations to be matched to appropriate and effective remedies when breached. These guiding principles apply to all states and to all business enterprises, transnational and others, regardless of their size, sector, location, ownership and structure.

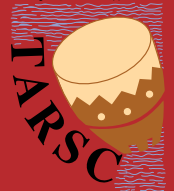
This brief sets out the international continental, regional and national level standards applying in the ESA region on business and health rights. It aims to inform state, civil society, professional, parliamentary and private actors on these rights and duties and to promote their implementation. The UN Human Rights Council (2011) guides that states are the primary duty-bearers responsible for providing guidance on human rights to business enterprises, for ensuring the implementation of these rights, and ensuring that relevant laws are aligned with their human rights obligations. States are also responsible for ensuring that the rights are effectively enforced, including through independent monitoring and accountability mechanisms.

The brief drew on public domain evidence from online searches (English only) from international agency websites, EQUINET reviews and online legal databases for ESA country laws covering Angola, Botswana, DRC, Eswatini, Kenya, Lesotho, Madagascar, Malawi, Mozambique, Mauritius, Namibia, Seychelles, South Africa, Tanzania, Uganda, Zimbabwe, and Zambia.



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## *International and regional standards on business and health rights*

A number of **international standards** have relevance to the protection of health in the practices of business and the duties of states to ensure this in relation to third parties.

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), sets out states duties to protect the right to work, just and favourable conditions of work including safe and healthy working conditions; the right to property; the right to form trade unions; to social security; to education; to an adequate standard of living; to the enjoyment of the highest attainable standard of physical and mental health; and the right to enjoy the application and benefits of scientific progress. The ICESCR calls on states to ensure equal opportunities for all men and women in the enjoyment of all economic, social and cultural rights, including to apply a gender lens to address the impacts of business activities on women and girls (UN, 2017). Article 3 of the 1979 Convention on the Elimination of all forms of Discrimination against Women (CEDAW) prohibits discrimination against women, and obstacles to their participation on equal terms with men in the political, social, economic and cultural life of their countries (OHCHR, 1979).

The 2011 UN Guiding Principles on business and human rights outlined in the introduction clarify the state duty to protect against business-related abuses of human rights abuse and the responsibility of companies to respect human rights, including in relation to health. The UN Human Rights Council guides that no matter the context, states and businesses retain distinct but complementary responsibilities. When human rights are violated by companies, governments must provide a robust and appropriate remedy for those affected. States have duties to prevent, investigate, punish and redress any violations through effective policies, legislation, regulations and adjudication. Business enterprises, including those

where the state itself is involved are required to respect all internationally recognized and nationally legislated human rights standards, including on health. Businesses should address adverse health rights impacts of their activities and products by taking adequate measures to prevent, mitigate and, where appropriate, remedy harms. In this, particular attention should be paid to the rights of the most vulnerable and/or marginalized groups such as: indigenous peoples; women; national or ethnic minorities, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families (UN, 2011).

Forty-three of the 46 sub-Saharan African countries have ratified the World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC), albeit with slow domestication and implementation (Worth, 2023). Botswana, Lesotho, Uganda and South Africa have domesticated the FCTC in national tobacco control laws. However, power imbalances, the commercial interests of farmers and growers, the influence of the tobacco industry and lack of transparency in the interaction between states and companies have been reported as barriers to the implementation of the FCTC in ESA countries, such as in Zambia, Tanzania and Mozambique (ATCA 2021; 2023).

**At continental level**, the African Charter on Human and Peoples' Rights requires every individual to have the right to dignity, and to enjoy the best attainable state of physical and mental health. States should take all the necessary measures to protect the health of their populations and to ensure that they receive medical attention when they need it. More explicitly, the African Commission on Human and Peoples' Rights states that "the growth of private actors' involvement in health and education services delivery often happens without the consideration of human rights resulting in growing discrimination in access to these services, a decrease in transparency and accountability, which negatively impact the enjoyment of the rights to health and education" (ACHPR, 2019). In response to this the ACHPR passed a resolution to develop norms on States' obligations to regulate private actors involved in the provision of social services (Right to Education Initiative, 2020).



The ACHPR in March 2023 passed [Resolution No. 550 of 2023](#) that focuses on business and human rights (ACHPR, 2023). The Commission called upon Member States to set an African Union Policy Framework on Business and Human Rights to ensure that businesses protect health rights and tasked its Working Group on Extractive Industries, Environment and Human Rights in Africa (WGEI) to work with African Union (AU) organs to address gaps in the implementation of obligations regarding business and human rights. In 2023 the ACHPR also adopted a Resolution on a Human Rights-Based approach to the Implementation and Monitoring of the African Continental Free Trade Area Agreement (AfCFTA) (ACHPR, 2023). It covered mainstreaming of human and peoples' rights in the negotiations on and the implementation of the AfCFTA Agreement; the recognition and protection of the roles of vulnerable groups and those engaged in micro, small and medium-size enterprises, in the context of trade in Africa and the impact of the AfCFTA Agreement on them, and the assessment of the human rights implications to identify and address gaps, including in compliance with the standards under the African Charter.

In addition, obligations for states to ensure health in business activities can also be found in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (OHCHR); the Sustainable Development Goals, (SDGs) including SDG 3 on good health and wellbeing; SDG 5 on gender equality and women empowerment, SDG 8 on decent employment and SDG 10 on reducing inequalities within and among countries.

At **regional level**, the East African Community (EAC); the Common Market for Eastern and Southern Africa (COMESA) and the Southern

African Development Community (SADC) treaties all stipulate adherence to principles of international law in relationships between states and commercial practices (EAC, 2002; COMESA, 2019; SADC, 1993). The EAC Treaty refers to promoting the shared interests of their people and the role of women in cultural, social, political, economic and technological development. All three treaties commit member states to adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, and to the promotion and protection of the rights in the provisions of the African Charter on Human and Peoples' Rights. The COMESA Treaty provides for security and other restrictions on trade where this affects human, animal, plant health or life, and commits states to undertake concerted measures to co-operate in health and environmental protection. Although not explicit on the UN Principles on Business and Human Rights, these treaties provide a basis for implementation of the principles as part of regional co-operation (EAC, 2002; COMESA, 2019; SADC, 1993).

## *National standards on business and health rights in ESA countries*

To domesticate these international standards, ESA countries have set laws relating to business and human rights, specifically the right to health, in both their constitutional provisions, Acts of parliament and regulations. Table 1 below presents these legal frameworks as found for the different ESA countries, specifically in relation to their Constitutions and public health laws. Laws not accessed online or not in English are not shown and Uganda is included as a more detailed example in *Box 1*.

**Table 1: ESA country laws on business duties for health and environment**

| Country | Business and health rights in Constitutions  | In public health legislation |
|---------|--|------------------------------|
| Angola  | Article 12 of the <a href="#">2010 Constitution</a> stipulates that Angola shall 'respect and implement UN and AU principles. Article 49 mandates that business associations must apply ethical standards, and human rights, while protecting in Article 38 free economic initiative in accordance with the law. | No law accessed              |



| Country                             | Business and health rights in Constitutions   | In public health legislation   |
|-------------------------------------|---|--|
| <b>Botswana</b>                     | Botswana's Constitution (1966) includes protections from conduct injurious to health and for the right to life. <a href="#">The National Vision 2036 of Botswana</a> states a commitment to facilitate a regulatory environment to promote business that could provide the basis for integration and protection of health rights.   | The <a href="#">Botswana Public Health Act of 2013</a> empowers the Minister to promote and regulate public health, and to set health standards. It establishes a National Health Council to advise the Minister on policy, law, norms and standards to protect, public health, covering also business entities.   |
| <b>Democratic Republic of Congo</b> | Article 36 of the <a href="#">Constitution</a> obliges the state as a guarantor of public health to create private socio-sanitary establishments within the conditions established by the law.  | No law accessed  |
| <b>Eswatini</b>                     | The <a href="#">Constitution of Eswatini</a> sets the right to life (Article 15) and in Article 61 indicates that in business matters rights and national interests be protected, including in foreign and trade policy. Whether this is reflected in government trade agreements would need to be assessed .   | The <a href="#">1969 Eswatini Public Health Act</a> , Sec. 9 mandates local councils to prevent pollution that could be harmful to health, and ensure provision of safe potable water, including by purifying polluted supplies. Councils are mandated to prevent conditions that could endanger health, including in relation to business entities.   |
| <b>Kenya</b>                        | The <a href="#">Kenya Constitution 2010</a> includes a Bill of Rights that binds all state organs and persons, the latter defined in Article 260 to include a 'company, association or other body of persons whether incorporated or unincorporated'. It thus obliges companies to respect human rights, including the rights to life and health provided in the Constitution. Article 22 grants the right to all persons to institute court proceedings claiming denial, violation, infringement, or threat against any right or fundamental freedom under the Bill of Rights. | The <a href="#">Kenya Public Health Act 2012</a> protects public health with duties related to business practices, such as food hygiene and protection of foodstuffs, public water supplies, sanitation, and housing. The <a href="#">Kenya National action plan (NAP) on business and Human Rights</a> addresses the UN guiding principles, SDGs and Kenya's Vision 2030, and commits to setting a legal, regulatory and administrative framework for businesses to respect human rights, guidance for business to understand their obligations, and improved access to justice for business-related rights abuses. |
| <b>Madagascar</b>                   | The <a href="#">Constitution of the Republic of Madagascar</a> recognizes in its preamble and adapts the international covenants on human rights among other legislations. The Constitution protects the right to health from conception under Article 19.  | No law accessed  |
| <b>Malawi</b>                       | Art 26 of the <a href="#">1994 Constitution</a> recognizes the right to development, including measures to guarantee equality of opportunity in access to employment. Art 24, protects women's rights, Art 31 safe labour practices and Art 129 established a Human Rights Commission with the mandate to protect and investigate human rights violations.  | <a href="#">Malawi's Public Health Act 2014</a> Sec 7 states a duty of local authorities to take all lawful, necessary and practicable measures to prevent or deal with outbreaks or diseases, to safeguard and promote public health, including in relation to business practices.  |





| Country             | Business and health rights in Constitutions   | In public health legislation   |
|---------------------|---|--|
| <b>Mozambique</b>   | Article 56 of <a href="#">Mozambique's 2004 Constitution</a> obliges businesses to comply with fundamental rights and freedoms in their operations.   | No public health legislation was accessed.   |
| <b>Namibia</b>      | Article 5 of <a href="#">the Constitution</a> provides fundamental rights and freedoms to be respected and upheld by all natural and legal persons in Namibia, and enforceable by the Courts. This binds businesses to protect these rights, including the right to life and health.  | The <a href="#">2015 Public and Environmental Health Act</a> provides for protection of individuals and communities from public health risks; and early detection of diseases and public health risks, including those from business practices. The Act mandates the Minister to work with local authorities to have a public and environmental health plan that would implicitly cover business activities. |
| <b>South Africa</b> | Article 8(2) of the <a href="#">1996 Constitution</a> imposes human rights obligations on businesses, binding natural or a juristic person, (including business) to fulfil rights.  | The <a href="#">2003 National Health Act 61</a> and <a href="#">2013 National Health Amendment Act</a> protect health rights and standards, and provide for investigation of non-compliance.   |
| <b>Zimbabwe</b>     | Article 76 of the <a href="#">Constitution</a> protects the right to health care and obliges the State to take rea-sonable legislative measures to ensure progres-sive realization of the right to health care.<br>Article 44 places a duty on the State, and every person (including businesses) to respect, protect, promote and fulfil rights of citizens. | The <a href="#">2018 Public Health Act</a> provides for duty of all including businesses to prevent harm to heath. In Section 137 it provides for the Minister to set codes of practices for specific activities and in Section 32 to require health impact assessments for specific business activities.  |

Note: Sources are provided as hyperlinks in the table.

Table 1 indicates that there is variation in the extent to which ESA countries ensure business duties to protect the right to health in their constitutions and laws. Some provide enabling clauses that may be interpreted to set such duties, while others, such as Kenya, South Africa, and Zimbabwe have more explicit provisions. Kenya's National action plan (NAP) on business and Human Rights provides an example of application of the UN guiding principles on business and human rights. In Malawi, a Human Rights Commission has produced a [Human Rights and business country guide](#) in consultation with stakeholders. The guide provides information on the potential and actual human rights impacts of businesses operating in the country to promote companies to respect human rights.

Even where there may be constitutional and legal protection of the rights to health as outlined in Table 1, this does not guarantee their implementation.

For example, in Botswana, where the African Charter on Human and People's Rights has been ratified, a case study on the right to health of miners and ex-miners found gaps in mine company duties to assess and account for the health impact of their operations on miners and ex-miners, and in the allocation of resources to meet standards and best practices (CESR et al., 2021). In the Democratic Republic of Congo, mining operations for cobalt and copper have been reported to be linked to forced evictions as rights abuses (Amnesty International, 2023).

As a further example, the government of Mozambique committed itself to protecting and promoting human rights, and became the first country in Africa in 2013 to begin work on a National Action Plan on Business and Human Rights. Despite these efforts, lack of public awareness of their rights in relation to businesses is a reality (Chatham House, 2021).



**Box 1: Uganda’s provisions on business and the right to health**

Uganda’s 2021 National Action Plan on Business and Human Rights aims to foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards, agreements and other ongoing initiatives (MGLSD, 2021). The Action Plan recognises the need to protect the rights of the most vulnerable people and provides strategies and roles for stakeholders in its implementation to build a cordial engagement between businesses and local communities. The country premises this Action Plan on its 1995 Constitution (as amended) which has several provisions on the right to health and medical services supported by legal precedents that include a 2020 Constitutional Court judgement on maternal health (Petition 16) (CEHURD, 2020). It is also inferred in other provisions on freedom from torture & inhuman treatment; the right to life; to a clean and healthy environment; and the rights of particular groups, including women, child and persons with disabilities. As in many other ESA countries, various laws govern the operations of business enterprises. These include: the Companies’ Act 2012; the Workers Compensation Act 2000, compensating workers for injuries and diseases incurred in the course of their employment; and the Occupational Safety and Health Act, 2006 which mandates an employer to ensure a safe working environment. The Human Rights Enforcement Act 2019 provides that a person and/or organization who claim that a fundamental or other right or freedom guaranteed under the Constitution has been infringed or threatened can seek legal redress. Notwithstanding this, rights to health have been violated within the private sector settings as exemplified in a successfully litigated case by CEHURD, where the judge distinguished between business and protection of rights to health in a matter in which a private health facility detained a patient for failure to pay fees. The Judge indicated in [his ruling](#) that; “If this court were to allow the practice of hospitals detaining patients who fail to pay their medical bills to go on unchecked, many hospitals could choose to incarcerate their clients in the basements of their premises until medical bills are cleared. This would easily pass on as a greenlight for hospitals to establish private prison cells as a debt recovery method, a phenomenon that is so antithetical to the rule of law. It is hereby declared that the detention of Mugerwa in Jaro hospital was illegal and unlawful...” (CEHURD, 2023).

Mozambique is reported to have amongst the highest level of tobacco industry interference from 2020-2023 (ATCA, 2023). Hence while Mozambique, like Malawi has a [Human Rights and Business guide](#) for the country that is premised on its Constitution and aims to advance health rights, it would be important to monitor progress on its implementation.

Where there are gaps in application of the law, some have used litigation to realise corporate respect for health rights. For example in Kenya In [Save Lamu & 5 others v National Environmental Management Authority \(NEMA\) & another \[2019\] eKLR.](#) Save Lamu, a community-based organisation representing the Lamu community, challenged the granting of a license for the construction of the Lamu

Coal-fired Power Plant as well as the process of obtaining the Environmental Impact Assessment (EIA) license in a by case involving an energy company contracted by the Kenyan government for a coal power generation project. The appellants contended that the project lacked proper public participation in the preparation of the Economic and Social Impact Assessment (ESIA) report, with a flawed report with misrepresentations, inconsistencies and omissions. They also contended that the project would harm the marine environment through the discharge of thermal effluent because of a poor and outdated cooling system, and lacked sound mitigation measures for these and other harms. The Tribunal subsequently cancelled the license issued to Amu Power by National Environmental Management



Authority (NEMA) and ordered a fresh ESIA report to be produced before commencement of the project. NEMA was required to comply with the relevant regulations by engaging with the lead agencies and the public in drafting the report. The Tribunal emphasized access to information for the affected community, through meaningful and effective participation in the process for the EIA.

As a further example, in Madagascar in 2020, the Supreme Court criticized the issuance of permits and regulatory approval to an Australian company, Base Resources, for serious and grave human rights violations in the large mineral sands project in Southwest Madagascar. The Project generated controversies surrounding transfer of land rights, lack of local community consultation and participation. Madagascar's Ministry of Justice has held a series of training courses on the UN guiding principles on Business and human rights within the mining entities with a view of ensuring that rights of the citizens are respected, and protected by the entities (Friedrich-Ebert-Stiftung, 2022).

In South Africa, the Courts have made reference to UN guiding principles on business and Human rights in making decisions about human rights violations. The Western Cape Division of the High Court of South Africa for example in making reference to the UN guiding principles in the case of *University of Stellenbosch Legal Aid Clinic and others v Minister of Justice and Correctional Services and others [2016] ZACC 32* noted that "they 'place a duty upon the State to take measures to prevent the abuse of human rights in their territory by business enterprises. States are obliged to reduce legal and practical barriers that may deny individuals a remedy.'

In Uganda, in a [CEHURD case in 2021](#), the [Court in Uganda](#) ruled that the Minister of Health and Attorney General must intervene by making regulations for reasonable fees payable to hospitals for management and treatment of Covid-19 patients. The court also ordered the Uganda Medical and Dental Practitioners Council to make recommendations to the minister of health regarding reasonable fees chargeable by hospitals for treatment and management of persons suffering from COVID-19. This ruling was to address the overcharging of patients by private hospitals, leading some families to abandon their deceased members in hospitals.

CEHURD has engaged in other cases of a similar nature in Uganda to protect individual or group rights from being harmed by a third party non-state actor including business enterprises (Nimwesiga, 2023).

## *Gaps to address on business and health rights in ESA countries*

As noted earlier, there is variability in the extent to which ESA countries provide specific legal protections of health rights, including on their public health law, together with policies and measures for their implementation. Some ESA countries have enshrined the UN Guiding Principles on Business and Human Rights in law or policy, whether explicitly or implicitly, but others have not. International Instruments outlined in this brief set specific provisions with clear language on state duties to hold business enterprises accountable on human rights including health rights. However, the laws in many ESA countries and regional treaties have less specific language on this, and there is no specific regional treaty promoting the UN Principles. It is not clear whether countries are provided with technical assistance to domesticate and implement the UN Principles on business and human rights. This weakens implementation of these guiding principles within ESA countries. It leaves affected communities to resort to litigation, with some ESA countries providing evidence of this. In one case this explicitly addressed to the limited or absent information to and participation of communities in ensuring that their health rights are respected by business enterprises.

Actions that could be taken to address this situation include:

- **State adherence to UN guiding principles**, through explicit policy statement, legal review and establishment of independent mechanisms to monitor and hold business enterprises, including those involving government, accountable for health standards, including in licensing and agreements for new business investments,
- **Improving national legislation and setting action plans on business and human/health rights**, integrating general duties to prevent harm to health and health impact assessment in public health law, as



in Zimbabwe, domesticating international and regional standards in relevant national law, and setting action plans as exemplified in Kenya and Uganda, with dedicated mechanisms to implement the plans, including through multisectoral approaches.

- **Providing guidance, technical assistance and capacity development to support implementation**, including through guidance documents, as for example provided in Malawi, and from South-to-South exchanges and technical assistance from the UN Human Rights Council.
- **Promoting awareness and participation of affected communities and stakeholders**, to enable them to be at the center of state efforts, to be informed on their rights in relation to business entities and to be able to seek legal redress where their rights to health are violated. The region can share information materials, plans, health impact assessment reports and capacities and case reports from court cases to strengthen awareness.
- **Nurturing a vibrant civil society movement** that is committed to promoting the protection of human rights within the context of conflict and business.

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