



## **THE PROCESS OF DEVELOPING A NATIONAL ACTION PLAN FOR BUSINESS AND HUMAN RIGHTS IN KENYA**

### **STEPS IN DEVELOPING KENYA'S NAP**

Kenya has adopted the 5 Phases of developing a NAP given in the guidance of the UN Working Group on Business and Human Rights. i.e

1. Initiation,
2. Assessment and Consultation
3. Drafting
4. Implementation
5. Update

### **KENYA'S EXPERIENCE WITH THE GUIDANCE OF THE UN WORKING GROUP**

The Guidance to a large extent informed the structure of the concept paper that the Department of Justice developed to inform and seek the official commitment of relevant Government Authorities to the commencement of the process of developing a NAP. We also followed the recommendations of the Guidance in arriving at the broad road map towards the process of developing our Nap. We found this quite helpful as we were able to modify different recommendations to suit our country specific circumstances.

- The steps of the process were particularly helpful. They provided the clarity that was needed for a broad road map.
- The discussion of the different steps with examples was found to be quite practical and enriched the adoption of the guidance steps.
- By way of improvement on the critical steps, the Guidance could discuss briefly the best practices observed from countries that have already developed such

plans and the circumstances that made them so. The guidance gives examples of different countries that adopted different steps but does not discuss the outcome.

## THE KENYAN PROCESS SO FAR

### Initiation

This First preparatory phase involved;

- a. Developing a concept paper, to not only inform relevant Government Authorities on UN Guiding Principles but also as an advocacy paper seeking approvals and authority to commence the process of developing a national action plan on business and human rights. We have received the necessary formal commitment from the Government to engage in an open-ended NAP process.

To communicate this, the Hon Attorney General issued a press statement stating, inter alia, “Kenya has committed to developing a National Action Plan on Business and Human Rights, a comprehensive strategy for protecting against human rights abuses by companies. This is an issue of urgent national importance. Recent years have seen a significant increase in foreign investment and remarkable growth in the domestic private sector. While these trends may support sustainable development, they may also adversely affect workers rights, communities and the environment. Adverse effects involving companies range from community displacements child labour, environmental degradation and detestable working conditions. Without deliberate state stewardship, Kenya’s expanding investments may lead to unmitigated violations.”

- b. The phase also involved holding some stakeholder consultations in order to come up with a well thought and balanced National Consultative /steering Committee to guide the process.

We have so far held three stakeholders' meetings.

The first meeting was held with businesses that are members of the Global Compact and or members of the Kenya Association of manufacturers who have signed on to the Code of Business ethics in Kenya. As a strategy, we thought that we would start with businesses that have already identified themselves with the need to safeguard human rights.

The second meeting was for other stakeholders including Government controlled businesses, trade Unions, Federation of Kenya employers, civil society Organizations, relevant Government Departments and agencies, the National Human Rights Institutions and the Office of the High Commissioner for Human Rights, Nairobi office.

The main objective of these two meetings was to agree on the modalities of consultations and engagement, especially on who would be included in the National Advisory steering committee.

The third meeting was facilitated by the Norwegian Embassy with Kenyan companies doing business with Norway and Norwegian companies doing business in Kenya.

- c. After these consultations, we were able to constitute the National advisory Steering Committee in April 2016. The members are drawn from; Ministry of Mining, Ministry of Energy and Petroleum, State Department of Labour, Kenya Human Rights Commission, COTU, Federation of Kenyan Employers, OHCHR, Council of Governors, Institute of Business and Human Rights, KEPSA and Global Compact. The Department of Justice and Kenya National Commission on Human Rights provide the secretariat to the steering Committee. The Committee which is expected to provide strategic guidance to the process was inducted by Prof. Ado, a member of the UN Working group on business and Human Rights. The Committee

## **Assessment and Consultation**

In this second phase,

- a. It is advised that a country carries out a gap analysis of its Implementation of the UN Guiding Principles on Business and Human Rights. In this regard, the Kenya Human Rights Commission (KHRC) is carrying out a National Baseline Assessment, in accordance with a systematic template based on the UN Guiding Principles on Business and Human Rights, to identify all agencies, laws and initiatives that seek to protect individuals from business-related human rights abuses. This template was developed by the Danish Institute for Human Rights (DIHR) and International Corporate Accountability Roundtable (ICAR), and is recommended for use by the UN Working Group on Business and Human Rights.

- b. We have also commissioned a national survey of human rights impacts linked to business activities in Kenya, looking at the full range of internationally and regionally recognized human rights, including labour conditions, environmental management and the collection and distribution of natural resource based revenues. This survey is expected to encompass businesses in all industries and sizes, in both the formal and informal sectors.
- c. The preliminary findings of these surveys are what has informed the proposed thematic groups that were discussed during the policy dialogues outlined here below. The findings of these two studies will also help in objectively determining the priorities of the first action plan constitute thematic working groups and map all the stakeholders to this process.
- d. During this phase, the consultations entail:
  - i. Having policy dialogues for better understanding of the UNGPs and the role that different identified groups are expected to play in the development and implementation of a National Action Plan to implement the UNGPs.
  - ii. Intense stakeholder consultations arising from these dialogues and other processes
  - iii. Conducting regional hearings. The regional hearings are intended to not only sensitize stakeholders on the process and the expected outcome but also give an opportunity to different regions to give local views on the specific impact that businesses operating in their regions have on their rights and give an insight into what the local communities expect of Government and business.
- e. It is only after collecting all the views from all the stakeholders that we shall start the process of drafting of the national action plan.

## **THE POLICY DIALOGUES**

We have also convened 3 policy dialogue meetings with the following actors i.e. state actors; non-state actors and Administration of Justice players for their better understanding of the UNGPs and the role they are expected to play in the

development and implementation of an National Action Plan to implement the UNGPs.

## **A. State Actors**

State-owned enterprises (SOEs) must lead by example in respecting human rights. More often than not, Governments ask private businesses to respect human rights, but forget to put the required measures in their own business therefore sending an incoherent message to businesses.

The Guiding Principles require that States exhibit concrete leadership, and demand that the enterprises they own or control be role models on human rights. This is part of States' legal obligations which can reinforce the legitimacy of States' expectations towards private businesses.

Kenya has a number of parastatals (enterprises in which the Government is a major stake owner if not whole owner) which are significant actors in diverse sectors such as energy, utilities, banking, telecommunication, infrastructure and transport.

The performance of SOEs on issues of governance and human rights is mixed, with reported cases of corruption and lack of transparency, and harm caused to workers and communities throughout SOEs' operations. These human rights impacts and the duties of the State to protect against them have not received the attention they deserve.

The objectives of the policy dialogue meeting with state actors therefore include;

- a. Creating awareness of the United Nations Guiding Principles on Business and Human Rights, highlighting the state duty to protect human rights;
- b. Identifying policy gaps; and
- c. Undertaking a national mapping of SOEs and human rights issues that they encounter in order for the NAP to address key risks.

The following Government Ministries, Departments and agencies were identified for this purpose:

- 1) Ministry of Industry, Trade and Co-operatives
- 2) Ministry of EAC, Labour and Social Protection (Department of Children's Services)
- 3) Ministry of EAC, Labour and Social Protection (Department of Labour)
- 4) Ministry of Energy and Petroleum
- 5) Ministry of Foreign Affairs
- 6) Ministry of Lands and Physical Planning
- 7) Ministry of Transport, Infrastructure, Housing and Urban Development

- 8) Ministry of Devolution and Planning (Devolution)
- 9) Ministry of Public Service, Gender and Youth Affairs
- 10) Ministry of Agriculture, Livestock and Fisheries
- 11) National Treasury, PPP Secretariat
- 12) State Corporations Advisory Committee
- 13) Kenya Power and Lighting Company
- 14) Agricultural Finance Corporation
- 15) National Hospital Insurance Fund
- 16) National Environment Management Authority
- 17) Kenya Railways Corporation
- 18) National Oil Corporation of Kenya
- 19) Kenya Wildlife Service

## **B. Non State Actors**

Businesses have been known to devote time and resources in order to influence policy and legislation in their areas of operation. Human rights violations may occur where such influence is only motivated by profit at the expense of public good. Businesses have the potential to play a key role in promoting adherence to human rights standards within their spheres of influence – they can for instance reduce the incidences of forced or child labour by not transacting with suppliers who practice it.

The corporate responsibility to respect human rights, as outlined in pillar two of the UN Protect, Respect and Remedy Framework, requires business enterprises to avoid infringing on human rights and to address any adverse human rights impacts with which they are involved. Businesses are required to identify, prevent, mitigate and remedy any adverse human rights impacts that they are involved with through their business activities or relationships and account for how they meet this responsibility.

According to Guiding Principle 15, in order to meet the corporate responsibility to respect human rights, businesses are expected to have in place:

- a) A policy commitment to respect human rights;
- b) A human rights due diligence process; and
- c) Processes to enable the remediation of any adverse impacts the company's activities have on human rights.

It is under the acknowledgment of the role of non-state actors in the NAP process that we decided to have a policy dialogue with the business community. The objective of this dialogue was to:

- a) create awareness about the UN Guiding Principles, and to build the capacity of businesses to address human rights impacts;
- b) raise awareness of the types of issues, both social and environmental, that pose a danger to human rights and which businesses should negotiate on;
- c) Promote partnership with businesses that are already implementing human rights policies to participate in the NAP process; and
- d) Undertake a national mapping of business and the different human rights issues that business encounter in order for the NAP to address on a priority basis, the key risks;

The following organizations were invited:

1. Kenya Private Sector Alliance (KEPSA)
2. Kenya National Chamber of Commerce and Industries
3. Kenya Association of Manufacturers
4. Kenya Flower Council
5. Kenya Bankers Association
6. Federation of Kenyan Employers
7. Kenya Chamber of Mines
8. Safaricom Ltd
9. Unilever
10. Nestle
11. Tullow Oil
12. Tata Chemicals Magadi
13. East African Breweries Ltd
14. Strathmore University
15. Bidco Oil Refineries
16. Mabati Rolling Mills
17. Oserian Flower Farm
18. Kenya Commercial Bank
19. AAR Health care
20. Krystalline Salt Limited

### **C. Administration of Justice players**

Pillar three of the UN Protect, Respect and Remedy Framework outlines that States are required to ensure the effectiveness of domestic judicial mechanisms in addressing business-related human rights abuses. Research has indicated that there are a number of obstacles facing victims that prevent them from using national courts to access a

remedy for business related human rights abuses. Administration of Justice players have a role to promote remedy through considering ways by which to reduce legal, practical and other relevant barriers that victims may face.

The Guiding Principles provide that access to remedy can be provided through:

1. State-based judicial mechanisms;
2. State-based non-judicial mechanisms; and
3. Non-State-based grievance mechanisms, including mechanisms provided by business, industry associations, multi-stakeholder groups and international bodies

While each category mentioned above has a role to play in securing access to remedy, it is widely accepted that effective state based judicial mechanisms must sit at the core of ensuring access to effective remedy for business-related human rights abuses while non-judicial mechanisms play a complementary and supporting role.

In order to promote the role of judicial mechanisms in the NAP process, we convened the justice actors with the following objectives:

- a) To create awareness about the UN Guiding Principles, and to build the capacity of the Justice chain to address human rights impacts;
- b) To identify the barriers to accessing judicial remedy;
- c) To provide outreach and advice to victims of corporate human rights abuse on how to access judicial remedies;
- d) To dialogue with the judiciary and the legal profession on particular topics related to judicial remedies, such as complicity and extraterritorial application of laws relating to business-related human rights abuses;
- e) To support the complaints handling functions of National Human Rights Institutions through sharing of information on cases and dispute resolution methodologies; and
- f) To create awareness on the need to facilitate access of victims of business-related human rights abuses to available state-based non-judicial mechanisms through outreach, education and referral.

In line with the above, the following justice chain players were invited:

- 1) Chief Registrar of the Judiciary
- 2) National Council on the Administration of Justice ( this has different actors including in the administration of justice chain)
- 3) Chartered Institute of Arbitrators
- 4) Judiciary Training Institute



- 5) Kenya Magistrates and Judges Association
- 6) Kenya Women Judges Association
- 7) Judge from the Environment and Land Court
- 8) Judge from the Employment and Labour Relations Court
- 9) Judge from the Commercial Division of the High Court
- 10) Judge from the High Court (Constitutional Division)
- 11) National Gender and Equality Commission
- 12) Commission on Administrative Justice
- 13) Kenya Police Service
- 14) The Independent Police Oversight Authority
- 15) Ministry of Interior
- 16) Ministry of Foreign Affairs
- 17) The Kenya Prison Service

## **APPROACH TO THE DIALOGUES: COLLABORATION WITH THE UN WORKING GROUP ON BUSINESS AND HUMAN RIGHTS (UNWG)**

Kenya has adopted to use the guidance of the UNWG on the development, implementation and update of its NAP on Business and Human Rights. It will be used as a reference guide for all stakeholders involved in the NAP processes.

The National Consultative /Steering Committee for the NAP process has therefore agreed to request the UNWG to be key resource persons during these policy shaping sessions recognizing that the UNWG has, among others the following terms of reference:

- To promote the effective and comprehensive dissemination and implementation of the [Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework](#);
- To provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights;
- To identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon and, in that context, to seek and receive information from all relevant sources, including Governments, transnational

corporations and other business enterprises, national human rights institutions, civil society and rights-holders;

- To conduct country visits and to respond promptly to invitations from States;