REPUBLIC OF KENYA

NATIONAL ACTION PLAN

ON

BUSINESS AND HUMAN RIGHTS

For the Implementation of the United Nations Guiding Principles on Business and Human Rights

Photo: Courtesy of Power Engineering International
Foreword from the Hon. Attorney General
Acknowledgements
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List of Acronyms and Abbreviations

DOJ Department of Justice
EACC Ethics and Anti-Corruption Commission
EMCA Environment Management and Coordination Act
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant of Economic Social and Cultural Rights
IHRB Institute of Human Rights and Business
KBS Kenya Baseline Study on Business and Human Rights
KHRC Kenya Human Rights Commission
KNCHR Kenya National Commission on Human Rights
NBA National Baseline Assessment
NAP National Action Plan
NEMA National Environmental Management Authority
NHRI National Human Rights Institution
NLC National Land Commission
NSC National Steering Committee
SDGs Sustainable Development Goals
UNGP United Nations Guiding Principles on Business and Human Rights
UPR Universal Periodic Review
Executive Summary

The Bill of Rights in the Constitution of Kenya binds all natural and legal persons, including businesses. At the international level, the United Nations Guiding Principles on Business and Human Rights (UNGPs) offers a global reference that restates and gives guidelines on how States should protect those under their jurisdiction from business-related human rights abuses; business should respect human rights; and how both States and businesses should ensure that victims of such abuses have access to effective remedy. Kenya is committed to ensure that businesses operating in the country respect human rights.

Kenya embarked on the process of developing a National Action Plan on Business and Human Rights (NAP) in 2015 to help it implement the UNGPs. Broadly speaking, the NAP consolidates policy actions by government agencies, businesses and other relevant stakeholders to further promote the respect of human rights by businesses. It also improves the range of protection offered by the government to victims of business-related human rights violations. A National Steering Committee (NSC) on a NAP has been spearheading the development process that has resulted in this document. This NAP zeros in on five thematic areas identified by stakeholders as the key priority areas that the NAP should initially focus on. These are labour, revenue transparency, environment, land, and access to justice.

The subsequent chapters discuss these priority areas including the summarized findings of a series of stakeholders’ consultations on each of the themes. Adopting the UNGPs protect, respect and remedy framework, the NAP further highlights the policy concerns and policy actions under each of the three pillars. It finally recommends a monitoring and implementation plan, including a simplified matrix to guide implementation. Under the oversight of the NAP Implementation Committee, this NAP will be reviewed periodically. This will ensure accountability for the implementation plan and guarantee that this NAP stays abreast with the contemporary practices and developments in the field of business and human rights with due regard to Kenya’s context.
Chapter 1: Introduction

1.1. Overview

Kenya is integrating the Sustainable Development Goals – Agenda 2030 into the Third Medium Term plan for the Vision 2030. SDGs are the universals goals on ending all forms of poverty, fighting inequalities and tackling climate change, while ensuring that no one is left behind. The achievement of the SDGs requires business support through among others, innovation, resource mobilization, inclusion and non-discrimination, collaboration and respect for human rights.

The Constitution of Kenya, 2010, has laid the normative framework for corporate respect for human rights in Kenya. It has explicitly stated the responsibilities of business with respect to human rights. Art. 20 provide that the Bill of Rights binds all state organs and all persons. Further, Article 260 of the Constitution defines a ‘person’ to include a: “company, association or other body of persons whether incorporated or unincorporated.” The courts have interpreted this to impose human rights obligations on businesses. This victim-friendly interpretation has enabled redress including in cases of discrimination, violation of the rights to education, housing and several labour-related protections. This constitutional imperative for businesses is also in tandem with Kenya’s obligations under the regional and international human rights instruments that it has ratified.

In Kenya, key business and human rights concerns revolve around workplace rights, local communities – business relations, human rights and sustainable land use, human rights and sustainable environment and human rights and small- and medium-sized enterprises. To develop a sustainable and equitable investment climate, these challenges must be addressed especially since they have a big impact on human rights. There is need to embed international human rights standards early into the investment decisions, impact assessments, due diligence mechanisms and business reporting.

The Government is committed to protect against the adverse impacts of business-related operations. We expect businesses to respect human rights in line with the second pillar of UNGPs. Businesses can achieve this by conducting human rights due diligence and ensuring access to remedies where violations occur.
This NAP is Government’s overall strategy and concrete commitments to address adverse business-related human rights impacts in line with the UNGPs. It is oriented towards addressing actual and potential business and human rights challenges.

1.2. **Background to the Development of the NAP**

At the international level, the 2012 endorsement of the UNGPs by the United Nations Human Rights Council was a pivotal point in building consensus about the required standard of business conduct that ensures respect for human rights. The UNGPs are based on three pillars.

The three pillars are elaborated in 31 guiding principles that offer guidance on how to operationalize each of those pillars. In addition to the UNGPs, organized business under the leadership of the Kenya Private Sector Alliance, Kenya Association of Manufacturers and Global Compact Network Kenya have developed a voluntary Code of Ethics that elaborates key obligations of responsible businesses including the respect for human rights in line with the UN Global Compact universal 10 Principles. The UN Working Group on Business and Human Rights, which is the body mandated by the UN Human Rights Council to promote the implementation of the UNGPs has recommended that States adopt NAPs on business and human rights to guide on the implementation of the UNGPs.

Kenya’s journey toward the development of the NAP was precipitated during the UPR review process in January 2015 where several states called on Kenya, and other countries to develop a NAP to promote local implementation of the UNGPs.

<table>
<thead>
<tr>
<th>Pillar 1:</th>
<th>Describes the duty of the State to protect those under its jurisdiction from human rights violations whether committed by public or private sectors. This can be achieved through legislation and/or administrative measures.</th>
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<tr>
<td>Pillar 2:</td>
<td>Spells out the responsibility of businesses to respect human rights by ensuring that due diligence is exercised in their operations to avoid causing harm to individuals or communities. It further calls on businesses to take positive measures to enhance the enjoyment of human rights.</td>
</tr>
<tr>
<td>Pillar 3:</td>
<td>Emphasizes the responsibility of States and the Corporate sector to ensure that victims of human rights violations have access to effective remedies. This can be achieved through Judicial and non-judicial grievance mechanisms.</td>
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Besides, the international commitments made, a reawakening of mining, energy and petroleum sectors further necessitated the development of the NAP. At the time, Kenya was voted as one of the top business destinations in Africa, encouraging an influx of investors. Most of these sectors established their operations in remote areas of the country, where mostly indigenous and marginalized communities live in communal ownership of land. In response, these communities clamored for inclusion, participation and consultation in the development agenda-taking place in their localities, it therefore became imperative that businesses take human rights seriously to avoid serious repercussions and achieve business goals.

The NAP process formally commenced in April 2016 through a public statement issued by the Attorney General committing to a consultative and inclusive process that would result in a NAP that reflects issues of priority to business and human rights in Kenya. The Office of the Attorney General & Department of Justice developed a concept paper, to not only inform relevant Government authorities on UNGPs, but also as an advocacy paper seeking approvals and authority to commence the process of developing a NAP. The NAP received the necessary formal commitment from Government agencies to engage in an open-ended NAP process. The Kenya National Commission on Human Rights (KNCHR) was selected as the key-implementing agency.

A National Steering Committee (NSC) consisting of representatives from 13 institutions was formed to coordinate the process. These are:

1) Office of the Attorney General & Department of Justice  
2) Ministry of Labor Social, Security and Services  
3) Ministry of Energy and Petroleum  
4) Central Organization of Trade Unions (COTU)  
5) Kenya National Commission on Human Rights (KNCHR)  
6) Kenya Human Rights Commission (KHRC)  
7) Federation of Kenya Employers (FKE)  
8) Office of the High Commissioner for Human Rights (OHCHR)  
9) Kenya Private Sector Alliance (KEPSA)
Stakeholders Consultations

As a first step, NSC commissioned a national baseline assessment that served to evaluate the current implementation of the UNGPs and relevant business and human rights frameworks. This was followed by several regional consultations in different parts of the country. In each region, consultation included the national, county, and local government officials, and local civil society including community members impacted by business conduct and the main business actors. Additional consultations included a national forum with indigenous people’s groups. The baseline assessment coupled with the regional consultations was important in the identification of key priority areas of focus by the NAP. NSC settled on 5 priority areas that include land, labor, environment, revenue, transparency and management, and access to remedy. Subsequently, it commissioned five thematic working groups drawn alongside the five thematic areas. The working groups were useful in refining the recommendations for the NAP.

This NAP is a crystallization of the findings of the baseline assessment, the stakeholder consultations and, the recommendations from the thematic working groups. The NAP focuses on but is not limited to a range of issues mapped along the five priority areas.

Objectives of the NAP

The objectives of this NAP are:

1) To ensure the State performs its duty to protect individuals and communities from business-related human rights abuses in a manner that is consistent with its domestic and international obligations.

2) To guide businesses on the measures they should take to meet their responsibility to respect human rights in their operations.
3) To offer a roadmap strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm. It will also promote human rights due diligence by businesses to ensure that they play their role in the attainment of SDGs in a manner that respects human rights.

4) To form a basis for dialogue between the State, businesses and civil society organizations on promoting respect for human rights by businesses.

This NAP applies to all businesses operating in Kenya regardless of whether they are parent companies or subsidiaries, locals or multinational, large or small, private or State owned. This underscores the State’s commitment to protect human rights and ensure that all businesses respect human rights.
CHAPTER 2: THEMATIC AREAS OF FOCUS

During the several stakeholder consultations, the NSC identified the recurrent priority themes regardless of the region or type of business. These are: the impact of businesses on land acquisition and use, the role of businesses in promoting revenue transparency, the impact of businesses on the environment and access to remedy for business-related human rights violations.

In identifying these themes, there was extensive public participation in the consultations, including by indigenous communities where applicable. Additionally, there was due regard on the gendered impacts of businesses on these themes, a factor that has been considered in making policy action commitments. This chapter discusses each of the five themes. Under each, the legislative framework, the nature of business and human rights concerns and items for consideration in the policy actions in the NAP are highlighted.

2.1. Land and Natural Resources

Land is essential for the realization of many economic, social and cultural rights such as: adequate standard of living, housing, food and culture. Moreover, many businesses use land to set up premises, and utilize renewable or non-renewable resources from land to create goods and services and in turn profit for the businesses and revenue for resource owners. The connection between land, economic growth and development is reflected by the fact that 13 out of the 17 SDG goals have links to land.

The ‘right to land’ in international human rights law is covered under the right to property, recognized under various human rights instruments. These include the Universal Declaration on Human Rights; International Covenant on Civil and Political Rights (ICCPR); International Covenant of Economic Social and Cultural Rights (ICESCR); and the African Charter on Human and Peoples Rights (Banjul Charter). Furthermore, prohibitions against arbitrary deprivation of property and legal obligations of states in undertaking lawful evictions the process are well established in international human rights law. The United Nations Declaration on the Rights of Indigenous Peoples (2007) and the ILO Indigenous and Tribal Peoples Convention (1989) recognize the unique importance and cultural
spiritual values that indigenous peoples attach to their lands, territories and the resources therein and offer guidelines on how to ensure that they are not unlawfully deprived.

**Constitutional and statutory framework**

Kenya has a robust constitutional and statutory framework on the ownership, management and access to land and the natural resources found upon it. The Constitution provides that land, whether public, private or communal, shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.

Like in international law, there is no express right to land in Kenya, but the Constitution guarantees the right to property, and the protection from arbitrary deprivation of one’s property including land. In addition to the Constitution, there are various statutes among them, the Land Act 2012, and the Community Land Act 2016, the main laws that deal with the administration and management of land. The former consolidates the previous numerous land laws and comprehensively deals with public and private land while community land issues are addressed under the latter. All matters relating to compulsory land acquisition are dealt with under the Land Act 2012.

Public participation in natural resources governance is also entrenched in the Constitution, which guarantees access to information, community empowerment and inclusion in decision-making, and benefit sharing from the exploitation of natural resources found upon their lands. Besides revenue, Kenya is keen that communities host to extractives projects benefit through local content by hiring locally and procuring local goods and services. The state and other entities involved in natural resource exploitation are enjoined to ensure public participation during land acquisition and throughout the mining or oil and gas cycles.

In addition to public participation at community level, the Mining Act 2016 requires that all mineral agreements of over USD 500 million in value be submitted to parliament for ratification and be published on the relevant ministry's website thereby establishing additional accountability checks. To improve the efficiency with which, land-related disputes are resolved including disputes arising from access related to business operations, Kenya has established a specialized Environment and Land Court with the status of High Court.
Despite the above measures, the NAP consultations revealed several gaps. These include:

- Lack of a compensation and resettlement framework for the voluntary and compulsory acquisition of land, therefore different projects come up with different frameworks, leading to lack of coherence and standards.
- Lack of guidance on community engagement in the context of natural resources governance.
- The registration of community land is yet to commence despite the enactment of Community Land Act, 2016 thus community are yet to fully access the protections contained in the law.

2.2. Revenue Transparency

Domestic revenue is derived from several sources including taxes, duties, fees, levies, charges, penalties, fines or other monies imposed under law - the Kenya Revenue Authority Act, 1995- and collected from individuals, private and public businesses by different entities at national and county level. This revenue is partly used by Government to fulfill its human rights obligations by investing in social services such as education and health.

Chapter XII of the Constitution of Kenya focuses on public finance and sets out the general principles for revenue sharing, which include openness, accountability, public participation and equity. Revenues raised are to be shared equitably between the national and county governments with a view to promote an equitable society. Kenya Revenue Authority collects revenue while the Commission on Revenue Allocation makes recommendations to parliament on revenue sharing. The Public Finance Management Act, 2012 entrenches public participation in the national and county budgeting process allowing citizens to give their views and inputs into planning and budgeting.

Experts have identified tax revenue as the most important, reliable and sustainable means of resourcing initiatives that help in the realisation of human rights. Businesses are important contributors of tax revenue. However, illicit financial flows (IFFs), tax avoidance and tax evasion by businesses jeopardise revenue collection.
Tax and financial behaviour of companies can no longer be treated in isolation from the corporate responsibility to respect human rights, outlined in the UNGPs and business commitments to support the SDGs. Indeed, the SDGs include specific targets on reducing IFFs, and returning stolen assets, reduction of corruption and strengthening domestic resource mobilization through international support to developing countries, to improve domestic capacity for tax and other revenue collection. The Sustainable Development Goal 17 target 17.1 provides for strengthening of domestic resource mobilization, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.

Kenya has put in place the necessary legal and institutional framework to tackle corruption and other economic crimes. Specifically, the Ethics and Anti-Corruption Commission Act-2012 enacted pursuant to Article 79 of the Constitution creates the Ethics and Anti-Corruption Commission with a mandate to combat and prevent corruption and economic crimes in the country. Other relevant laws include the Penal Code, the Anti-Corruption and Economic Crimes Act, 2016 the Public Officer Ethics Act, 2003, Public Procurement and Disposal Act, the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017 and the Bribery Act, 2016. The Bribery Act 2016 places a duty on businesses to put in place appropriate measures appropriate to their size, scale and nature of operations towards the prevention of bribery and corruption and report bribery. The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017, establishes the Financial Reporting Centre (FRC) (Kenya's Financial Intelligence Unit) an independent agency charged with the principal mandate of combating money laundering and identifying the proceeds of crime.

Kenya is party to both international and regional efforts to combat corruption as a signatory to the UN Convention Against Corruption (UNCAC) and the African Union Convention on Preventing and Combating Corruption. The UNCAC criminalizes both public and private acts of corruption and calls on States to prevent and combat; cooperate with other states in the fight against corruption including asset recovery; and promote integrity, accountability and proper management of public resources. Kenya has established Anti-Corruption and Economic Crimes Division of the High Court. These courts are meant to
ensure effective case management and expeditious disposal of cases involving corruption and economic crimes.

The NAP consultations identified several challenges in revenue transparency including:

- 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, which they attributed to both the public and private sectors actors.

- Lack of a policy and regulatory framework for the administration and management of revenues from mining and oil and gas exploitation. The provisions of Mining Act 2016 on revenue sharing from mining activities with county governments and communities as envisaged under the Mining Act 2016 had not been operationalized.

2.3. Environment

There is growing global consciousness on the impacts of business on the environment. Certain businesses such as those in the extractive, manufacturing and transport sectors if not properly regulated, could have negative impacts on the environment that could lead to illnesses and even death. This is due to the possibility of disposal of industrial waste, pollution (water, air, soil). At the international level, the right to a clean environment is enshrined in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples Rights.

Article 42 of the Constitution of Kenya provides for a right to a clean and healthy environment. The state commits to protect this right through legislative and administrative means. Article 69 (2) obligates every person (including businesses) to cooperate with state organs and other persons in the protection and conservation of the environment. Article 70 of the Constitution gives any person the right to seek redress in court if the right to a clean and healthy environment has been violated or is likely to be violated.
The Environment Management and Coordination Act (EMCA) and the Climate Change Act are the framework laws on the environment. EMCA, with the attendant Environmental Management and Coordination (Amendment) Act, 2015 establishes institutions responsible for implementing the Act. An Environmental Impact Assessments (EIA) is a key tool in protecting the environment, as it is a mandatory requirement for businesses to conduct EIAs and seek approval from NEMA before commencing operations. The Climate Change Act establishes the National Climate Change Council, which is mandated to provide guidelines to private entities on their climate change obligations, including their reporting requirements.

The stakeholders’ consultations during the development of this NAP identified several key issues related to the environment. These are:

1) The potential of environmental pollution by business operations in the extractive industry including oil exploration and salt mining.
2) Compromise of access to water and sanitation by businesses, including by discharge of effluent into waterways.
3) Poor disposal of solid waste, toxic and hazardous substances.
4) Loss of biodiversity due to destruction and encroachment for commercial reasons.
2.4. Labour

Most of the labour force in Kenya is employed by the private sector. Given the growth of the private sector and the relative high level of unemployment, it is imperative that the labour market is regulated to ensure that it complies with the constitutional and international standards to curb exploitative labour practices. The SDGs have several labour-related targets including SDG 1 Target 1.3, which calls upon States to implement “nationally appropriate social protection systems and measures...[to achieve] substantial coverage for the poor and the vulnerable. Other SDGs relevant that have aspects of working conditions include the ones on hunger, quality education, gender equality, decent work and economic growth, reduction of inequality and the establishment of strong institutions.

Article 41 of 2010 Constitution guarantees every person the right to fair labour practices. It then confers specific rights to workers, employers and trade unions and employers’ organizations. Every worker is entitled to fair remuneration, reasonable working conditions, and the right to join and participate in the activities of a trade union and go on strike as a means of advocating for their labour-related rights. Employers are entitled to form and join employers’ organizations and participate in such organizations’ programs. Trade unions and employers’ organizations are entitled to organize and form new or join existing federations. It prohibits slavery, servitude and forced labour.

There are several statutes that give effect to these labour-related constitutional guarantees. This includes those dealing with labour disputes, working conditions and protection against discrimination. Some of the key statutes are Occupational Safety and Health Act, 2007, The Employment Act, The Labour Relations Act, The HIV and AIDS Prevention and Control Act, The Children Act and the Sexual Offences Act.

During the stakeholders’ consultation the following issues were identified as key for the NAP to consider;

1) The lack of effective remedies for labour-related grievances partly caused by lack of capacity of labour inspectors.

2) The lack of awareness about labour rights among workers and employers
3) The lack of enforcement of labour laws by SMEs and in the informal sector.

2.5. Access to Remedy

Article 260 of the constitution states that corporations are legal persons and are obligated to respect the Bill of Rights. The Kenya Constitution also adopts international law as part of the domestic law. In international human rights law, Kenya is obligated to protect those under its jurisdiction against human rights violations, including by third parties such as businesses.

At the domestic level, there is legislation regulating business conduct and has the effect of protecting citizens from business practices that may violate rights. For example, protection against discrimination on the ground of HIV/AIDS status including in private sector employment, provisions to ensure that persons with disabilities are treated with dignity at the workplace, requirements for businesses that are initiating certain project to conduct environmental impact assessment to ensure that they do not compromise the enjoyment of the right to a clean and healthy environment.

There are judicial avenues for remedying grievances of business-related human rights abuses. These include the Human Rights Division of the High Court, the Environment and Land Court, and the Employment and Labour Relations Court. Those dissatisfied with the decisions of these courts may appeal at the Court of Appeal and a right of further appeal lie in the Supreme Court.

There is legislation establishing tribunals that handle grievances of business-related human rights abuses. For instance, the National Environment Tribunal has heard cases of communities complaining about the potential impact of projects on the environment, while the Rent Restriction Tribunal adjudicates disputes between tenants and landlords.

Despite these legal protections, the community consultations conducted as part of the NAP process revealed structural and procedural barriers to access to remedy. These include:

1) Physical access to courts where far-flung areas do not have specialist courts in nearby towns. For instance, in Lodwar, there are no environment courts
and yet magistrate’s courts do not have jurisdiction to hear environment matters. This increases the cost of accessing justice for local communities should they wish to pursue an environment-related claim in court, as they would have to travel far.

2) Despite the possibility of criminal sanctions against directors and managers of companies that may be involved in certain abuses, there has been a general reluctance by the office of the Director of Public Prosecution to pursue such cases.

3) In some cases, there may be need for individuals to summon experts to testify on certain issues. For instance, environmental experts may be required if a community is alleging environmental potential pollution. Such expertise may be unavailable for the community or where they are available, may be very expensive to secure.

4) There have been instances where human rights defenders who have lodged cases against businesses especially on land and environment grievances have alleged death threats and other forms of intimidation. Such hostility may instill fear in others who may wish to lodge complaints, robbing communities and individuals the protection that the law could have offered against business-related abuses.

5) The capacity of government agencies offering non-judicial remedies is often limited by lack of personnel, technical capacity to understand emerging complex issues and limited reach where they may be concentrated in towns.

6) The lack of guidance to businesses on establishing credible operational-level grievance mechanisms by businesses.
CHAPTER 3: POLICY ACTIONS

This NAP identifies the policy concerns that need attention to ensure implementation of the UNGPs in relation to land, environment, revenue, labour and access to justice. The government then commits to concrete policy actions to address the identified gaps.

The policy actions are identified in accordance with the UNGP framework. The first part relates to the first pillar of UNGPs and spells the actions that would ensure the government effectively plays its role in protecting those under its jurisdiction from human rights abuses by businesses. The second part related to the second pillar of the UNGPs and spells out the measures that businesses should take to ensure that they respect human rights, independent of government’s actions. Finally, the third part relates to the third pillar of the UNGPs and contains policy actions to strengthen access to state-based judicial and non-judicial remedies on the one part, and non-state-based mechanism on the other.

3.1. Pillar 1: The State Duty to Protect

Under international law, States have the primary obligation to protect against human rights abuses within their jurisdiction and territory. Pillar 1 of the UNGPs clarifies that this obligation includes protecting against human rights abuses by third parties such as businesses. In this regard, states should take appropriate steps to prevent, investigate, punish and redress through having in place effective policy, legal, regulatory and adjudicative measures.

Pillar 1 comprises of Principles 1 to 10. Principle 1 and 2 are the foundation principles, which restate the state’s obligation to protect against abuses and to clearly set out expectations that all businesses in their jurisdiction respect human rights. Principles 3 to 10, then spell out how states can do this: focus is on four areas of state action:

- Principle 3: General state regulatory and policy functions
- Principle 4 – 6: The State-business nexus
- Principle 7: Supporting business respect for human rights in conflict affected areas
• Principle 8 – 10: Ensuring policy coherence

State regulatory and policy function: In meeting their obligation to protect, States should establish and enforce laws and policies including those that require businesses to respect human rights; provide guidance to business on respecting human rights; and where appropriate require businesses to communicate how they address their human rights impacts.

In this regard, Article 20 of the Constitution of Kenya binds businesses to the Bill of Rights in the constitution as well as other international human rights obligations ratified by Kenya that are now part of domestic law by virtue of Article 2(5 and 6) of the Constitution. As earlier discussed, there are numerous laws that regulate business behavior as it relates to the rights of individuals and communities including those on the protection of environment, access to land, labour, anti-bribery and non-discrimination.

Policy Concerns

1. Kenya is one of the source countries of emigrant workers and there have been reports of exploitation, cruel and degrading treatment of these workers.

2. Land adjudication has not been done in some areas where businesses are operating or propose to operate. This complicates discussions on who are the rightful parties to be consulted and compensated, especially where individuals or communities use such land to earn their livelihood.

3. The Mining Act has not been operationalized. This denies local communities impacted by the operations of mining companies the rights and protections given by the law.

4. There is no legal requirement for mandatory due diligence for businesses prior to commencement of their operations.

5. Although the Companies Act envisages non-financial reporting for companies, there are no guidelines on how this can be done or what the parameters of such reporting entail.
Policy Action

The Government will:

1) 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. The government will also explore measures for providing legal and psychosocial support services to victims of unfair labour practices.

2) Continue with land adjudication and registration including in areas where there is community land and land intensive projects are proposed.

3) Take legislative and policy measures on resettlement and compensation to augment the legal framework on voluntary and compulsory land acquisition. The framework will balance the interests of communities as well as investors.

4) Introduce procedural guidelines for use by businesses, individuals and communities in their negotiations for land access and acquisition. These guidelines will safeguard the participation of vulnerable and other marginalized groups.

5) Work with stakeholders including devolved governments to operationalize revenue sharing from mining as envisaged by the Mining Act 2016.

6) Develop a natural resource revenue management policy and regulatory framework for administering and managing natural resource revenue paid to host communities. This framework will seek to promote equity, inclusivity and community decision-making and will include training to enhance the capacity of communities to manage their own affairs.

7) Develop guidelines for non-financial reporting under the Companies Act 2015

8) Consider a review of the Companies’ Act to require mandatory human rights due diligence for certain categories of businesses.

State-business nexus: The UNGPs identifies three major ways by which states engage in business:

1) Directly through state-owned enterprises (SOEs), or businesses that receive
substantial support and services from the state.

2) By contracting businesses to provide basic public services through privatization.

3) Through commercial transactions with business such as public procurement of goods and services. In this regard the State can shape business behavior through demanding that its own enterprises, and those with who it conducts business respect human rights

There are three significant ways in which the government engages with businesses. These are; procurement of goods and services; SOEs spanning different sectors such as energy, agribusiness, tourism; and provision of special support to businesses operating within the Export Processing and Special Economic zones.

Policy Concern

1. There is low awareness about human rights obligations of businesses and the UNGPs framework by SOE's boards of directors and senior management.

2. There is no guidance on how SOEs and other businesses that enjoy government support may conduct human rights due diligence.

3. There have been concerns about government’s support to businesses whose operations have the potential for serious environmental degradation.

4. There is no requirement for human rights criteria in awarding bids during procurement for public goods and services.

Policy Action

The Government will take the following measures:

1) To offer Guidance for State-owned enterprises and state supported businesses:

   - Raise awareness among chairs of boards and the top management of state-owned businesses regarding its expectation on the compliance with the government’s human rights obligations with special attention to land, labour and environmental impacts.
• Develop guidelines on human rights due diligence for SOEs and other businesses that receive export credit and similar state support.

2) To ensure protection of the environment:

• Consider withdrawing support to projects that have a disproportionately high potential of harming the environment; and consider incentives for businesses that exemplify excellence in environmental protection practices.

3) To ensure public procurement is leveraged to promote human rights:

• Review existing public procurement policies with due regard to the state’s human rights law obligations. For example, including demonstrable business respect for human rights as part of the minimum threshold to qualify for government tenders.

Supporting business respect for human rights in conflict affected areas: the UNGPs provide that states should provide guidance to businesses on how to avoid contributing to human rights harm in conflict-affected areas, which are often areas where there are already risks of existing human rights abuses and weak rule of law systems. Home states of such businesses have a duty to assist such enterprises through guidance and appropriate consequences for failure to cooperate leading to human rights abuses.

Kenya is a dominant economic player in the sub-region and the number of Kenyan businesses operating in various countries in sub-region is growing notwithstanding the ongoing conflicts in some of them.

Policy Concerns

1) There are no guidelines for companies operating in conflict areas to ensure that they are not complicit, and their activities do not escalate the conflict.
Policy Actions

The Government will:

1) **On Guidance for business:** Develop guidelines for Kenyan companies operating in conflict areas about how to avoid contributing to human rights abuses.

**To guarantee policy coherence across different government agencies,** the UNGPs require States to ensure that in discharging their mandates, all these institutions are aware of and observe the state’s human rights obligations. The State’s duty in this regard includes equipping these institutions with the requisite information through training and support (horizontal coherence) while ensuring that the policies and regulatory frameworks and processes in place are in tandem with the state’s international human rights obligations (vertical coherence).

Within Kenya’s devolved governance system, numerous government ministries, departments, and agencies, at national and county level are involved in promoting and regulating various aspects of business affairs. Moreover, the government has various policies, programs and plans the implementation of which involves aspects of business. Notable among these is Vision 2030 and the Big Four Agenda. Vision 2030 is Kenya’s economic blueprint that aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030. Business is a major player under its economic and macro pillar, whose sectors are tourism, agriculture and livestock, wholesale & retail, trade, manufacturing, financial services, business process offshoring and IT-enabled services.

On its part the Big Four Agenda spells out the government’s areas of focus from 2018 to 2022. These are, enhancing manufacturing; food security and nutrition; universal health care coverage and; affordable housing. Once again, business is a major stakeholder in delivery of the agenda. In manufacturing the government would like to see the creation of 500,000 new jobs, 100,000 of which will be in apparel manufacture. Other specific initiatives will be in agro-processing, mining and oil and gas, iron and steel manufacture, fish processing, ICT, production of construction materials and leather processing. Policy review and sector incentives are some of priority the strategies to be deployed to facilitate
the implementation of the agenda. In the food security and nutrition, three broad areas will be in focus; enhancing large-scale production; boosting smallholder productivity; and reducing the cost of food. Under universal health coverage the government will reconfigure the National Health Insurance Fund and review the laws governing private insurance companies to encourage further investment by private health insurers.

To achieve the goal of new 500,000 units of affordable housing, the government will implement policy and administrative reforms, which are targeted at lowering the cost of construction and improving accessibility of affordable mortgages. The focus will be on raising low-cost funds from public and private sectors for investment in large-scale housing production. To ensure policy coherence, this Agenda has been integrated into Vision 2030’s Third Medium Term plan.

In addition, Kenya is also integrating into the Third Medium Term plan, the Sustainable Development Goals – Agenda 2030 the universal goals on ending all forms of poverty, fighting inequalities and tackling climate change, while ensuring that no one is left behind. The achievement of the SDGs will require business support through among others, innovation, resource mobilization, inclusion and non-discrimination, collaboration and respect for human rights.

**Policy Concerns**

1. There is need to improve policy coherence between government agencies promoting human rights on the one hand, and those promoting trade and investments.

2. International trade agreements do not necessarily give premium to their human rights implications, including access to remedy for local communities, their impact on the environment and ensuring local employees and sub-contractors enjoy legal and constitutional protections.

3. There may be cases of illicit financial flows by subsidiaries of companies operating in the country denying the company revenue that could be used to improve provision of basic services.
Policy Actions

The Government will take the policy actions:

1) **Training:** Work with partners to provide training for government agencies involved in the promotion and regulation of businesses on its human rights obligations.

2) **Review of policies:** Review current policies that promote growth of trade and investment into the country to ensure that they are in line with their international human rights law obligations.

3) **Maintaining adequate domestic policy space:**
   - Ensure non-derogation from the acceptable standards of environmental protection during negotiations and signing of bilateral and multilateral trade and investment agreements.
   - Ensure that there is non-derogation from the applicable labour standards when negotiating international trade agreements.
   - Review current agreements on double taxation to ensure that they are not used to facilitate IFFs and tax evasion by businesses.

3.2. **Pillar 2: Corporate Responsibility to Respect Human Rights**

Pillar 2 restates that businesses respect human rights wherever they are operating. This is achieved by ensuring that they avoid abusing others’ rights and where harm has already occurred, take steps to remedy the harm. This expectation is independent of whether the government is honouring its legal obligation in relation to protecting human rights.

Human rights due diligence is the main tool that ensures that businesses identify the human rights risks of their activities, take measure to avoid or mitigate them, and where the harm has already occurred, ensure that the victims have access to an effective remedy.

According to the foundational principle of the UNGPs,” [b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.

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This responsibility extends beyond their own activities to their business relationships including suppliers and contractors.

As earlier stated this NAP applies to all businesses regardless of their ‘size, sector, operational context, ownership and structure”. This means that they apply to SMEs, family owned businesses, state-owned businesses etc.

Policy Concerns:

1) Businesses, including SMEs have a relatively low understanding of their human rights responsibilities resulting in lack of visible engagement with employees and other stakeholders on how to ensure that they respect human rights.

2) The current voluntary initiatives established and adopted by business associations on different human rights issues such as the Code of Ethics, do not have a strict reporting and compliance mechanisms. Therefore, they fail to offer businesses that have ascribed to them the required guidance and supervision to ensure that their operations respect human rights.

3) Currently there is no regulatory requirements or common practice for businesses to adopt human rights policies, make them internally and externally public, and report on compliance

4) There is no mandatory requirement for human rights due diligence and businesses, including state-owned enterprises, have not embraced the practice of engaging those whose rights are most likely to be impacted by their operations in any kind of human rights due diligence.

Policy Actions

The Government will take the following actions on several issues.

a) Training

1. Provide guidance to businesses on their role in environmental protection, including offering specific guidance on measures they should take to respect others’ right to a clean and healthy environment.
2. Undertake a sensitization campaign targeted at the SMEs and their employees to help them understand and respect the relevant human rights obligations.

3. Develop guidelines for businesses to ensure that they are sensitive to the implications of their operations on gender - women, including labour practices and anti-discrimination.

4. Disseminate the Kenya Climate NAP and promote dialogue among businesses on the climate change so that they can adopt practices that reduce climate change and ensure resilience. It will also encourage businesses to continuously assess their risks to the environment beyond submission and approval of the EIA.

5. The committee will disseminate this NAP to businesses, communities at high risk of business-related human rights abuses and government agencies.

b) Policy commitments

1. Encourage business to adopt human rights policies, including measures that they will take to ensure their operations respect human rights.

2. The committee will encourage employment agencies to secure legal protection and care of persons who have suffered or been subjected to abuse abroad.

3. The committee will encourage State-owned enterprises (SOEs) to respect and be held to the same standards as those applicable to private business: state regulatory and oversight bodies will ensure the respect of human rights by SOEs and other businesses that receive export credit and similar state support.

4. Encourage businesses and business associations to use human rights and sustainability as criteria for industry awards. Encourage those that are doing to offer guidance to their peers and the SMEs in their supply chains.

c) Human right due diligence: Encourage businesses to conduct comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent and redress human rights violations.

d) Reporting: Encourage the use of non-financial reporting by state-owned enterprises to include their impacts on human rights and the mitigation measures that they are taking.
e) **Cooperation on access to remedies:** Encourage businesses to cooperate with government agencies and other stakeholders in facilitating remedies for business-related human rights violations. This includes actively participating in policy discussions on access to remedy and adopting policies that enhance access to remedy.
3.3. Pillar 3: Access to Remedy

Access to an effective remedy guarantees victims of business-related human rights abuse with predictable avenues for complaints, articulation on their grievances, an opportunity for the other party to present its case and the fair award on the merits of the case. Additionally, it ensures that the award is honored to bring justice for the abuse, including stopping it in case of ongoing abuses.

According to the UNGPs, State-based judicial and non-judicial mechanism should be the main foundation for accessing remedies by victims of corporate abuses. Besides that, the victims should also have access to operational level grievance mechanisms at the business level, where workers, local communities and civil society advocates representing individuals and communities negatively impacted by businesses may lodge their complaints and receive a just outcome such as compensation, guarantee of non-repetition by the offender, apology, restitution, rehabilitation or legally-sanctioned penal or administrative sanctions.

A) State-based judicial and non-judicial remedies.

Policy concerns:

- Lack of strict enforcement of the applicable environmental standards in relation to the impacts of business operations on the environment
- The cost of litigation is still high for local communities, which acts as a barrier to pursuit for remedies.
- There is room for more appreciation of the current trends on business and human rights by different government agencies that have judicial and non-judicial mandates over businesses.
- The law does not require businesses to have grievance mechanisms
- Public procurement laws do not have human rights indicators as a basis for scoring and evaluating bids.
Policy Actions

The Government will:

1. Ensure businesses comply with all applicable laws as well as respect internationally recognized human rights laws and standards as they relate to land access and acquisition and natural resource management, environment and revenue management.

2. Work with local and international partners to support its legislative and judicial arms to be well versed with the current jurisprudence. Kenya will look for opportunities to provide the following institutions with relevant training on business and human rights:
   - The judiciary through the Judicial Training Institute
   - Members of Parliament especially the Committee on Human Rights.
   - Regulatory bodies including NEMA and Capital Markets Authority
   - Constitutional bodies including the KNCHR and The Gender and Equality Commission
   - Nairobi Center for International Arbitration

3. Ensure that information on both judicial (proceedings) and non-judicial mechanisms including the environment tribunal (alternative dispute resolution mechanisms) is widely disseminated. This will include targeting regions where businesses that pose great risk to the environment are operating, to promote access to justice on environmental matters.

4. Conduct a law review to consider the extent to which the current laws promote respect for human rights by business. The areas that will be considered include:
   - The current companies law and the possibility of using the reporting requirements to have a social and economic impact component.
   - Consider the possibility of mandatory periodic human rights diligence for businesses that have a high risk of causing human rights harm to their communities, workers and other stakeholders.
- Review current trade-promotion and related laws to ensure consistency with the bill of rights and that they promote respect for human rights by businesses.
- Kenya will consider law review to include the extraterritorial jurisdiction for companies registered in Kenya but with operations in other countries.

5. Ensure more stringent regulation of the registration and operations of employment agencies involved in recruitment of Kenyans for employment in businesses abroad. Workers recruited by these employment agencies will be trained before departure at the cost of the recruitment agencies.

6. Kenya will consider the relevant public procurement laws and standards to assess the possibility of introducing compliance with labour standards as evaluation criteria for bid qualification for government contracts. Such review will consider the necessity to give preference to businesses that give primacy to human rights due diligence and make public reports about their risks to human rights and how they mitigate such risks.

7. Given the relatively low level of understanding of the need and constitutional imperative to respect human rights by businesses, including small and medium-sized enterprises, work with other partners to disseminate information through brochures and other media to both duty bearers and rights holders. The information will include guidance to businesses to adopt human rights policies and establish credible operational-level grievance mechanisms.

8. Devise ways of improving access to legal aid by victims of business-related human rights abuses

9. Continue with the ongoing efforts to improve the public confidence in the judiciary to ensure that victims of human rights abuses, including by businesses, refer their grievances to judicial institutions.

10. Review the operations of 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 the whether the courts are expeditious and affordable.
11. The Office of the Attorney General will work with the National Land Commission, The National Gender and Equality Commission, The Kenya National Commission on Human Rights, the National Environment Tribunal to:

- Enhance inter-agency coordination in handling complaints of business-related human rights abuses that related to their mandate, including where there is an overlap of their mandate, including environment, labour and land matters.
- Improve their technical capacity to handle grievances support them to effectively play their regulation and law enforcement roles in relation to the environment.

12. Support the KNCHR audit environmental impact of business operations. This will be in due regard to the fact that the right to a clean and healthy environment is now enshrined in the Kenya Constitution’s Bill of Rights.

13. To build the capacity of the relevant agencies to handle labour-related grievances related to businesses, including:

- Consider increasing the number of labour inspectors to monitor and enforce labour standards including by businesses, with special attention to the implementation of the mandatory sexual harassment policies, the payment of minimum wages, non-discrimination against women and marginalized and minorities.
- Review the remuneration of labour inspectors and ensure strict monitoring and reporting of their activities to guarantee their independence

B) Non-State-Based Grievance Mechanisms

Independent of states obligation to ensure access to remedy, businesses should administer grievance mechanism either alone, with stakeholders or industry associations. This is meant to ensure speedy, physically and financially accessible remediation of human rights concerns.

Policy concerns

- Businesses do not as a matter of practice, establish credible operational-level grievance mechanisms to improve access to remedy for those with concerns about their conduct
- The current voluntary initiatives do not have a public reporting and accountability requirements. This makes it difficult to hold businesses to account on their policy commitments on human rights, including access to remedy.
- Many communities experiencing the negative environmental impacts of business operations lack the capacity to monitor and document compliance with the relevant standards by the businesses.

Policy Actions

The Government will:

1. Build the understanding by businesses and those impacted by their activities on the benefits of establishing credible operational-level grievance mechanisms.
2. Disseminate information on the practical steps on the establishment of credible grievance mechanisms that are consistent with international standards.
3. Encourage community-based organizations working on environmental issues to build their technical capacity to effectively monitor environmental impacts of businesses.
4. Work with business associations including the Kenya Association of Manufacturers to:
   a) Encourage a review of its Code of Conduct to include a human rights framework and a complaints system.
b) Encourage more businesses to subscribe to adhere to local and international initiatives for promotion and respect for human rights such as the Code of Ethics for Business in Kenya by Kenya Association of Manufacturers, Kenya Private Sector Alliance and the Global Compact Network Kenya
CHAPTER 4: IMPLEMENTATION AND MONITORING

To ensure that the measures proposed in this NAP are executed accordingly, there shall be a NAP steering committee over-sighted by the department of justice and the Kenya National Commission on Human Rights. The implementing committee will consist of representatives from the following:

- The Department of Justice
- The Ministry of Foreign Affairs
- The Kenya National Commission for Human Rights
- Civil Society Organizations Representative
- Kenya Association of Manufacturers
- Global Compact Network Kenya
- Kenya National Chamber of Commerce
- Kenya Private Sector Alliance

The NAP Implementing Committee shall, within six months of adoption of this NAP, come up with a detailed work plan on how to implement and monitor the action plans committed to under this NAP. The work plan shall include the timeline and the offices responsible for the implementation of each of the NAP. This NAP shall be subjected to a review after every 3 years.

Working with international institutions, the AG and the KNCHR will provide information about the business and PLAN human rights, including practical steps that businesses can take to improve their respect of human rights. KNCHR and the AG’s office with maintain a microsite on their websites to disseminate information on this NAP.
## 4.1. Implementation and Monitoring Matrix

<table>
<thead>
<tr>
<th>STRATEGIC OBJECTIVE</th>
<th>ACTIONS</th>
<th>RESPONSIBLE AGENCY</th>
<th>TIMEFRAME</th>
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<tbody>
<tr>
<td><strong>Strategic Objective 1: Enhance existing policy, legal, regulatory and administrative framework for ensuring respect of human rights by business through legal review and development of specific guidance for business</strong></td>
<td><strong>Land and natural resources</strong>  Adjudication and registration of community land development</td>
<td>Ministry of Lands, National Land Commission</td>
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<td>Ministries of petroleum and mining, and energy, NLC</td>
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<td>Develop guidelines on community engagement</td>
<td>NLC</td>
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<td></td>
<td>Develop policy and legal framework on resettlement and compensation to guide the land acquisition</td>
<td>Ministries of petroleum and mining and energy, Commission on Allocation of Revenue, County Governments</td>
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<td></td>
<td>Develop policy and legal framework for administering and managing natural resource revenues paid to communities</td>
<td>Ministries of petroleum and mining and energy, Commission on Allocation of Revenue, County Governments</td>
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<td><strong>Revenue transparency</strong>  Review existing double taxation agreements</td>
<td>KRA</td>
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<td><strong>Environment</strong></td>
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<td><strong>Labour</strong>  <strong>General</strong>  Develop guidelines for non-financial reporting</td>
<td>AG's office</td>
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<td></td>
<td>Review of the Companies’ Act provisions on non-financial reporting</td>
<td>AG's office</td>
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<td>Review existing public procurement guidelines with due regard to human rights obligations</td>
<td>PPOA</td>
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<td>Improve access to information on EIAs, EMPs, contracts relating to the exploitation of natural</td>
<td>NEMA, Ministries of petroleum and mining, and energy</td>
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Develop guidelines for businesses operating in conflict and post-conflict regions on how to avoid contributing to human rights abuses

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<tr>
<th>Strategic objective 2: Enhance understanding of the UNGPs and other international frameworks as well as existing national laws relevant to business and human rights</th>
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<tr>
<td>Training for national and county government ministries, departments and agencies involved in:</td>
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<tr>
<td>- Licencing and Regulation of business</td>
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<tr>
<td>- Negotiation of trade and investment treaties</td>
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<tr>
<td>- Promotion of investments and trade</td>
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<tr>
<td>- Enforcing of labour and environment protection laws</td>
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<tr>
<td>- Promoting and protection of human rights</td>
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<tr>
<td>- Members of parliament</td>
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<td>- Designated lead agencies in matters of EIA review</td>
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<td>- County environmental committee</td>
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<th>Strategic Objective 3: Foster business respect for human rights through training</th>
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<tr>
<td>Awareness raising among Chairs and boards on state obligations on human rights and how business can be involved in negative impacts</td>
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<th>Strategic Objective 4: Enhance</th>
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<td>Training of access to justice players including,</td>
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<td>Access to justice through capacity building</td>
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<tr>
<td>Awareness raising of communities on access to justice including in existing state and non-state grievance mechanisms and on access to legal aid</td>
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<tr>
<td>Access to legal aid</td>
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<tr>
<td>Review existing state and non-state-based grievance mechanisms</td>
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**Strategic Objective 5: Establish a NAP implementation and monitoring mechanism that will also act as a platform on dialogue on business and human rights issues in the country**

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<tr>
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<th>NAP Steering Committee</th>
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<tr>
<td>Develop a mechanism to monitor compliance and implementation of the NAP</td>
<td>NAP Implementation Committee</td>
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<tr>
<td>Develop annual NAP implementation work-plans</td>
<td>NAP Implementation Committee</td>
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<tr>
<td>Disseminate the NAP</td>
<td>NAP Implementation Committee</td>
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Annexes

Annex 1: UN Guiding Principles on Business and Human Rights

Annex 2: Guidance for companies on how to respect human rights in accordance to the UNGPs [https://www.ungpreporting.org/](https://www.ungpreporting.org/)

Annex 3: Kenya National Baseline on Business and Human Rights