REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY GENERAL AND
DEPARTMENT OF JUSTICE

CONCEPT PAPER
ON THE DEVELOPMENT OF
A NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS
INTRODUCTION

In 2003, the UN took the first initiative to develop international standards on the responsibilities of business in regard to human rights with the UN Draft Norms on the Responsibilities of Transnational Corporations (TNCs) and other business enterprises with regard to Human Rights. The draft Norms did not receive support from the member States of the UN Commission on Human Rights, necessitating the former UN Secretary General Kofi Annan to appoint Professor John Ruggie as the Special Representative on the issue of human rights and transnational corporations and other business enterprises.

The Special Representative was mandated to: identify and clarify standards of corporate responsibility and accountability regarding human rights; elaborate the roles of states in regulating and adjudicating corporate activities; clarify concepts such as ‘complicity’ and ‘sphere of influence’; develop methodologies for human rights impact assessments; and consider state and corporate best practices.

In June 2008, the Special Rapporteur proposed a framework ‘Protect, Respect and Remedy’ to address the challenges of business and human rights which was based on three complementary and interdependent components: the state duty to protect human rights; the corporate responsibility to respect human rights and access to remedial mechanisms by victims of human rights violations. The Framework was unanimously endorsed by the Human Rights Council in June 2008. The Special Representative was mandated by the UN Human Rights Council to provide practical guiding principles to operationalise the Framework.

In 2009, the African Commission on Human and People’s Rights (ACHPR) adopted Resolution ACHPR/Res. 148(XLVI) 09, to establish the Working Group on Extractive Industries, the environment and human rights violations in Africa. The mandate of the Working Group is to among others:

- examine the impact of the extractive industries in Africa within the context of the African Charter;
- research the specific issues pertaining to the rights of persons to freely dispose of their wealth and natural resources;
- undertake research on human rights violations by non-state actors in Africa; and
• Develop recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples’ rights by the extractive industries.

The Constitution of Kenya, 2010, has laid the foundation for corporate respect for human rights in Kenya. It has clarified the responsibilities of business with respect to human rights. Art. 20 provides that the Bill of Rights binds all state organs and all persons. Article 260 of the Constitution defines a ‘person’ to include a: “company, association or other body of persons whether incorporated or unincorporated.” The Constitution therefore envisages a role for business enterprises with regard to human rights, a departure from the traditional view that only States have obligations in respect to human rights. This is in tandem with emerging global and regional norms, which recognise that businesses share in the responsibilities for human rights.

In June 2011, the United Nations Human Rights Council (UNHRC) unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) and in June 2014, called on all Member States to develop National Action Plans (NAPs) to promote the implementation of the UNGPs within their respective national contexts.

The UN guiding principles on business and human rights (UNGPs) reiterate existing obligations of states and other actors and provide the first globally agreed standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. They do not limit or undermine any legal obligations that a State may have with regard to human rights.

The Guiding Principles set the baseline responsibility of all enterprises as, respect for human rights wherever they operate. Beyond that, enterprises may voluntarily undertake additional human rights commitments.

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. (UN Working Group on Business and Human Rights Version 1.0 I December 2014).

The Guiding Principles apply to all States and to all business enterprises, transnational and others, regardless of their size, sector, location, ownership and structure.
They are based on the UN Protect, Respect and Remedy Framework which recognizes the complimentary but distinct roles of the States and businesses to protect and respect human rights.

They have been endorsed by other business reporting mechanisms including:

- The African Commission on Human and Peoples Rights (ACHPR). While adopting the Resolution ACHPR/Res. 148(XLVI) 09, to establish the Working Group on Extractive Industries the ACHPR noted that the UN Guiding Principles on Business and Human Rights are also relevant to the extractive industry sector in Africa given that several African States are parties to this instrument and therefore have made the commitment to implement the reference framework, including to “protect, respect and remedy”, a framework which underlines these principles.

- The U.N. Global Compact endorses the UNGPs as relevant in as much as it provides “further operational clarity” for the Global Compact’s own foundational human rights principles.

- The Organization for Economic Cooperation and Development (OECD). In 2011, the OECD endorsed the UNGPs and overhauled its 2008 Guidelines for Multinational Enterprises by specifically incorporating the Guiding Principles into a new chapter that for the first time addresses in a comprehensive manner business-related human rights concerns.

- The European Commission strongly welcomed the UNHRC’s approval of the Guiding Principles on business and human rights and noted that they would serve as “an important reference for the European Union’s renewed policy on corporate social responsibility”.

Some of the Key advantages of the guiding principle that have led to this endorsement include:

- That it is the most authoritative and internationally recognised framework for business and human rights, as it is backed by UN member state governments and was based on extensive consultations with many stakeholders over a period of six years. The Guiding Principles explain the standard corporate conduct that is expected from companies by UN member states, and have been supported by many business and industry associations.
• That the corporate responsibility to respect, as outlined by the Guiding Principles, has advanced the debate with regard to the responsibility of companies to respect human rights considerably. With the Guiding Principles in place, many arguments used by business to deny their responsibility to avoid and address adverse human rights impacts have become invalid.

• That the Guiding Principles have effectively clarified that businesses have the responsibility to address the impacts on human rights that occur through their own activities or as a result of their business relationships with other parties, including in their supply chains.

FOUNDATIONAL PRINCIPLES/ PILLARS OF UNGPs

The UNGPs are premised on the following principles:

1. States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms.
   This means States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

2. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.
   The responsibility to respect human rights requires business enterprises to:
   a. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
   b. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services or those they contribute to owing to their business relationships.

3. The need for rights and obligations to be matched to appropriate and effective remedies when breached.
As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such violations occur within their territory and/or jurisdiction those affected have access to effective remedies.

**JUSTIFICATION**

Kenya is a member of the United Nations Human Rights Council (UNHRC), which unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) and called on all Member States to develop National Action Plans (NAPs) to promote the implementation of the UNGPs within their respective national contexts.

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 provides that the Bill of Rights binds all state organs and all persons. Further, Article 260 of the Constitution defines a ‘person’ to include: “company, association or other body of persons whether incorporated or unincorporated.” Hence, the Constitution envisages a role for business enterprises with regard to human rights, in tandem with emerging global norms, which recognise that businesses share in the responsibilities for human rights.

This is also in tandem with Kenya’s obligations under the regional and international human rights instruments that it is a state party to. For example under the convention on the Rights of the Child and the Protocols thereto, States are obligated to have adequate legal and institutional frameworks to respect, protect and fulfil children’s rights, and to provide remedies in case of violations in the context of business activities and operations. In this regard, the Committee on the Rights of a Child has adopted general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights. All state parties to the Convention will be expected to report on the compliance with this General Comment.

The UN Committee on the Elimination of Discrimination Against Women has also issued General Recommendation No.30 (2013) for States to engage non-state actors including business to prevent abuses regarding their activities in conflict-affected areas, particularly regarding all forms of gender-based violence, provide adequate assistance
to businesses to assess and address the heightened risk of abuse in conflict-affected areas, and establish effective accountability mechanisms.

In line with Kenya’s human rights obligations also, Kenya was reviewed under the UN Human Rights Council Universal Periodic Review second cycle process in January 2015. The Universal Periodic Review (UPR) was created through the UN General Assembly on 15 March 2006 by resolution 60/251, which also established the Human Rights Council. The UPR is a State-driven process which reviews the human rights records of all 192 UN Member States once every four years, providing an opportunity for States to demonstrate what actions they have taken to improve the human rights situation in their countries. It is one of the key elements of the Council, which reminds States of their responsibility to fully respect all human rights and fundamental freedoms and aims at improving the human rights situation in all countries, identifying human rights violations wherever they occur, and supporting States to rectify them.

The review is conducted through interactive dialogues between the country under review and a Working Group composed of the 47 members of the Council. During Kenya’s review, a number of states, in keeping with United Nations Human Rights Council (UNHRC) call on all Member States to develop National Action Plans (NAPs) to promote the implementation of the UNGPs within their respective national contexts, made recommendations to Kenya on the same. Kenya, being a member of the Human Rights Council and in line with Kenya’s human rights obligations accepted the recommendations to develop a National Action Plan for Business and Human Rights.

**KEY BUSINESS AND HUMAN RIGHTS CONCERNS IN KENYA**


There have been allegations of human rights abuse across many business sectors including in the agricultural sector where sexual harassment, poor housing, low remuneration and poor working conditions are common particularly in commercial farms growing tea, coffee and cut flowers. This is also the case within the manufacturing industry, for example, within the Export Processing Zone (EPZ) garment factories.
New discoveries of oil and other natural resources present opportunities but also potential ground for challenges to human rights such as those relating to sustainable land use, relations with local communities, and ensuring transparency and accountability in revenue streams, violation of local laws by foreign companies operating in the country.

For example, the relationship between communities and oil companies, such as Tullow Oil, which operate in Turkana, has not been positive, raising a number of grievances on the part of the local community revolving around community engagement, land use, environmental protection, employment, procurement and corporate social responsibility.

To develop a sustainable and equitable extractive sector, 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 exploration and drilling contracts, impact assessments, due diligence mechanisms and business reporting. A National action Plan on the UN ‘Protect, Respect, Remedy’ Framework and its Guiding Principles would clarify the Government’s expectation from concerned businesses in this regard.

NATIONAL AND REGIONAL INITIATIVES IN ADDRESSING THESE ISSUES

At the national level, the Kenya National Commission on Human Rights (KNCHR), has made efforts to address issues of human rights pertaining to the operations of transnational corporations and other business entities arising out of complaints presented to the Commission. These include violations relating to poor terms and conditions of work; forced evictions and displacements of communities to pave way for the economic developmental projects and extractive activities.

On 8th November, 2012, Kenya hosted a Roundtable for business leaders from East Africa as well as multinational corporations (MNCs) operating in the region. The event highlighted the experiences of businesses and relevant experts, exploring the value of and challenges related to corporate respect for human rights.
The objectives of the Roundtable included: demystifying the agenda by clarifying the link between human rights and business; building the business case for using human rights as a way to understand and implement corporate responsibilities; exchanging experiences on good practices, dilemmas and challenges for corporations in East Africa and around the world in respecting human rights in business operations; identifying the possible contribution of the business community to the human rights and business agenda, and vice-versa; and developing a road-map for exploring human rights and business in East Africa and globally.

The Roundtable discussions highlighted key areas of high risk to human rights for companies operating in East Africa, as well as possible responses. They also dwelt with specific practices and policies that businesses have put into place to respect human rights in East Africa and around the world and key business and human rights developments as well as challenges faced by East African businesses from the regional and local human rights perspective.

The round table agreed that East Africa can learn from what has been done in other regions so as not to reinvent the wheel when it comes to how businesses should approach human rights.

The Kenya National Commission on Human Rights (KNCHR) and the Institute for Human Rights and Business (IHRB) launched the ‘Nairobi Process in 2013: a pact for responsible investment’ whose aim is to embed human rights standards and due diligence through the application of the UN Guiding Principles in the emerging oil and gas sector in Kenya. The ‘Nairobi Process’ brings together a group of oil and gas ‘majors’ (multinationals) and ‘juniors’ (smaller exploration companies), which have been granted exploration licenses in Kenya to address collaboratively key areas of human rights concerns. The Nairobi Process seeks to promote international standards of responsible business practice, based on the UN Guiding Principles on business and human rights and the Voluntary Principles on Security and Human Rights by Focusing on government advocacy, company engagement and civil society capacity-building.

In October 2014, a multi-stakeholder dialogue, held as part of the Nairobi Process, brought together for the first time Kenyan representatives from national government, counties, parliament, companies, civil society, defence and security providers and
regulatory bodies to discuss, with lessons shared from elsewhere in Africa, on relevant tools such as the Voluntary Principles on Security and Human Rights.

Looking at the above initiatives, there is need now to have a National Action Plan to agree on the Kenya’s priorities and expectations from business organizations so as to standardise the organizations reports on agreed priorities. This has implications for the sustainability of business.

In measuring sustainability, business has been using the United Nations Global Compact and the Global Reporting Initiative (GRI). Kenya recognises that these voluntary actions of corporate responsibility by business enterprises, such as social investments, advocacy and public policy engagement, voluntary codes of conduct, philanthropy and other collective actions can advance human rights and therefore encourages such voluntary actions and initiatives as a means of creating a business culture which respects and supports human rights.

However, it is a reality that voluntary actions and initiatives are not a substitute for State action and regulation of businesses in line with Kenya’s human rights obligations, or for businesses to comply with their responsibility to respect human rights. The processes are important steps because of the potential they have in formalizing the relationship between Business and Human rights. All the issues that they address would adversely affect the realisation of human rights if not dealt with in a coherent and standardised manner, an opportunity that the UNGPs give.

VISION 2030, BUSINESS AND HUMAN RIGHTS

Under the social pillar of the Vision 2030, Kenya aims to build a just and cohesive society with social equity in a clean and secure environment. The Key sectors under the social pillar namely: education & training, the Health System, Water and Sanitation, the environment, housing and urbanization, gender, youth and vulnerable Groups, equity and poverty elimination revolve around the economic, social, cultural and environmental rights guaranteed under the Constitution of Kenya, 2010.

Economic, social and cultural rights are those human rights relating to the workplace, social security, family life, participation in cultural life, and access to housing, food, water, health care and education. These dovetail the accepted position that the
responsibility of business enterprises to respect human rights refers to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

**BENEFITS OF AN ACTION PLAN ON THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS**

The NAP will provide the overall strategy and concrete commitments by the Government for addressing adverse business-related human rights impacts in line with the UNGPs. It will be oriented towards addressing actual and potential business and human rights challenges.

According to the United Nations Global Compact, respecting and supporting human rights remains one of the most challenging areas of corporate sustainability. This is partly because, human rights have traditionally been the concern of States, and international human rights instruments are addressed to them. However in the lead up to, and following the endorsement of, the Guiding Principles on Business and Human Rights by the Human Rights Council, more businesses have come to the realisation of their legal, moral and/or commercial need to address human rights issues within their own activities and their business relationships.

Despite this realisation, organisations are confronted with a number of challenges including: the understanding of the human rights framework; where the boundaries of their human rights responsibilities lie and how this relates to an organisation’s activities; and have uncertainties on how to avoid complicity in human rights abuse. Moreover reporting on compliance is complicated. Therefore, looking at all the initiatives towards sustainability reporting, there is merit in having a system that will help business come up with a focused and integrated reporting. An action plan on the implementation of the UN Guiding Principles will serve that purpose.

Regardless of size or operational context, all companies can benefit from tools and guidance to help them with their implementation efforts. The process and development of a National Action Plan will bring more clarity by highlighting the relevance of
human rights for business, demonstrating the business case for human rights, emphasizing practical solutions and pointing to useful tools and guidance materials. It will facilitate the identification of approaches that have been recognized by a number of businesses and stakeholders as being good for business and good for human rights. Embracing the action plan is in keeping with the goal of showing that advancing human rights is not just about managing risks and meeting standards and expectations but also about realizing new opportunities for sustainable growth.

Adopting an action plan for business and human rights will facilitate any organisation to carry out its human rights due diligence towards meeting its responsibility to respect human rights. It sends a clear signal to internal and external stakeholders that the company is committed to embedding human rights into its operational policies and procedures and leads to an understanding of the human rights impacts of the business, both positive and negative. It also signals a commitment to take respect for human rights seriously enough to allocate management time and resources to developing and implementing an action plan especially where it involves stakeholders’ consultations.

Respecting human rights is a responsibility that requires action on the part of businesses. An organisation needs to be able to demonstrate that it is indeed respecting human rights in practice. That, in turn, requires it to have certain policies and processes in place. The Guiding Principles define these as: a statement of policy commitment, human rights due diligence process and processes to enable remediation (UN HR PUB 12.2)

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- A policy commitment to meet their responsibility to respect human rights;
- A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Facilitating an organisation to comply with due diligence standards and other practices based on a more inclusive range of human rights norms will significantly reduce or
even potentially eliminate exposure to human rights liability now and in the future. Therefore having a National action plan will minimise the uncertainty and inconsistency associated with making corporate human rights responsibilities contingent upon the whim of an organization and lends itself to a more reliable processes and outcomes.

The NAP will be used to guide in the prioritising of impacts which are most severe in terms of their scale, scope, and irremediable character and to develop strategies to prevent, mitigate and remedy current and potential adverse impacts on human rights. It will also be used to define the strategies and concrete measures which are most effective in addressing adverse corporate human rights impacts.

The NAP will also help the Government to take into account differential impacts on vulnerable groups and make sure the measures defined in the NAP allow for the effective prevention, mitigation and remediation of such impacts.

THE PROCESS

(See attached work plan.)

It is envisaged that the development of the initial NAP will take two years. After the initial approval and validation of the concept paper, it will be critical to put in place a National Steering Committee composed of relevant government departments, National Human Rights Institutions, civil society organizations, representatives of business and other identified critical stakeholders. The Department of Justice, Office of the Attorney General and Department of Justice, shall be the secretariat of the Committee.

At the initial stages it is proposed that the National steering Committee commissions two baseline studies namely: a survey on actual and potential adverse corporate human rights impacts in Kenya; and conduct a gap analysis of Kenya’s implementation of the Protect, Respect and Remedy Framework for Human Rights and Business. These two studies will facilitate the constitution of thematic working groups to ensure thorough treatment of important identified issues. It is proposed that the findings of the two studies be made public as a prelude to focused hearings in regions that have been adversely impacted by business activities and those highly likely to be.
The drafting of the NAP will start after the regional hearings have been completed and the information gathered collated. The drafts will be subjected to stakeholders and experts review before final validation, completion and publication.

The NAP will be reviewed after one year of implementation and thereafter, desirably after every year with provision for update any time that circumstances demand so.

**MONITORING AND EVALUATION**

The monitoring and the evaluation of the National Action Plan shall be the responsibility of a focus group, Business and Human Rights Focus Group (BHRFG), composed of key stakeholders including representatives of relevant Government Ministries, departments and agencies, business representatives, the National Human Rights Institutions and representatives of relevant Civil Society organizations.

The BHRFG, will work with the Human Rights focal points in relevant Government Ministries, departments and agencies.
REFERENCES

2. The Mining Bill, 2014
10. OECD Guidelines For Multinational Enterprises, OECD (2011),