

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

JUNE 2019

## FOREWORD

In Recent years Kenya has seen significant increase in foreign investment and remarkable growth in the domestic private sector. While these trends may support sustainable development, they may also adversely affect workers rights, communities and the environment. Adverse effects from business activities range from community displacements, child labour, environmental degradation and detestable working conditions. Without deliberate state stewardship, Kenya's expanding investments may lead to unmitigated violations of human rights.

The Government through the Office of the Attorney General & Department of Justice has developed a National Action Plan on Business and Human Rights, a comprehensive strategy for protecting against human rights abuses by businesses, whether private or owned by Government.

The National Action Plan (NAP) has domesticated the UN Guiding Principles on Business and Human Rights and has focused on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy. It outlines concrete commitments by the Government for addressing adverse business-related human rights impacts under these themes. It does not create new obligations but restates those already recognised under the Constitution. It is oriented towards addressing actual and potential business and human rights challenges, by both the Government and businesses.

The development of this National Action Plan involved an extensive stakeholder consultative process. The development process was led by the Office of the Attorney General & Department of Justice and the Kenya National Commission on Human Rights and was coordinated by an inter-agency National Steering Committee. As an initial step, the government commissioned a survey of human rights impacts linked to business activities in Kenya. This included the full range of internationally and regionally recognized human rights, including labour conditions, environmental management and the collection and distribution of revenue to local communities. The Government also commissioned a National Baseline Assessment, which was carried out by the Kenya Human Rights Commission (KHRC) and the Institute of Human Rights and Business to assess some of the country's key laws and regulation that guide the conduct of business in order to identify the extent to which they address human rights, their enforcement, institutional arrangements, gaps and recommendations. It also assessed the extent to which the Government has implemented its obligations in promoting the respect for human rights and the protection against human rights violations by business enterprises

through policies, laws and regulations, their enforcement as well as provision of appropriate and effective remedies for any breach.

This Action Plan details policy priority areas that the Government will focus on in the next five years in a bid to ensure that all businesses including State Owned Enterprises respect human rights. The Action Plan consolidates the existing efforts in the protection and fulfilment of human rights by the State and non state actors. I call upon both levels of Government and businesses to put in place the necessary mechanisms to facilitate the implementation of this National Action Plan.

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## LIST OF ABBREVIATIONS AND ACRONYMS

DOJ	Department of Justice
EACC	Ethics and Anti-Corruption Commission
EMCA	Environmental Management and Coordination Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IFFs	Illicit Financial Flows
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 Environment Management Authority
NHRI	National Human Rights Institution
NLC	National Land Commission
NSC	National Steering Committee
SDGs	Sustainable Development Goals
UNGPs	United Nations Guiding Principles on Business and Human Rights
UPR	Universal Periodic Review

## EXECUTIVE SUMMARY

The Bill of Rights in the Constitution of Kenya, 2010 binds all natural and legal persons, including businesses. At the international level, the United Nations Guiding Principles on Business and Human Rights (UNGPs) offer a global reference that reaffirms States' duty to protect those under their jurisdiction from business-related human rights abuses, business responsibility to respect human rights, and the requirement for both States and businesses to ensure that victims of such abuses have access to effective remedy.

Kenya is committed to ensuring that businesses, whether private or public, operating in the country respect human rights. In this regard, this National Action Plan on Business and Human Rights (NAP) has been developed to guide implementation of the UNGPs. The Office of the Attorney General & Department of Justice and the Kenya National Commission on Human Rights (KNCHR) coordinated the NAP development process. This NAP focuses on five critical thematic issues identified by stakeholders: labour, revenue transparency, environment, land and natural resources and access to justice.

Chapter one gives an overview of the NAP development process, including the objectives of the Action Plan. Chapter two contextualises each of the five thematic areas and highlights the policy concerns under each thematic area. Chapter three identifies the policy actions using the three pillars framework of the UNGPs'. Chapter four spells out how the policy actions shall be implemented and monitored.

This NAP is a statement of government policy actions to ensure the respect of human rights by business. It applies to all businesses regardless of their size, sector, operational context, ownership and structure. It will be reviewed periodically under the guidance of the NAP Implementation Committee. This committee will ensure accountability of the various stakeholders charged with implementation. It will also guarantee that the NAP implementation process remains aligned to contemporary practices and developments in the field of business and human rights with due regard to the Kenyan context.

## CHAPTER ONE: INTRODUCTION

### 1.1 Overview

Kenya is working towards achieving middle-income country status by the year 2030 through implementation of Vision 2030. Vision 2030 aims to transform Kenya into a middle-income country through three pillars; economic, social and political, implemented through being implemented in successive 5-year Medium Term Plans (MTPs). The second Medium Term Plan objectives were each mapped to the 17 Sustainable Development Goals (SDGs) to ensure that the global development framework and its implementation is directly linked to achieving both Vision 2030 and the SDGs. The SDGs ,adopted by all United Nations Member States in 2015, consist of 17 broad goals with 169 ‘integrated and indivisible’ globally applicable concrete targets with a wide range of economic, social and environmental objectives, including poverty eradication, food security, sustainable consumption, health care for all and peaceful and inclusive societies. Most importantly, the agenda is not just a call for action, but also includes specific guidance for implementation that provides flexibility for taking into account national circumstances and associated challenges. Achievement of the SDGs requires business support through innovation, resource mobilisation, inclusion and non-discrimination, collaboration and adoption of sustainable practices. Human rights treaties and standards underpin the entire 2030 Agenda and over 90% of SDG targets can be linked to human rights standards. Thus, business’ respect for human rights will be a key means of ensuring progress towards achievement of the SDGs in a manner that contributes to equal outcomes for all, and the realisation of human rights.

The Constitution of Kenya, 2010, provides the normative framework for the respect of human rights by businesses in Kenya. Article 20 provides that the Bill of Rights binds all state organs and all persons, who are defined in Article 260 as including a “company, association or other body of persons whether incorporated or unincorporated.” The courts have interpreted this as imposing human rights obligations on businesses, which approach has potentially given victims of business related human rights abuses an extensive range of options for remedy. This Constitutional imperative for businesses supports the State’s commitment to protect human rights and is consistent with the State’s obligations under regional and international human rights instruments . In this respect, Articles 2(5) and (6) of the 2010 Constitution provide that the general rules of international law, and any treaty or convention ratified by Kenya, form part of the laws of Kenya. Therefore, treaties and international agreements that Kenya is a State Party to and international normative frameworks such as the UNGPs, are a part of the domestic legal framework.

At the international level, the 2011 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 i.e. State Duty to Protect Human Rights, Corporate Responsibility to Respect Human Rights and Access to Remedy.

**Pillar 1; State Duty to Protect Human Rights:** 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 legislative and administrative measures.

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

**Pillar 3; Access to Remedy:** 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.

The three pillars are elaborated in 31 guiding principles that offer guidance on how to operationalize each of them. The working group on the issue of human rights and transnational corporations and other business enterprises (the Working Group on business & 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.

The Government is committed to protecting individuals and communities against the adverse impacts of business-related operations and expects businesses to respect human rights in the course of their operations. This NAP presents the Government's commitment to address adverse business-related human rights impacts. The NAP will bring more clarity to the relevance of human rights for business, emphasizes practical solutions and proposes the development 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 and development.

## **1.2. The National Action Plan Formulation Process**

In January 2015, during her second review under the Universal Periodic Review Process before the Human Rights Council, Kenya accepted recommendations to develop a national action plan to implement the UNGPs.

Kenya adopted the 5 Phases of developing a NAP given in the guidance of the UN Working Group on Business and Human Rights. i.e Initiation, Assessment and Consultation Drafting Implementation and Update.

The First preparatory phase involved communicating and advocating for the development of the NAP and holding some stakeholder consultations in order to come up with a well thought and balanced National Consultative /steering Committee to guide the process.

In October 2015, the Office of the Attorney General & Department of Justice developed a concept paper whose objectives were to briefly highlight business and human rights challenges in the country and to seek requisite approvals to commence the development of a National Action Plan on Business and Human Rights. In April 2016, through a public statement issued by the Attorney General, Kenya officially committed to developing a national action plan that reflects issues of priority to business and human rights in Kenya. The development process has been spearheaded by the Office of the Attorney General & Department of Justice and the Kenya National Commission on Human Rights.

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

- 1) Office of the Attorney General & Department of Justice
- 2) Kenya National Commission on Human Rights (KNCHR)
- 3) National Gender and Equality Commission (NGEC)
- 4) Ministry of Labour and Social Protection
- 5) Ministry of Energy and Petroleum
- 6) Central Organization of Trade Unions (COTU)
- 7) Kenya Human Rights Commission (KHRC)
- 8) Federation of Kenya Employers (FKE)
- 9) Kenya Private Sector Alliance (KEPSA)
- 10) Global Compact Network Kenya (GCNK)
- 11) Council of Governors
- 12) Office of the High Commissioner for Human Rights (OHCHR)
- 13) Institute for Human Rights and Business (IHRB)

### **Stakeholders' Consultations**

As a first step, the National Steering Committee commissioned a national baseline assessment (NBA) that served to evaluate the current implementation of the UNGPs and relevant business and human rights frameworks. This was augmented by the Kenya

Human Rights and Business Country Guide. The NBA was followed by policy dialogue fora held in Nairobi in October 2016 with stakeholders from Government, Businesses and Civil Society Organizations. Between November 2016 and February 2018, regional stakeholder consultations were held in different parts of the country. In each region, those consulted included officials in the National and County Governments, business representatives, local civil society and community members impacted by business operations in their respective localities. Additional consultations encompassed a national forum with indigenous people's groups. There was due regard for the gendered impacts of businesses during the consultations, examination of each theme and in policy action formulation.

Given the wide range of business-related human rights concerns, the NBA coupled with the regional consultations were vital in the identification of the recurring thematic areas for the NAP. These are: Land and natural resources, Revenue transparency, Environmental Protection, Labour Rights and Access to remedy. Additionally, there was recognition that certain groups are disproportionately impacted by business activities. In this regard, issues of gender, the situation of vulnerable, marginalised and minority groups such as persons with disabilities (PWDs), self-identifying indigenous groups, were identified as cross cutting issues to be addressed under each of the themes.

Subsequently, the National Steering Committee commissioned five thematic working groups drawn alongside the five thematic areas. The working groups were useful in refining the policy concerns and recommendations for the NAP. This NAP is a crystallisation of the National Baseline Assessment findings, the stakeholder consultations and the recommendations from the thematic working groups.

### **Objectives of the NAP**

The objectives of this NAP are:

- 1) To guide the State as it fulfils its duty to protect individuals and communities from business-related human rights abuses, consistent with its domestic and international obligations.
- 2) To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations.
- 3) To offer a roadmap of strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm and to promote human rights due diligence by businesses, ensuring 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, individuals and communities whose rights are adversely impacted by business operations, and civil society organisations on promoting respect for human rights by businesses.

## CHAPTER TWO: THEMATIC AREAS OF FOCUS

Businesses in Kenya, just as businesses worldwide have both positive and negative impacts on human rights. The positive includes employment creation, contribution to public revenue through payment of taxes and life-quality-enhancing innovations. Negative impacts include violations of labour rights, displacement of communities to pave way for operations often without adequate consultation or compensation, environmental pollution, objectionable financial practices such as illicit financial flows and transfer pricing that often deprive the host government of much-needed revenue to ensure the development of social services such as education and healthcare, among others. The stakeholders' consultations revealed that human rights abuses are prevalent across various sectors in Kenya including but not limited to manufacturing, tourism, mining, telecommunications, banking and finance, business services, and agribusiness.

This chapter contextualises each of the themes and gives an overview of the nature of the business and human rights concerns identified throughout the consultation process, the legal and regulatory framework and sets out areas or matters for policy actions in this NAP.

The NAP is aligned to Kenya's vision 2030 and the SDGs for both vertical and horizontal policy coherence and integration. It links each of the identified themes and the cross cutting issues to the corresponding SDGs. The NAP does not create any new obligations but is an overarching coherent tool to guide all actors in respecting human rights as they play their expected role in development of the country, including attainment of the SDGs.

### **2.1 Land and Natural Resources**

Land is a prerequisite for the enjoyment of economic, social and cultural rights relating to an adequate standard of living, housing, food and natural resource benefits sharing. The Constitution states that "all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals". However it is often a source of conflict due to population pressure, rapid urbanisation, environmental degradation, land-intense large-scale projects such as mining, oil and gas and commercial agriculture, all of which result in competition for available productive land.

Both the Constitution of Kenya and international human rights law guarantee against arbitrary deprivation of property and provide a standard of conduct to be followed in the case of evictions. Furthermore, there are additional protections for indigenous peoples in recognising the unique importance, cultural and spiritual values that they attach to their lands, territories and natural resources (United Nations Declaration on the Rights of Indigenous Peoples [2007] and the ILO's Indigenous and Tribal Peoples

Convention [1989]). These guarantee land rights for indigenous peoples and provide protections against displacement of these peoples from their lands. They also provide for consultation and consent to development projects.

Several SDGs relate to land and natural resources. These include 1.4 (access by all, in particular the poor and the vulnerable...to economic resources), 2.1 (protection of the poor and vulnerable groups from situations that may deprive them of access to food), 2.3 (double agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land...), 5.a (reforms to ensure women have equal rights to economic resources), 6.1 (access to safe and affordable drinking water), 11.1 (provision of adequate, safe and affordable housing and basic services), 11.4 (strengthening protection and safeguard of world's cultural and natural heritage), 12.2 (sustainable management and efficient use of natural resources) and 15.2 (promotion of the implementation of sustainable management of forests, including halting deforestation).

Kenya has a progressive constitutional and statutory framework for the ownership, management and access to land and natural resources. 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. The Constitution also guarantees the right to property and the protection from arbitrary deprivation of one's property including land. In addition to the Constitution provides for public land under Article 62, private land under Article 64 and community land under Article 63. The Community Land Act, 2016 deals substantively with community land which is vested in and held by communities identified on the basis of ethnicity, culture or similar community of interest. All matters relating to compulsory land acquisition, including access to land for business purposes, are governed the Land Act, 2012.

The country has also made strides in the legal protection of women's property rights in matters of ownership, inheritance, management and disposal. Despite the new laws, there are still obstacles including cultural traditions and lack of awareness that inhibit women from accessing their fair share of property and attendant rights.

The Constitution also guarantees access to information, community empowerment and inclusion in decision-making and benefit sharing from the exploitation of natural resources. Additionally, Kenya has various laws and policies to ensure communities hosting extractives projects benefit through revenues, employment of local people, and utilisation of local goods and services.

The NAP consultations identified the following challenges related to land, natural resource development and business:

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

## **2.2 Revenue Transparency**

Tax revenue is the most important, reliable and sustainable means of resourcing initiatives that contribute to the realisation of human rights such as health and education. Businesses are significant contributors to tax revenue. The Kenya Revenue Authority Act, provides that, domestic revenue is derived from several sources including taxes, duties, fees, levies, charges, penalties, fines or other monies and are collected from individuals, private and public businesses by different entities at national and county levels.

Tax justice and the regulation of 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 illicit financial flows (IFFs), returning stolen assets, reduction of corruption, and strengthening domestic resource mobilisation. In this respect, Goal 16 on the promotion of peaceful and inclusive societies includes specific targets on reducing illicit financial flows (target 16.4) and corruption (target 16.5). Goal 17 on strengthening implementation and partnerships under target 17.1 provides for the strengthening of domestic resource mobilisation, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection.

Like many other jurisdictions, Kenya faces challenges concerning revenue mobilisation and the link to business activities, among them IFFs, tax avoidance and tax evasion by

businesses. These practices result in reduction of the resources available for investment in essential social services, fostering inequalities, undermining economic and social institutions, and even discouraging transparency in matters of public finances. Kenya has put in place legislation to address these practices, including the Anti-Corruption and Economic Crimes Act, the Bribery Act, 2016, and amendments in 2017 to the Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA).

The 2017 amendments to the Proceeds of Crime and Anti-Money Laundering Act, 2009 establish the Financial Reporting Centre (FRC), an independent financial intelligence agency charged with combating money laundering and identifying proceeds of crime including tax evasion. The Ethics and Anti-Corruption Commission Act, 2012 creates the Ethics and Anti-Corruption Commission (EACC) whose mandate is to combat and prevent corruption and economic crimes set out in the Anti-Corruption and Economic Crimes Act. The Bribery Act, 2016 seeks to address the supply side of corruption by placing a duty on businesses to put in place appropriate measures relative to their size, scale and nature of operations towards the prevention of bribery and corruption, and also requires any person holding a position of authority in a business to report any knowledge or suspicion of bribery within twenty-four hours. Kenya is also a State Party to international and regional initiatives on combating bribery and corruption.

Despite the above efforts, the NAP consultations identified several challenges that affect revenue transparency:

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

### **2.3. Environmental Protection**

There is growing global consciousness on the impacts of business on the environment. The operations of businesses such as extractives, manufacturing and infrastructure could have adverse impacts on the environment leading to illness or death of populations

unless effectively regulated. 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, all of which Kenya is a State party to, among others.

Various SDG goals relate to the environment. These targets are underpinned by human rights, and include : 1.5 (building the resilience of the poor and the vulnerable to reduce their exposure to climate change impacts); 6.3 (improving water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals); 7.2 (increasing use of renewable energy); 9.4 (adoption of clean and environmentally sound technologies and industrial processes); 11.6 (reducing adverse environmental impact of cities, including by paying attention to air quality and municipal and other waste management); 12.4 (adoption of environmentally sound management of chemicals and waste); 12.6 (encourage companies 'to adopt sustainable practices and to integrate sustainability information in their reporting cycle'); 12.7 (promotion of public procurement practices that are sustainable); 13.1 (strengthening resilience to climate change); and 15.2 (promotion of the implementation of sustainable management of forests, including halting deforestation).

At the domestic level, Article 42 of the Constitution codifies the right to a clean and healthy environment. Article 69 requires the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, including by eliminating processes and activities that are likely to endanger the environment. It also obligates every person, the definition of which includes 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 Environmental Management and Coordination Act, 1999 (EMCA), which was substantively revised in 2015, and the Climate Change Act, 2016 are among the key legal frameworks concerning the protection of the environment. Under the EMCA, Kenya has also adopted the use of the Environmental Impact Assessments (EIA) as a tool to help decision makers improve the environmental outcomes of their management decisions. It is mandatory that certain activities that are likely to have significant impacts on the environment are evaluated and that they spell out measures to be put in place to mitigate identified negative impacts prior to their being approved to commence operations. The National Environment Management Authority (NEMA) is the institution responsible for the review and approval of EIAs and Environmental Management Plan (EMP) as well as for regular auditing and monitoring of the same.

The Climate Change Act, 2016 establishes the National Climate Change Council, which is mandated to provide guidelines to private entities on their climate change obligations, including their reporting requirements.

Stakeholders' consultations during the development of this NAP identified the following concerns related to the impacts of businesses on the environment:

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

## **2.4. Labour**

The Kenyan labour market is highly informal. Of the 19.3 persons active in the labour market, only 2.6 are in formal employment including in the private sector (Kenya National Bureau of Statistics (KNBS), 2018). Furthermore, 1 out of 4 jobs in the formal sector are held by casual employees, those with contracts of three months or less (KNBS, 2018). Casual workers have less protections under the labour laws such as no right to collective bargaining or paid leave. The ILO refers to this as casualisation of labour and has expressed concerns in the increased use of casual labour in formal employment. While the current NAP does not cover the informal sector, it is important that the country formulates policies for the proper oversight of this sector.

It is important that the labour market is regulated to ensure compliance with Constitutional and international standards. Several SDGs and ILO core conventions cover various aspects of working conditions including; decent work and economic growth, reduction of inequality, quality education and gender equality. The relevant SDG targets include : 1.3 (improve nationally appropriate social protection systems for all, particularly the poor and vulnerable); 2.3 (double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers); 4.5 (eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable including persons with disabilities, indigenous peoples and children in vulnerable situations); 5.2 (eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking, sexual and other types of exploitation); and 8.5 (achieve

full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value); 8.8 (protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment); and 16.2 (end abuse, exploitation, trafficking and all forms of violence against and torture of children).

Article 41 of the Constitution of Kenya guarantees every person the right to fair labour practices and confers specific rights on workers, employers, trade unions and employers' organisations. 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' organisations and participate in such organisations' programs. Trade unions and employers' organisations are entitled to organise and form new or join existing federations. Other Constitutional rights related to labour include prohibition of slavery, servitude and forced labour under Article 30 and equality and freedom from discrimination under Article 27, specifically including the equal rights of women and men to opportunities in the economic sphere and the dictate that, no person shall discriminate against another person directly or indirectly on grounds including sex, health status, religion, ethnic origin, disability and social origin.

Several statutes give effect to these labour related Constitutional guarantees, including those dealing with labour disputes, working conditions and protection against discrimination. Some of the critical statutes are the Counter Trafficking in Persons Act, 2010, Occupational Safety and Health Act, 2007, the Employment Act, 2007, the Labour Relations Act, 2007 and the Sexual Offences Act, 2006.

During the stakeholders' consultations the following concerns were identified:

- 1) Sexual harassment is widespread and underreported, with women being the majority of victims. Fear of job loss is a major factor in the reluctance to report. Furthermore there is low enforcement of the Sexual Offences Act, 2006;
- 2) Lack of access to maternity and paternity leave. While the law provides and protects both maternity and paternity leave, not all workers in the private sector are able to access this benefit for fear of job loss. Once again, enforcement of the law in this respect remains weak;
- 3) Low level of awareness on labour rights among workers (mostly women in low income or low skilled jobs) and employers;
- 4) Lack of effective regulation of recruitment agencies for migrant workers;

- 5) Lack of publicly available statistics disaggregated by sex and other vulnerabilities that could be useful in addressing sex and other forms of discrimination in the workplace; and
- 6) Lack of effective remedies for victims of labour-related grievances resulting in high prevalence of unresolved labour-related grievances. A weak enforcement mechanism, in particular inadequate number of state labour inspectors and the lack of effective operational level grievance mechanisms were cited as contributing factors.

## **2.5. Access to Remedy**

The Constitution of Kenya, 2010 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. SDG 16.3 urges states to 'promote the rule of law at the national and international levels and ensure equal access to justice for all'. Additionally, SDG 16.6 calls for the development of 'effective, accountable and transparent institutions at all levels'.

Article 20(1) of the Constitution provides that the Bill of Rights binds all persons, including businesses. Indeed, since the promulgation of the Constitution in 2010, Courts of law have adjudged several businesses to be in violation of human rights and awarded victims varying remedies. Furthermore, there are a number of legislative provisions regulating business conduct to protect those within Kenya's jurisdiction from business-related human rights violations. Protection against discrimination on the ground of HIV/AIDS status, for example, covers those in employment. The same applies to the protection of discrimination against persons with disabilities, women and marginalised groups.

The breach of these and other relevant laws may result in administrative and judicial sanctions. Judicial avenues 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 with a limited right of further appeal to the Supreme Court. Administrative avenues include tribunals such as, National Environment Tribunal (adjudicates environmental cases including grievances against businesses) and the Rent Restriction Tribunal (adjudicates disputes between tenants and landlords). One may appeal the decisions of these tribunals to the High Court.

One example of an avenue to access remedy is Section 3 of the Environmental Management and Co-ordination Act which provides that a person may apply to the Environment and Land Court for redress for any denial, violation, infringement of or threat to the person's right to a clean and healthy environment on the person's own

behalf or on behalf of a group of persons or in the public interest. If the Court finds such a denial, violation, infringement or threat to have occurred, it may make any order it considers appropriate to prevent or stop any act or omission that is deleterious to the environment, compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment, require that any on-going activity be subject to an environment audit, compel the persons responsible for environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage, or provide compensation for any victim of pollution.

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

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

Most businesses have a relatively low understanding of their human rights responsibilities resulting in lack of engagement with employees, local communities and other stakeholders on how to ensure that they respect human rights and provide a remedy for violations. Business associations stated that they lack proper guidance on establishing credible operational-level grievance mechanisms.

## CHAPTER THREE: POLICY ACTIONS

This chapter provides policy actions in response to the concerns raised that should be taken to operationalise the UNGPs.

The first part relates to Pillar 1 of the UNGPs and spells out the actions required to ensure that the government effectively plays its role in protecting those under its jurisdiction from human rights abuses by businesses. The second part is related to Pillar 2 of the UNGPs and spells out the measures that businesses should take to ensure that they respect human rights, independent of government actions. Finally, the third part relates to Pillar 3 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 mechanisms 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 such abuses by having in place effective policy, legal, regulatory and adjudicative measures. States are therefore expected to explicitly set out expectations that all businesses in their jurisdictions, including state-owned businesses and those businesses with which they engage in commercial transactions, respect human rights through policies, laws and guidance. Additionally, States are expected to guarantee policy coherence across different government agencies, thereby ensuring that different state institutions are aware of and observe the State's human rights obligations. The State's duty in this regard includes providing these institutions with the requisite information through training and support (horizontal coherence) while ensuring that the policies and regulatory frameworks are consistent with the state's human rights obligations (vertical coherence). This coherence should extend to the State's investment treaties with other States or with business enterprises. This State duty is also consistent with the spirit of the SDGs including 5.1 (non-discrimination on gender grounds), 10 (reduction of inequalities), 12 (responsible production and consumption) and 16 (accountable and inclusive institutions).

#### Policy Actions

The Government will:

- 1) introduce a requirement for conducting Human Rights Due Dilligence, before approval of licences/permits to businesses;
- 2) ensure continuous training for government agencies' workers involved in the

- promotion and regulation of businesses on the State's human rights obligations and the nexus to their various mandates and functions;
- 3) strengthen the labour inspectorate department to enable it effectively carry out its mandate;
  - 4) develop guidelines for non-financial reporting under the Companies Act 2015;
  - 5) develop regulations that facilitate disclosure of corporate beneficial ownership of business and related entities such as trusts;
  - 6) expedite land adjudication and registration with a view to securing the protection of land owners/users and communities especially in areas earmarked for major projects.;
  - 7) strengthen regulations on the registration and oversight of recruitment agencies involved in the recruitment of Kenyans for employment in businesses abroad. It will also 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 labour abuse.;
  - 8) Sensitise relevant sections of the public especially women and other marginalised and minority groups on Land laws, including resettlement and compensation frameworks Labour laws and the rights of migrant workers and environmental laws and standards;
  - 9) develop procedural guidelines for use by businesses, individuals and communities in their negotiations for land access and acquisition. These guidelines will ensure and safeguard the participation of women, persons living with disabilities, youth, children and other marginalised groups;
  - 10) work with stakeholders to develop a natural resource revenue management policy and regulatory framework for administering and managing natural resource revenue paid to host communities. This framework should seek to promote equity, inclusivity and community decision-making and will include training to enhance the capacity of communities to manage their affairs. It will also serve to guide the operationalisation of mining revenue as envisaged by the Mining Act, 2016;
  - 11) finalise the development of regulations to the Access to Information Act to facilitate disclosure of contracts, including those that have a significant economic and social impact in the country;
  - 12) strengthen leverage in using public procurement to promote human rights. This will involve the review of existing public procurement policies, laws and standards and their impacts with due regard to the state's human rights obligations including the participation of women, persons with disability and

- other vulnerable groups; and
- 13) review current trade and investment promotion agreements and bring them into compliance with the Constitution and international human rights standards and to also ensure that they are not used to facilitate illicit financial flows and tax evasion by businesses.

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

Pillar 2 of the UNGPs states that businesses should respect human rights wherever they are operating. This is achieved by ensuring that they avoid abusing others' rights and where harm has already occurred, taking steps to remedy the harm. This expectation is independent of whether the government is honouring its obligation to protect human rights or not. Human rights due diligence is the primary tool that ensures that businesses identify the human rights risks of their activities, take measures to avoid or mitigate them, and where the harm has already occurred, ensure that the victims have access to an effective remedy. This responsibility extends beyond their activities to their business relationships including suppliers and contractors.

The current voluntary initiatives established and adopted by business associations on different human rights issues do not have strict compliance and reporting mechanisms. They therefore fail to offer businesses that have ascribed to them the required guidance and supervision to ensure that their operations respect human rights. There is no mandatory requirement for human rights due diligence. Businesses, including state-owned enterprises, have not embraced the practice of engaging those whose rights are most likely to be impacted by their operations .

#### **Policy Actions**

##### **a) Training**

The Government will:

1. develop and disseminate guidance for businesses on their duty to respect human rights and the operationalisation of this duty in the Kenyan context, including the implications of their operations on the environment, gender, minorities, persons living with disabilities, marginalised and other vulnerable groups to promote responsible labour practices and inclusivity.

##### **b) Human Rights Policy commitments**

The Government will:

1. require business to adopt human rights policies, including taking measures to ensure their operations respect human rights, including by providing access to remedy for human rights violations;

2. encourage recruitment agencies to provide any required repatriation, legal and psychological support to migrant workers who have suffered or been subjected to abuse abroad;
3. enforce compliance with human rights standards by State owned enterprises and other businesses that receive export credit and state support, including by providing access to remedy for human rights violations; and
4. promote the use of human rights and sustainability as criteria for industry awards by businesses and business associations.

**c) Human rights due diligence**

The government will require businesses to carry out comprehensive human rights due diligence including through conducting comprehensive and credible human rights impact assessments before they commence their operations and continuously review the assessment to ensure that they prevent, address and redress any human rights violations. Such impact assessment should involve meaningful consultation with potentially affected groups and other relevant stakeholders and include particular gendered impacts.

**d) Reporting**

The Government will enforce the requirement for businesses to prepare non-financial reports in line with the Companies Act, 2015, and encourage proactive disclosure of their impacts on human rights and the mitigation measures they are taking .

**e) Cooperation on access to remedies**

The Government will require 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 predictable avenues for complaints, adjudication of their grievances, an opportunity for the other party to present its case and a fair remedy based on the merits of the case. Additionally, it ensures that remedies are relevant and proportionate to the violation, including orders to cease ongoing abuses.

According to the UNGPs, State-based judicial and non-judicial mechanisms should be the primary avenue for accessing remedies by victims of corporate abuses. However, victims should also have access to operational-level grievance mechanisms established by

businesses, where workers, local communities and civil society advocates acting on behalf of 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.

## **Policy Actions**

### **A) State-based judicial and non-judicial remedies**

The Government will:

1. enforce all applicable laws as well as respect internationally recognised human rights laws and standards as they relate to land access and acquisition, natural resource management, environment and revenue management;
2. in line with Article 159 of the Constitution, promote the use of Alternative Dispute Resolution mechanisms in dealing with disputes between businesses and those harmed by their operations.
3. provide training and support to the judicial, administrative and oversight organs to be well versed with business obligations in respect of human rights. Priority will be given to the following institutions:
  - the Judicial Training Institute;
  - relevant parliamentary oversight committees;
  - relevant regulatory bodies;
  - Constitutional bodies including the KNCHR
  - Nairobi Center for International Arbitration; and
  - the Law Society of Kenya;
4. improve access to information on available judicial and non-judicial mechanisms involved in the resolution of business-related abuses as a measure to promote access to justice. Such information will be made available in all counties and provided in a manner accessible to vulnerable groups;
5. prioritise access to legal aid for victims of business-related human rights abuses, consistent with the national Legal Aid Act, 2016 and the National Action Plan on Legal Aid;
6. improve access to the Human Rights Division of the High Court, Employment and Labour Relations Court, and the Environment and Land Court to ensure that they are accessible, expeditious and affordable avenues for remedying business-related human rights abuses; and
7. increase the capacity of the labour inspection department to handle labour-related grievances, including through:
  - increasing the number of labour inspectors to monitor and enforce compliance with labour standards by businesses, with particular attention to the implementation of mandatory policies to prevent and

address sexual harassment and violence, payment of minimum wages, equal pay for work of equal value, prohibition of child labour and non-discrimination against women, marginalised groups and minority groups; and

- taking measures to guarantee the independence of labour inspectors and to ensure that their duties are undertaken with integrity and in a transparent and accountable manner.

## **B) Non-State-Based Grievance Mechanisms**

Independent of the State's obligation to ensure access to remedy, businesses should administer grievance mechanisms alone, or in conjunction with stakeholders or industry associations, either by having grievance mechanisms where they are based, referred to as operational-level grievance mechanisms, or by being part of any industry-wide grievance mechanisms. This is meant to ensure speedy, physically and financially accessible remediation of human rights complaints.

### **Policy Actions**

The Government will:

1. develop and disseminate guidance for businesses on the establishment of credible operational-level grievance mechanisms that are consistent with international standards. Such grievance mechanisms should be responsive to the needs and rights of vulnerable groups i.e. women, persons with disabilities, children and indigenous persons;
2. sensitise businesses and those impacted by their activities on the benefits of establishing credible operational-level grievance mechanisms; and
3. assist community-based organisations working on human rights issues to build their technical capacity to monitor human rights impacts of businesses effectively and advocate for individuals and communities to enforce their right to a remedy for human rights violations.

## CHAPTER FOUR: IMPLEMENTATION AND MONITORING

To ensure that the measures proposed in this NAP are implemented, there shall be a NAP steering committee overseen by the Department of Justice and the Kenya National Commission on Human Rights. The Implementing Committee will consist of representatives from the following institutions:

1. Department of Justice, Office of the Attorney General and Department of Justice
2. Ministry of Foreign Affairs
3. Kenya National Commission on Human Rights
4. Three (3) Civil Society Organizations Representatives of persons living with disabilities, women and indigenous persons
5. Ministry of Trade and Industrialisation
6. Kenya Association of Manufacturers
7. Global Compact Network Kenya
8. Kenya National Chamber of Commerce
9. Kenya Private Sector Alliance
10. Law Society of Kenya
11. National Council on Administration of Justice
12. National Council for Children Services
13. National Gender & Equality Commission

The NAP Implementing Committee shall, within six months of the adoption of this NAP, come up with a detailed work plan on how to implement and monitor the policy actions under this NAP. The work plan shall include a timeline, measurable indicators and targets and clear designation of the agencies responsible for the implementation of each of the actions.

### **Review of the National Action Plan**

This National Action Plan shall be reviewed after five years.

#### 4.1. SUMMARY OF POLICY ACTIONS

STRATEGIC OBJECTIVE	POLICY ACTIONS	RESPONSIBLE ACTOR(S)
<p><b>Strategic Objective 1:</b></p> <p>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</p>	<p>Strengthen regulations on the registration and oversight of recruitment agencies involved in recruitment of Kenyans for employment in businesses abroad.</p>	
	<p>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 labour abuse.</p>	
	<p>Expedite land adjudication and registration</p>	
	<p>Develop 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.</p>	
	<p>Work with stakeholders to develop a natural resource revenue management policy and regulatory framework for administering and managing natural resource revenue paid to host communities.</p>	
	<p>Develop guidelines for non-financial reporting under the Companies’ Act 2015</p>	
	<p>Consider a review of the Companies’ Act 2015 to</p>	

	require mandatory periodic human rights due diligence review for business activities with significant negative risks to the environment, host communities and workers.	
	Adopt regulations that facilitate transparency, including disclosure of beneficial ownership of business entities.	
	Strengthen leverage in using public procurement to promote human rights.	
	Review current agreements on double taxation to ensure that they are not used to facilitate IFFs and tax evasion by businesses.	
	Review current trade and investment promotion agreements and bring them in consonance with the Constitution and the state's international human rights obligations.	
	Develop guidelines for businesses to ensure that they are sensitive to the implications of their operations on gender, human rights defenders and minorities, persons living with disabilities, marginalised and other vulnerable groups to promote responsible labour practices and inclusivity.	
	Require 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.	
	Enforce 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.	
<p><b>Strategic objective 2:</b></p> <p><b>Enhance understanding of the obligation of business to respect human rights</b></p>	<p>Sensitise relevant sections of the public on:</p> <ul style="list-style-type: none"> <li>• Land laws, including resettlement and compensation frameworks.</li> <li>• Labour laws and the rights of migrant workers</li> <li>• Environmental laws and standards</li> </ul>	
	Continuous training for government agencies involved in the promotion and regulation of businesses on its human rights obligations.	
	<p>Training for national and county government ministries, departments and agencies involved in: -</p> <ul style="list-style-type: none"> <li>• Licencing and Regulation of business</li> <li>• Negotiation of trade and investment treaties</li> <li>• Promotion of investments and trade</li> <li>• Enforcing of labour and environment protection laws</li> <li>• Promoting and protection of human rights</li> </ul>	

	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.	
	Undertake continuous sensitization campaigns to help businesses understand and respect the relevant human rights obligations.	
	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.	
	Urge business to adopt human rights policies, including measures that they to ensure their operations respect human rights.	
	Encourage recruitment agencies to secure legal protection and care of persons who have suffered or been subjected to abuse abroad.	
	Promote the use of human rights and sustainability as criteria for industry awards by businesses and business associations.	
	Encourage businesses to conduct comprehensive and credible human rights due dilligence before they commence their operations and continuously review the assessment to ensure that they prevent and redress	

	human rights violations.	
	Foster the use of non-financial reporting by businesses to include their impacts on human rights and the mitigation measures that they are taking.	
	Provide training and support to the judicial, administrative and oversight organs to be well versed with the current developments towards greater corporate accountability for human rights.	
	Develop and disseminate guidance for businesses on the establishment credible operational-level grievance mechanisms that are consistent with international standards.	
	Build the understanding by businesses and those impacted by their activities on the benefits of establishing credible operational-level grievance mechanisms.	
	Encourage community-based organizations working on environmental issues to build their technical capacity to effectively monitor environmental impacts of businesses.	
	Encourage business associations to join local and international initiatives for promotion and respect for human rights.	

<p><b>Strategic Objective 3:</b></p> <p><b>Enhance access to justice for victims of business-related human rights abuses</b></p>	<p>Training of access to justice players including, judiciary, prosecutors, police</p>	
	<p>Require 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</p>	
	<p>Improving access to information on available judicial and non-judicial mechanisms involved in the resolution of business-related abuses as a measure to promote access to justice. Regions host to businesses operations that pose significant risk to the environment and communities will be particularly targeted.</p>	
	<p>Prioritise access to legal aid for victims of business-related human rights abuses.</p>	
	<p>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.</p>	
	<p>The Office of the Attorney General will work with the relevant agencies to:</p> <ul style="list-style-type: none"> <li>• Enhance inter-agency coordination in handling</li> </ul>	

	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	
	<ul style="list-style-type: none"> <li>• 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.</li> <li>• Improve their technical capacity to handle grievances support them to effectively play their regulation and law enforcement roles in relation to the environment</li> </ul>	
<b>Strategic Objective 4: 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</b>	Develop a mechanism to monitor compliance and implementation of the NAP	
	Develop annual NAP implementation work-plans	
	Disseminate the NAP	