

affected groups and other relevant stakeholders and include particular impacts

d) Reporting: The state should enforce the requirement for businesses to prepare non-financial reports in line with Companies Act, 2015 and encourage the proactive disclosure of their impacts on human rights and the mitigation measures they are taking in this regard

e) Cooperation on access to remedies: States should require businesses to cooperate with government agencies and other stakeholders in facilitating remedies for business-related human rights violations. These include actively participating in policy discussions on access to remedy and adopting policies that enhance access to remedy.

Pillar 3: Access to Remedy

Access to effective remedy guarantees victims of business- related human rights abuse with predictable avenues for complaints, adjudication of their grievances, an opportunity for the other party to present its case and a fair remedy based on the merits of the case. It also ensures that remedies are relevant and proportionate to the abuses, including orders to stop ongoing abuses.

Policy Actions: State-based Judicial and Non-Judicial Remedies

Policy Actions

The government will:

a) Enforce all applicable laws as well as respect internationally recognised human rights laws and standards as they relate to land access and acquisition and natural resources, environment and revenues management

b) Promote the use of Alternative Dispute Resolution mechanisms in dealing with disputes between businesses and those allegedly harmed by their operations

c) Provide training and support to the judicial, administrative and oversight organs on business obligations in respect of human rights. Priority will be given to the following institutions:

- ★ The Judicial Training Institute
- ★ Relevant parliamentary oversight committees
- ★ Relevant regulatory bodies
- ★ Relevant State-Owned Enterprises (SOEs)
- ★ Constitutional Bodies including the KNCHR
- ★ Nairobi Centre for International Arbitration
- ★ The Law Society of Kenya

d) Improve access to information on available judicial and non-judicial mechanisms involved in the resolution of business- related abuses as a measure of promoting access to justice. Such information should be made available in all counties and provided in a manner accessible to vulnerable groups

e) Prioritise access to legal aid for victims of business- related human rights abuses, consistent with the Legal Aid Act, 2016 and the National Action Plan on Legal Aid

f) Improve access to the human rights Division of the High Court. Employment and Labour Relations Court and the Environment and Land Court to ensure that they are accessible avenues for remedying business-related human rights abuses. The review shall include an assessment on whether the courts are expeditious and affordable

g) Increase the capacity of the labour inspection department to handle labour related grievances, including through:

- ★ Increasing the number of labour inspectors to monitor and enforce compliance with labour standards by businesses, with particular attention to the implementation of mandatory policies to prevent and address sexual harassment and violence, payment of minimum wages, equal pay for equal work of equal value, prohibition of child labour and non-discrimination against women, marginalised groups and minority groups
- ★ Taking measures to guarantee the independence of labour inspectors and to ensure that their duties are undertaken with integrity and in a transparent and accountable manner.

Non- State Based Grievance Mechanisms

Businesses should administer grievance handling mechanisms either alone as operational level grievance mechanisms, or in conjunction with stakeholders or industry associations as part of any industry-wide grievance mechanisms. This is meant to ensure speedy, physically and financially accessible remediation of human rights complaints.

a) Develop and disseminate guidance for businesses on the establishment of credible operational-grievance mechanisms that are consistent with international standards. Such grievance mechanisms should be responsive to the needs and rights of vulnerable groups such as women, persons with disabilities, children and indigenous persons.

b) Sensitise businesses and those impacted by their activities on the benefits of establishing and utilising credible operational level grievance mechanism.

c) Assist community-based organisations working on human rights issues to build their capacity to effectively monitor human rights impacts of businesses and advocate for individuals and communities to enforce their right to a remedy for human rights violations.

4. Implementation and Monitoring

Implementation of this policy will be by a NAP Steering Implementation Committee to be overseen by the Department of Justice and the Kenya National Commission on Human Rights. Representation is drawn for a cross section of stakeholders. They are:

- 1) Office of the Attorney General and Department of Justice
- 2) Ministry of Foreign Affairs
- 3) Ministry of Labour and Social Protection
- 4) Ministry of Public Service and Gender (State Department for Gender)
- 5) The Ministry of Trade and Industrialisation
- 6) The Kenya National Commission on Human Rights
- 7) Three Civil Society Organisations Representatives of Persons with Disabilities, Women and Indigenous persons
- 8) Kenya Association of Manufacturers
- 9) Global Compact Network Kenya
- 10) Kenya National Chamber of Commerce and Industry
- 11) Kenya Private Sector Alliance
- 12) Law Society of Kenya
- 13) National Council on Administration of Justice
- 14) National Gender and Equality Commission
- 15) Federation of Kenya Employers
- 16) National Environment Management Authority
- 17) Central Organisation of Trade Unions Kenya (COTU)(K)

Review

The National Action Plan on Business and Human Rights shall be reviewed after five (5) years.

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From
the People of Japan

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The National Action Plan on Business and Human Rights, Session Paper No. 3 of 2021

Simplified Version

PROTECT RESPECT REMEDY

1. What is the National Action Plan on Business and Human Rights (NAP -BHR)?

The National Action Plan on Business and Human Rights is a comprehensive government strategy for protecting against human rights abuses by businesses, whether private or state owned. The NAP-BHR outlines concrete commitments by the government for addressing adverse business-related human rights impacts. It however does not create any new obligations but restates already existing obligations under the Constitution of Kenya 2010, regional and international human rights instruments.

Background

The National Action Plan on Business and Human Rights is a policy document that domesticates the United Nations Guiding principles (UNGPs) on Business and Human Rights. The UNGPs were developed through the mandate of the United Nations Secretary General, who in 2005 appointed Professor John Ruggie as the Special Representative , to look into the issue of human rights and transnational corporations and other businesses. This was informed by a request by the Human Rights Council. The mandate of the Special Representative was to clarify the roles and responsibilities of states, companies and other actors within the business and human rights sphere. Professor John Ruggie, the Special representative, was expected to issue an interim report presenting views and recommendations for consideration by the Human Rights Council in its 62nd Session 2006.

After extensive consultation with business leaders, governments, civil society organisations, academia, national human rights institutions and other actors, Professor Ruggie presented the “Protect, Respect and Remedy” Framework. The framework elaborated the three pillars thus:

- i. The State duty to protect against human rights abuses,
- ii. The Business responsibility to respect human rights and, Access to remedy (judicial and non-judicial) in the event of a violation/abuse.
- iii. Upon presentation of this framework, Professor Ruggie's mandate was extended and he was tasked with operationalising and promoting the framework. Hence further engagements with actors which led to the 31 principles presented as the United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs address the three pillars and identify what needs to be done under each. The principles address the duty of the state to protect against human rights abuses by businesses whether private or state owned, the responsibilities that the businesses must take to respect human rights and the remedial measures both governments and businesses should take to address impacts of businesses on human rights. In Kenya, the UNGPs are domesticated and operationalized through the NAP-BHR, Sessional Paper No. 3.

UN Guiding Principles on Business and Human Rights



PROTECT

The state to
protect against
human rights
abuses

RESPECT

The Business
responsibility to
respect human
rights

REMEDY

Access to remedy
(judicial and non-
judicial) in the
event of a
violation/abuse

2. NAP-BHR development process

After adoption by the Human Rights Council, states were requested to develop national action plans to domesticate or /operationalise the UNGPs in their countries. During Kenya's second review under the Universal Periodic Review cycle in 2015, the UN Human Rights Council recommended that Kenya develop a NAP-BHR, a recommendation that the State accepted. The Office of the Attorney General and Department of Justice developed a concept paper outlining the key business issues in Kenya and sought the necessary approvals to commence the development of NAP. In 2016, the Attorney General of Kenya made a public commitment that Kenya would commence the development of NAP and invited all stakeholders to participate in the process. The Department of Justice in partnership with the Kenya National Commission on Human Rights led the development process.

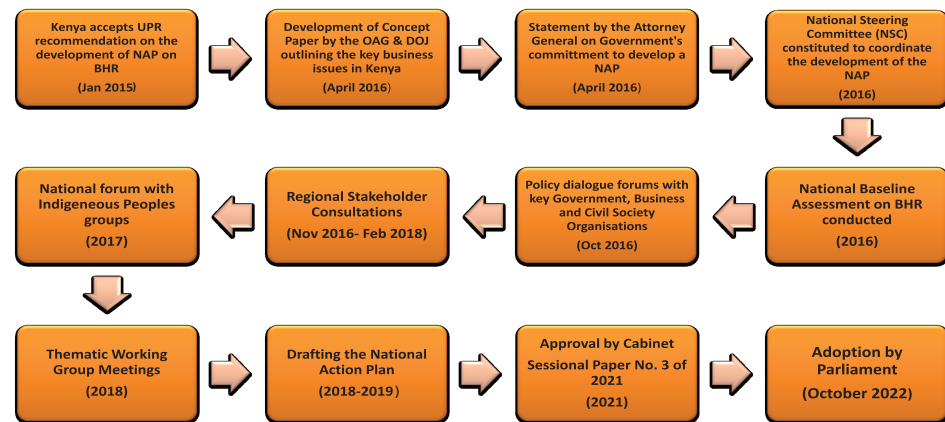
A National Steering Committee (NSC) was constituted to advise and coordinate the development of the NAP. It comprised the following stakeholders:

- The Office of the Attorney General and Department of Justice
- The Kenya National Commission on Human Rights
- The Ministry of Energy and Petroleum
- Kenya Private Sector Alliance
- Kenya Human Rights Commission
- Ministry of Labour and Social Protection
- The Council of Governors
- The Office of the High Commissioner for Human Rights (OHCHR)
- The Central Organization of Trade Unions (Kenya)
- Federation of Kenya Employers
- The National Gender and Equality Commission
- The United Nations Global Compact

Objectives of the NAP-BHR

Development of the NAP was meant to fulfil the following objectives:

- To guide the State in fulfilling its duty to protect individuals and communities from business-related human rights abuses consistent with its domestic and international obligations
- To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations
- To promote human rights due diligence by businesses as a concrete measure of preventing adverse impacts on people
- To offer a roadmap of strengthening access to State based judicial and non-judicial, and non-state-based remedies for victims of business-related harm.



In 2016, the NSC commissioned a National Baseline Assessment (NBA) to evaluate the status of business and human rights in the country. The baseline also evaluated the status of implementation of the UNGPs and other human rights frameworks with regards to business.

After the NBA, policy dialogue forums were held with key government agencies, businesses, civils society organisations, communities and vulnerable groups. The forums were held across the country with the former provincial administrative units (provinces) being convenient venues. A national forum was also conducted to get views from indigenous communities.

Thematic areas addressed in the NAP-BHR

The NBA and consultations conducted helped to identify issues that cut across the regions and stakeholder groups. After analysis, the following were identified as thematic areas:

a) Land and Natural resources

Concerns

- ★ Lack of knowledge of existing compensation and resettlement framework for the voluntary and compulsory acquisition of land
- ★ Lack of guidance on community consultations in the context of natural resources governance resulting in inadequate participation of local communities in decision making
- ★ Land adjudication has not been undertaken in some areas where businesses are operating or propose to operate, complicating decisions on who the rightful parties to be consulted and compensated are
- ★ The Mining Act, 2016 has not been fully operationalised with regards to the sharing of revenues, effectively denying local communities impacted by the operations of mining companies the rights and protections under the law
- ★ Cultural and historical barriers to access to land by women, minorities and marginalised groups such as indigenous persons. These barriers limit these groups' decision-making power and participation in decision making power over land related issues
- ★ Lack of sustainable benefits for host communities from the exploitation of natural resources despite the constitutional imperative for equitable sharing of benefits

b) Revenue Transparency

Concerns

- ★ Corruption in the process of revenue collection and the management of public revenue,. Stakeholders identified corruption in the business licensing process, the process of tax collection and public procurement attributed to both public and private actors
- ★ Lack of disclosure of contracts particularly those that have significant economic and social consequences
- ★ Lack of transparency in administration and management of revenues from the exploitation of natural resources including from mining and oil and gas activities
- ★ The absence of legal beneficial ownership disclosure aids the veil of secrecy in determining who owns and controls business entities inhibiting law enforcements' ability to 'follow the money'

c) Environmental Protection

Concerns

- ★ Environmental pollution by business operations, including through discharge of effluent into waterways, air and noise pollution and poor disposal of solid waste, toxic and hazardous substances. These negative impacts compromise the rights to a clean and healthy environment, health, reasonable standards of sanitation, clean and safe water
- ★ Loss of biodiversity due to destruction and encroachment on the natural environment for commercial purposes negatively impacts livelihoods, health and access to clean and safe water for present and future generations.

d) Labour rights

Concerns

- ★ Sexual harassment is widespread and underreported, with women being the majority of victims- fear of job loss being a major factor in the reluctance to report. Furthermore, there is low enforcement of the Sexual Offences

Act, 2006

- ★ Lack of access to maternity and paternity leave. While the law provides and protects both maternity and paternity leave, not all workers in the private sector are able to access this benefit for fear of job loss.
- ★ Low level of awareness on labour rights among workers (mostly women in low income or low skilled jobs) and employers
- ★ Lack of effective regulation of recruitment agencies for migrant workers
- ★ Lack of publicly available statistics disaggregated by sex and other vulnerabilities that could be useful in addressing sex and other forms of discrimination in the workplace
- ★ Lack of effective remedies for victims of labour related grievances resulting in high prevalence of unresolved labour-related grievances. A weak enforcement mechanism, in particular inadequate number of state labour inspectors and the lack of effective operational level grievance mechanisms were also cited as contributing factors

e) Access to Remedy

Concerns

- ★ Limited physical access to courts for people living in rural and remote areas that do not have specialised courts in nearby towns. This limitation increases the cost of accessing justice for local communities
- ★ Despite the possibility of criminal sanctions against directors and managers of companies that may be involved in specific human rights violations that also invite penal sanctions, there is a low rate of prosecution and hence system fails to act as a deterrent to such violations
- ★ The cost of litigation is still high for significant sections of individuals and communities. In some lawsuits, for example, it may be necessary to summon experts such as environmental experts to testify on specific issues. Such expertise may be unavailable for the community or where available, may be too expensive for the community to secure
- ★ There have been instances where human rights defenders who have lodged cases against businesses, especially land and environment grievances, have reportedly faced death threats and other forms of intimidation which they hardly report to authorities. This hostility may instil fear in others who may wish to lodge complaints hence robbing communities and individuals of the protection that the law could have offered against business-related abuses
- ★ The capacity of the administrative tribunals to offer non-judicial remedies is often limited by lack of personnel to conduct proper outreach outside of urban centres and the technical capacity to understand emerging and complex issues.

NOTE: Issues of gender, vulnerable groups such as persons with disabilities, indigenous and marginalised communities, women and children were identified as cross cutting.

3. Policy Actions

Policy statements and actions have been formulated to respond to the concerns raised through the five thematic areas and cross-cutting issues. These policy actions and statements are formulated around the three pillars of the UNGPs.

Pillar 1: The State Duty to Protect

International law obligates states to protect against human rights abuses within their jurisdiction. Pillar 1 clarifies such obligations as including protecting against human rights abuses by third parties such as businesses. This requires states to take appropriate steps to Prevent, investigate, punish and redress such abuses. The government should do this by putting in place effective policy, legal, regulatory and adjudicative measures.

The NAP proposes the following Policy Actions:

- Introduce requirement for Human Rights Due Diligence before issuance of business licenses
- Ensure continuous training for government agencies workers involved in the promotion and regulation of businesses on the state's human rights obligations and nexus to their various mandates and functions
- Strengthen the labour inspectorate department to enable it effectively carry out its mandate
- Develop guidelines for non-financial reporting under the Companies Act, 2015
- Expedite land adjudication and registration with a view to securing the protection of land owners/users and communities especially in areas earmarked for major projects

f) Strengthen oversight mechanism for recruitment agencies involved in the recruitment of Kenyans for employment in businesses abroad. In this regard, the government will work with host governments to take appropriate measures to promote safe and fair labour migration including agreements on free exchange of information and more stringent regulation of employment agencies. Government will also provide legal and psychosocial support services to victims of labour abuses

g) Sensitise relevant sections of the public especially women and other marginalised and minority groups on:

- Land laws including resettlement and compensation frameworks
- Labour laws and the rights of migrant workers
- Environmental laws and standards

h) Develop procedural guidelines for use by businesses, individuals and communities in their negotiations for land access and acquisition. These guidelines will ensure and safeguard the participation of women, persons with disabilities, youth, children and other marginalised groups.

i) Work with stakeholders to develop a natural resource revenue management policy and regulatory framework for administering and managing natural resources revenue paid to host communities. This framework should seek to promote equity, inclusivity and community decision making and will include training to enhance the capacity of communities to manage their affairs. It will also serve to guide the operationalisation of mining revenue as envisaged by the Mining Act, 2016.

j) Finalise the development of regulations to access to information Act to facilitate disclosure of contracts, including those that have a significant economic and social impacts in the country and join the Extractives Industry Transparency Initiative (EITI) for the facilitation of revenue transparency.

k) Strengthen leverage in using public procurement to promote human rights. This will involve the review of existing public procurement policies, laws and standards and their impacts with due regard to the state's human rights obligations including women's rights as part of the criteria

l) Review current trade and investment promotion agreements and bring them into compliance with the Constitution and international human rights standards to ensure that they are not used to facilitate illicit financial flows and tax evasion by businesses.

Pillar 2: Corporate Responsibility to Respect Human Rights

This pillar states that businesses should respect human rights wherever they are operating. This respect is achieved by ensuring that they avoid abusing others' rights and where harm has already occurred, they should take steps to remedy them. Businesses should use human rights due diligence as the primary tool that ensures that they identify the human rights risks of their activities, take measures to avoid or mitigate them, and where the harm has already occurred, ensure that the victims have access to an effective remedy.

Policy Actions

a) Training: The State should develop and disseminate guidance for businesses on their duty to respect human rights and operationalisation of this duty in the Kenyan context, including the implications of their operations on the environment, gender, human rights defenders, minorities, persons with disabilities, marginalised and other vulnerable groups to promote responsible labour practices and inclusivity

b) Human Rights Policy Commitments- the State should:

- Require businesses to adopt human rights policies, including taking measures to ensure their operations respect human rights, including by providing access to remedy for human rights abuses
- Encourage recruitment agencies to provide any required repatriation, legal and psychological support to migrant workers who have suffered or been subjected to abuse abroad
- Enforce compliance with human rights standards by State Owned Enterprises and other businesses that receive export credit and state support including by providing access to remedy for human rights violations
- Promote the use of human rights and sustainability as criteria for the industry awards by businesses and business associations

c) Human Rights Due Diligence: the state should require businesses to identify their human rights impacts including through conducting comprehensive and credible human rights impacts assessments before they commence their operations and continuously review the assessment to ensure that they prevent, address and redress human rights violations. Such impact assessments should involve meaningful consultation with potentially