

# DIALOGUE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS IN EAST & HORN OF AFRICA REGION

**KENYA NATIONAL DIALOGUE REPORT  
8 DECEMBER 2021  
SAROVA PANAFRIC HOTEL, NAIROBI**



# CONTENTS

---

List of Abbreviations and Acronyms	3
1. Introduction	4
2. Understanding Business Human Rights (BHR) Policy and Normative Frameworks	6
3. Kenyan National Action Plan (NAP) Process	7
4. Key Highlights of the Dialogue	8
5. Foreseeable Challenges in the Implementation of the NAP	9
6. Key Steps Forward	10

**Acknowledgments:** This report was compiled by Anne W. Mwathi, Office of Attorney General & Department of Justice, Kenya. The National Dialogue in Kenya was conducted as part of the Dialogue on National Action Plans on Business and Human Rights in East & Horn of Africa Region. The Kenya National dialogue component on 8 December was facilitated by the Office of the Attorney-General & Department of Justice, the Kenya National Commission on Human Rights, Global Compact Kenya, the Network of African National Human Rights Institutions, the Danish Institute for Human Rights and the United Nations Development Programme Kenya, with support from the African Union, the African Commission on Human and People's Rights, the Office of the UN High Commissioner for Human Rights, the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and the Africa Trade Policy Centre. The co-organisers do not necessarily adhere to any of the views expressed by participants.

**Layout:** Hedda Bank

# LIST OF ABBREVIATIONS AND ACRONYMS

---

BHR	Business and Human Rights
DIHR	Danish Institute for Human Rights
NANHRI	Network of African National Human Rights Institutions
NAP	National Action Plan on Business and Human Rights
SMEs	Small-Medium Enterprises
UNGC	United Nations Global Compact Network Kenya
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNDP	United Nations Development Programme
OAG&DOJ	Office of the Attorney General & Department of Justice
OHCHR	Office of the United Nations High Commissioner for Human Rights

# 1.

## INTRODUCTION

In June 2011, the United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs) and in June 2014, called on all Member States to develop National Action Plans on Business and Human Rights (NAPs) to promote the implementation of the UNGPs within their respective national contexts. The UNGPs are grounded on three key pillars namely: the state duty to protect human rights; the corporate responsibility to respect human rights; and access to effective remedy. They also set the baseline responsibility of all enterprises to respect human rights wherever they operate.

Since the adoption of the UNGPs in 2011, only ten African Countries out of 55 have developed or are developing NAPs through a state-led process or have an ongoing process towards NAP development led by civil society, the national human rights institution and/or academia. In the East and Horn of Africa, Kenya and Uganda have concluded and published a NAP, while the Tanzanian state has committed to the development of a NAP. Kenya was the first African country to develop a NAP and as such provides a good case study that other countries in Africa could learn from. There also remains a need for stakeholders to discuss strategies for its adoption and implementation.

It is against this backdrop that the African Union, the African Commission on Human and People's Rights, the Office of the UN High Commissioner for Human Rights (OHCHR), the United Nations Development Programme (UNDP), the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, the Network of African National Human Rights Institutions (NANHRI), the Danish Institute for Human Rights (DIHR) and the Africa Trade Policy Centre organised a two-day regional dialogue held on 7 and 8 December 2021, to discuss strategies for the adoption and implementation of NAPs in the region. The 8 December national dialogues in Kenya, Uganda and Tanzania were convened in collaboration with the Department of Justice, Kenya (DoJ), the Kenya National Commission on Human Rights (KNCHR), the Uganda Human Rights Commission (UHRC) and the Commission for Human Rights and Good Governance (CHRAGG) Tanzania. The regional dialogue had in attendance stakeholders from government ministries, departments and agencies; national human rights institutions (NHRIs); businesses; trade unions; and civil society organisations.

In her opening remarks, Ms. Kariuki, OAG & DoJ, acknowledged the role of soft law such as the UNGPs which although not legally binding represents the collective will of states to aspire to a certain set of standards. She noted the impact of COVID-19 on all aspects of society which included micro, small and medium enterprises (SMEs) that faced unprecedented income losses and uncertainties about their future because of business disruptions due to the outbreak of the pandemic. She also highlighted the need to have human rights conversations in the workplace. There is a need to ensure safeguards are provided for all workers

to ensure a sustainable people-centric response while fighting COVID-19 and trying to keep economies afloat. She emphasised that the NAP introduces a requirement for mandatory human rights due diligence for all businesses operating in Kenya, an action that the state intends to pursue in the coming decade through various regulatory reform processes. She therefore called upon all actors to work together as one, in ensuring that the business and human rights (BHR) agenda is mainstreamed in all aspects of society.

Ms. Victoria de Mello, UNDP, in her opening remarks thanked the participants for attending the forum. She emphasised that it was time to put the policy into practice. It was important for the state to take cognizance of the fact that the business sector has grown tremendously over the last ten years and the evolving nature of human rights. It was therefore the role of stakeholders to ensure that the NAP goes beyond being a policy document. She noted that the implementing authorities have the capacity to implement the NAP and only once it is incorporated into practice, will the NAP be able to have an impact. She wished the participants fruitful deliberations and expressed hope that by June 2022, Kenya will have a successful implementation of the Kenya NAP.

Mr. Barissa, NANHRI, in his remarks commended how far Kenya had come in the development of the Kenya NAP. He was emphatic that as much as Kenya and Uganda had taken a lead in the development of NAPs, it was important to ensure that the momentum and drive is not lost on the way. He further noted that it was important for stakeholders to ensure that clear and specific strategies are developed that can be used to implement the NAP. It is therefore important to come up with concrete steps which will ensure that the spirit of the NAP is kept alive.

Mr. Mwenda, KNCHR, went on to affirm the commitment by the NHRI to exercise its mandate fully and extend hands of collaboration to ensure the NAP is implemented. He emphasised that the work has now just begun and there is a need for the implementing actors to get the ball rolling and begin the work.

Various presenters made presentations on the BHR framework, the Kenya NAP and the specific policy actions of the NAP.



**The Kenyan stakeholders on the National Action Plan on Business and Human Rights**

# 2.

## **UNDERSTANDING BUSINESS HUMAN RIGHTS (BHR) POLICY AND NORMATIVE FRAMEWORKS**

### **PRESENTATION BY DIRK HOFFMANN, DIHR**

Mr. Hoffmann began by taking the participants through the UNGPs. He outlined the steps in conducting a human rights due diligence (HRDD) process, which assists in ensuring responsible business conduct. The steps include identification of human rights impacts, acting upon findings, tracking and verification of responses, provision of remediation, and the embedding of HRDD into policies and management systems.

He emphasised the importance of NAPs as they define the actions that a state commits to undertake to implement the UNGPs. However, development of a NAP is not enough as the successful implementation is critical. A survey of 22 countries in 2018 showed that having explicit dates for the completion of all action points, having specific indicators, having responsible actors, having a budget attached to each action and engaging stakeholders in the review mechanism were key in ensuring successful NAP implementation. He also pointed out that enforcing mandatory due diligence can contribute significantly to access to remedy. This can be achieved by developing and putting in place vigilance plans for accountability of state actors in enforcing BHR and ensuring that human rights are not abused by businesses. Currently, there are HRDD laws passed in France and Germany while the Netherlands passed a law on Child Labour Due Diligence. These laws aim at ensuring accountability in the area of BHR.

It is therefore important for the players in the BHR field to sensitise the various companies in Kenya on the importance of having HRDD within their companies to reflect the current trends in the world with relation to promotion of BHR. The impact of climate change cannot be ignored as the courts are relying on the UNGPs to hold companies accountable for CO<sup>2</sup> emissions, as was evident in the Shell Case in the Netherlands. There is also increasing pressure on companies to communicate how they address impacts of COVID-19, including more involvement with the legal departments owing to the legal implications of HRDD. There is therefore a need to identify the gaps in state laws relating to BHR abuses and address them.

# 3.

## KENYAN NATIONAL ACTION PLAN (NAP) PROCESS

### PRESENTATION BY MS. CLARIS KARIUKI, OAG & DOJ

Ms. Kariuki's presentation covered the NAP development process in Kenya including the next steps in the process. The journey towards the development of a NAP was precipitated by two key events. One was the 2010 Constitution, while the other was the acceptance of a recommendation to develop a NAP made during the Universal Periodic Review (UPR) review process in January 2015. The state of Kenya commenced the process of NAP development officially in 2016.

Kenya thereafter proceeded to establish a multi-agency National Steering Committee which offered the much-needed technical support in development of the Kenya NAP. She informed the participants on some of the key lessons learnt which included the importance of state leadership and stakeholder buy-in, as well as the need for adequate financial support. She noted that the Steering Committee did face some challenges when engaging SMEs as they felt the NAP applied mainly to the big companies. This is despite the fact that SMEs encompass 98 per cent of the businesses in Kenya. There is therefore a need for better engagement with SMEs on the NAP as well as the need to respect and promote human rights.

The state now intends to conduct wide dissemination of the NAP and build capacity of the different stakeholders involved. The state has since constituted an Inter-Agency Implementation Committee to oversee the implementation of the NAP and develop an Implementation Plan for the NAP. The committee is expected to review relevant policies and laws for purposes of alignment to the obligations under the NAP as well as monitor its implementation.



The Kenyan stakeholders holding dialogues on implementing the National Action Plan on Business and Human Rights through a multi-sectoral approach

# 4.

## KEY HIGHLIGHTS OF THE DIALOGUE

The Dialogue presented an opportunity for deliberations by different stakeholders on how best to implement the Kenya NAP. Some of the key highlights in the discussions included:

- i. Kenya was applauded for the good progress made in adoption of the NAP. The NAP was approved by Cabinet on 25 February 2021 and is currently before Parliament awaiting adoption as Sessional Paper No. 3 of 2021.
- ii. Kenya has since established an Inter-Agency Implementation Committee in line with Chapter Four of the NAP. The committee is expected to develop an Implementation Plan as well as provide leadership and guidance in the Implementation of the NAP.
- iii. It was noted that there are a number of existing mechanisms that can be replicated by the NAP. Most notably, is the Central Bank of Kenya Directives on Climate Risk Management and KAKUZI's Operational Grievance Mechanism (OGM) that has been put in place as a mechanism to remedy BHR abuses. It was emphasised that documentation is key with OGMs as it helps in addressing concerns before they blow up into grievances.
- iv. The intention by the state to use a sectoral approach in the implementation of the NAP was acknowledged as it is expected to help identify key human rights risks per sector.
- v. The efforts by the United Nations Global Compact Kenya were noted. They have developed programmes such as the Ethically Aware Supplier Induction Program, where big companies help SMEs to comply with responsible business practices. They also train their member companies on the UNGPs, how to draft human rights policy statements, etc.
- vi. The existing collaboration between the East Africa Law Society (EALS) and Advocates for International Development (A4ID) to build capacity of lawyers to better appreciate BHR issues was also highlighted. In the last four years, training has been conducted for 1,500 commercial lawyers and in-house counsel (Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan) – with five workshops organised for Kenyan lawyers (Nairobi, Kisumu and Mombasa).



# **5.**

## **FORESEEABLE CHALLENGES IN THE IMPLEMENTATION OF THE NAP**

### **i. Human rights language has been a barrier to effective communication with businesses**

The use of human rights language is a hindrance to effective communication with businesses. There is thus a need to use language that businesses can understand and relate to, for example, by approaching discussions with a business case for human rights.

### **ii. Identifying human rights risks for businesses**

A company's business model, business relationships or policy decisions may result in a number of risks. However, not all risks are associated with human rights risks. There is therefore a need for implementation of policies that identify the most salient human rights risks to people and the possible mitigating measures.

### **iii. Lack of coordination**

Multi-agency coordination when it comes to reporting on the key risks is lacking. There is duplicity of reporting avenues especially to various government agencies. There is a need to put in place a coordinated system of reporting to government on what is being done by the businesses which will then facilitate reporting of the NAP.

### **iv. Climate change**

There was agreement that emerging BHR concerns should be captured in the implementation of the NAP, for example, reporting on climate change.

### **v. Capacity to understand BHR**

The informal sector in Kenya, as well as many business people in the digital economy, still remain largely unprotected, especially in terms of decent work standards. There is a need to build the capacity of SMEs and of people engaged in the informal sector to ensure the NAP is not a hindrance to them but a tool to help improve their business practices and circumstances. There is also a need for clarity on the distinction between corporate social responsibility (CSR) and sustainable business practices when it comes to businesses.

# 6.

## KEY STEPS FORWARD

After the extensive and interactive discussions, participants at the National Dialogue proposed a number of recommendations on how best to ensure effective implementation of the NAP as well as overcome the challenges that were discussed at length. These include:

### **i. Development of an Actionable Implementation Plan**

It is paramount to develop a concrete implementation plan for the implementation of the NAP Policy Actions. It was also emphasised that there is a need to strengthen the NAP policy actions as well as indicators to include emerging issues, which is expected to bring about better accountability of the NAP.

### **ii. Legal Framework**

It is important to have legally binding agreements that will focus on the further promotion of BHR. The adoption of the African Union Draft Policy Framework on BHR is therefore considered to be a good opportunity to ensure the existence of a legal and binding framework for NAPs in the region.

### **iii. Coordination Framework**

There is need to develop a National Coordination Framework for the BHR agenda as this would help to break the silos currently existing among various agencies. There should also be streamlining on non-financial reporting obligations for businesses to avoid duplicity and reporting fatigue. Further, there is a need for stakeholders to collaborate to avoid duplication of efforts.

### **iv. Capacity Building**

There is a need to build capacity of businesses – both big and SMEs – to bring them on board in the implementation of the UNGPs and the NAP. This is because the UNGPs are still not clearly understood by many businesses. There is therefore a call for continuous dissemination, awareness creation and dialogue with BHR stakeholders, especially SMEs and the informal sector.

### **v. Financial Implications of Implementing the NAP**

The financial impact on businesses to comply with the NAP should also be taken into account. There therefore needs to be a shared responsibility between the state and businesses. There are also financial implication when developing operational-level grievance mechanisms, and as such SMEs require support in establishment of such mechanisms. There was thus a call on businesses to leverage partnerships, including with global donor agencies and other states who are willing and able to support the process.