



## **Asia & Africa National Action Plans Update to the UN Working Group on Business and Human Rights**

October 2015  
Third Submission

### ***Introduction***

In July 2013, a coalition of African and Asian researchers led by the Centre for Applied Legal Studies at the University of Witwatersrand in Johannesburg (“CALS”) and the Asian Business and Rule of Law initiative at the Singapore Management University (“SMU”)<sup>1</sup> responded to the UN Working Group on Business and Human Rights’ (“Working Group”) request for proposals to develop implementation guidelines for national action plans on business and human rights (“NAPs”). The centrepiece of the proposal was two workshops, one in Asia and one in Africa, aimed at bringing forth the perspectives on NAPs of stakeholders in the Global South, and identifying individuals and organisations to support the Working Group’s mission to embed NAPs in the regions.

The Working Group awarded the grant to the CALS-SMU Coalition (hereafter, “the Coalition”). As the Working Group lays the foundation for States to develop, adopt and implement NAPs, this submission, the Coalition’s third,<sup>2</sup> highlights key points that have emerged from our consultations and research. It also draws attention to developments in the two regions that portend the potential for NAPs development in Asia and Africa. The report begins with a summary of key takeaways across the two regions, followed by individual summary reports of the Asia and Africa consultations respectively. It concludes with a note on the value of the consultations for NAPs development in the regions.

### ***Key Takeaways from the Asia and Africa Consultations***

The following are key points highlighted by both consultations, which demonstrate an appetite for NAPs and the priority considerations for both regions:

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<sup>1</sup> Other institutional partners include the Center for Human Rights, University of Pretoria and the ASEAN CSR Network.

<sup>2</sup> For previous submissions in August 2014 and November 2014 see: <http://business-humanrights.org/sites/default/files/documents/cals-smu-submission-on-naps-aug-2014.pdf> and <http://business-humanrights.org/sites/default/files/documents/Coalition%27s%20Submission%20to%20the%20WG%20FINAL%2020141129.pdf> respectively.

1. Unprecedented foreign investment in the Global South brings considerable benefits as well as human rights risks.<sup>3</sup>

**Recommendation: NAPs in the Global South can ensure that human rights promotion and protection are not sacrificed for the sake of economic growth led by multinational corporations (“MNCs”).**

2. By outlining a State’s domestic regulatory space concerning issues of public interest, such as human rights and the environment, NAPs may be able to serve to defend the interests of States in relation to bilateral investment treaties (“BITs”) and oblige foreign investors to respect the State’s right to regulate.

**Recommendation: Properly devised, NAPs may be able to provide a level of clarity, consistency and certainty to these commitments that is essential for States and foreign investors alike.**

3. NAPs processes in the Global South should consider first identify gaps in existing legislative and regulatory frameworks, and reasons for the failure to enforce them.

**Recommendation: Gaps in legal/regulatory frameworks should be addressed through new policy commitments or legal reforms.**

4. While economic development dominates the agenda of both regions, forward-thinking businesses based in the Global South understand that inclusive and sustainable growth is necessary.

**Recommendation: Progressive businesses, supported by like-minded business associations, such as local Global Compact networks, have a critical role to play in advocating for NAPs in their countries.**

5. In many Global South countries, the interests of corporations and governments are tightly bound. The progressive business vision of the business case for a NAP may include: meeting the need for clear rules of the road and a level playing field so that businesses, ready to be good corporate citizens, are not undercut by bad actors.

**Recommendation: Having a clear business case for a NAP is critical to moving governments to act.**

6. In contrast to NAPs in the Global North, which emphasize extraterritorial application of domestic laws to companies operating abroad, a NAP in a country in the Global South will focus principally on human rights impacts domestically. That said, countries within Asia and Africa are also home to MNCs — including Singapore and South Africa where the Coalition members are based — and south-south and intra-regional investment is rapidly growing.<sup>4</sup>

**Recommendation: NAPs in Asian and African countries should consider also addressing the extraterritorial application of laws and policies to companies that operate beyond their borders.**

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<sup>3</sup> Ten of the twenty top countries with foreign direct investment are from the Global South. United Nations Conference on Trade and Development, *World Investment Report: 2014*, available at [unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf), at xv.

<sup>4</sup>Data from the United Nations Conference on Trade and Development indicates that six of the top twenty investing countries are from the Global South. *Ibid*

7. For NAPs in the Global South, as with NAPs in the Global North, the integrity of the NAPs development and monitoring process is crucial.  
**Recommendation: Process elements should aim to entail: inclusive multi-stakeholder dialogue, the setting of concrete targets and timetables, regular (two-to-three year) review and updating of NAPs; and transparency, consistency and predictability in both the development of NAPs and their monitoring and updating.**
8. In light of resource constraints and in an effort to build policy coherence, it often makes sense for Global South countries to build NAPs into their country's National Development Plans. Yet, in both Asia and Africa, consultation participants noted that implementation of National Action Plans on Human Rights have been encumbered by deficiencies in capacity and resources. The stakeholders involved in the planning and implementation of NAPs are likely to have more overlap with those involved in National Development Plans than with those involved in human rights national action plans.  
**Recommendation: It may make sense in certain contexts to integrate a NAP for business and human rights ("BHR" or "business and human rights") into a NAP for human rights.**
9. A NAPs process creates opportunities for an on-going, structured national dialogue on business and human rights. This is particularly valuable in the Global South where knowledge of rights is generally low and the view that "corporate social responsibility" is no more than philanthropy remains prevalent.<sup>5</sup> In this regard, there's a high value in beginning these discussions in Africa and Asia.  
**Recommendation: National Human Rights Institutions ("NHRIs") may have an important role to play in many Global South countries in kick-starting the NAPs process.**
10. The Asia and Africa consultations identified the following issues as important for all NAPs, in the Global North as well as the Global South, to address.
  - (a) Labour rights are a key area of concern where Global South NAPs can and should take the lead. The International Labour Organisation's conventions and recommendations are a good guide for effective and sustainable standards in this area.
  - (b) NAPs should aim to include respect for customary tenure to protect the land rights of indigenous peoples and other vulnerable groups.
  - (c) NAPs should consider emphasising the need for policies that are gender-sensitive rather than gender-blind, including with respect to compensation schemes when people are forced to move off their lands to make way for business.
  - (d) NAPs should consider making human rights due diligence mandatory, especially for companies operating in conflict zones.

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<sup>5</sup> In addition, small and medium enterprises remains removed from the conversation on BHR and CSR.

- (e) NAPs should consider making mandatory the publishing of contracts and benefit-sharing agreements.
- (f) NAPs should ideally be designed to implement the Sustainable Development Goals of the post-2015 development agenda.

## ***The Asia Consultation***

On 4 and 5 February 2015, the Asia Consultation on NAPs was held in Bali, Indonesia (the “Bali Workshop”).<sup>6</sup> The Bali Workshop gathered more than one hundred high-level stakeholders from business, government and civil society, including: (a) the Chairman and members of the ASEAN Intergovernmental Commission of Human Rights (“AICHR”); (b) members of the Myanmar Investment Commission; (c) leading Asian business associations and chambers of commerce; (d) civil society organisations (“CSOs”), (e) business representatives from multi-national and local (Indonesian) companies; (f) NHRIs; and (g) two members of the Working Group, Puvan Selvanathan and Michael Addo. Government ministries and individual businesses, which appear to be adopting a “wait and see” approach to NAPs were not well-represented, however.

Plenary discussions and breakout sessions were organized around the following themes:

- (a) ASEAN perspectives on NAPs;
- (b) Key business and human rights concerns in the region;
- (c) Outlook for NAPs / UN Guiding Principles on Business and Human Rights (“UNGPs”) in ASEAN States;
- (d) Process issues: NAPs development and monitoring; and
- (e) Asian perspectives beyond ASEAN.

The Bali Workshop served to increase awareness and understanding of NAPs among participations. Overall, participants expressed positive sentiments about the idea of devising and implementing a NAP for their country, and discussions easily moved to how governments could be persuaded to begin the NAP process. Further, the discussions spurred the attendees, in particular the participating AICHR representatives, to consider beginning the process of a regional action plan on business and human rights (“RAP”). At the same time, there was scepticism regarding the ability of a NAP to effectively address some long-standing human rights issues, such as economic and social rights. In some Asian countries, the political climate has long forestalled such debates.

The following section outlines issues and concerns related to NAPs that emerged from the Bali Workshop.

### Integrating NAPs into Ongoing Policy Processes in ASEAN

The ASEAN Economic Community (“AEC”), which will be launched in 2015, is a key priority for the region. The AEC’s three “pillars” are designed to illustrate the region’s political economy, competitive advantage and potential as a trading bloc.<sup>7</sup> Corporate social responsibility (“CSR”) considerations are currently subsumed under a separate ASEAN Socio-cultural Community Blueprint.<sup>8</sup> Several participants posited that NAPs should be

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<sup>6</sup> 4 February consisted of plenary discussions and breakout sessions. On 5 February targeted individual interviews with key government and AICHR and NHRI individuals were conducted. The Bali Workshop took place in conjunction with the ASEAN CSR Network’s (“ACN”) Next Generation CSR Forum from 3-7 February.

<sup>7</sup> Today ASEAN has a combined GDP of about US\$2.5 trillion and upwards of US\$1.5 trillion flowing throughout the region. The OECD has also partnered with ASEAN to strengthen investment policy.

<sup>8</sup> *ASEAN Socio-cultural Community Blueprint* at p. 13; available at: <http://www.asean.org/archive/5187-19.pdf>

understood separately from CSR in its most basic sense, and should therefore be considered in connection within the AEC Blueprint.

There is considerable common ground between well designed NAPs and the agenda of the AEC Blueprint. According to the Asian Development Bank (“ADB”) which has led the drafting of the blueprint, within ASEAN states *“proper combination[s] of domestic reforms and initiatives for closer integration that complement and reinforce one another are needed to promote the region’s equitable and inclusive development, strengthen its macroeconomic stability, and protect the environment.”*<sup>9</sup> This supports the case for the creation of NAPs in ASEAN states.

The AEC Blueprint states that *“ASEAN shall act in accordance to the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence to rules-based systems for effective compliance and implementation of economic commitments.”*<sup>10</sup> NAPs can complement the blueprint for a “borderless economic community,” the region’s framework for “seamless” economic integration, which ASEAN aims to achieve by 2030.

According to the ADB, Asia requires \$8 trillion to be invested from 2010 to 2020 in infrastructure for the region to continue economic development.<sup>11</sup> The Asian Infrastructure Investment Bank (“AIIB”), a US \$100 billion lender expected to be operational in 2015, appears to be the region’s answer to this need. Notably, all ASEAN countries are founding members of the AIIB. Some have questioned the AIIB’s ability to meet environmental and human rights standards. No social safeguards have been put in place as yet for the massive infrastructure projects that will be funded. There is as yet no adequate grievance mechanism, and no announced mechanism for civil society input.

In the Coalition’s view, NAPs can provide, or at least lay the foundation for, a means of monitoring infrastructure projects within a country’s territory. They can call for the periodic assessment and review of these projects, and thereby better ensure that the human rights impacts that may come with this investment are minimized and remedied when they do occur.

NAPs in ASEAN should reference related regulations contained within the ASEAN Comprehensive Investment Agreement (“ACIA”), which includes a State’s right to advance human rights policies. In this regard, article 17 of the ACIA says that States have the right to adopt or enforce measures, which, among other things, maintain social order and address environmental concerns. The ACIA is in line with Principle 9 of the UNGPs, which states that States should *“maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises”*.

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<sup>9</sup> ASEAN 2030, *Towards a Borderless Community* at p. xxi; available at:

<http://www.adbi.org/book/2014/07/18/6357.asean.2030.borderless.economic.community/>

<sup>10</sup> ASEAN Economic Community Blueprint, p. 5, available at: <http://www.asean.org/archive/5187-10.pdf>

<sup>11</sup> Pricewaterhouse Cooper, *Developing Infrastructure in Asia Pacific: Outlook, Challenges and Solutions* (May 2014), available at: <http://www.pwc.com/sg/en/capital-projects-infrastructure/assets/cpi-develop-infrastructure-in-ap-201405.pdf>

The Right to Development is enshrined in Articles 35-37 of the ASEAN Human Rights Declaration (“AHRD”), and specifies that development should be inclusive, equitable, sustainable, and rights-based.<sup>12</sup> This demonstrates support within ASEAN for the notion that development must be rights-compatible. NAPs should therefore be aligned with national and regional development plans, such as the Bali Concord III Plan of Action (2013 - 2017), and other plans that ASEAN and AICHR may develop in relation to the UN’s Post-2015 development agenda. For some States in the region, it may be desirable to integrate NAPs into existing development plans.

Within ASEAN, there is a high incidence of State- or military-sponsored human rights violations being perpetrated ostensibly to protect business interests — including forcibly evicting indigenous peoples and other communities from their land and resorting to violence when guarding the operations of extractive industry companies. Likewise, businesses operating within the region often disregard labour, environmental, and land laws that are in place. In their zeal to attract direct investment, ASEAN states often turn a blind eye to human rights promotion and protection.<sup>13</sup> ASEAN NAPs should be in conformity with the ACIA and the AHRD and related instruments, and emphasize that economic growth should not be sought blindly and at the expense of “domestic policy space” to protect the public interest.

Guiding Principle 16 states that, “as the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy”. NAPs should therefore further require that corporations operating in the region develop and implement their own policy statements on human rights.

### Initiating the NAP Process

National and regional initiatives regarding business and human rights should be aligned. AICHR’s inaugural thematic Baseline Study on Corporate Social Responsibility and Human Rights provides a comprehensive assessment on CSR as it relates to the promotion and protection of human rights in the ASEAN region, including the application of international standards in the ASEAN context.<sup>14</sup> As suggested in the study itself, it can “*serve as the foundation for the establishment of a common framework to accelerate the promotion of CSR and human rights in the region.*”<sup>15</sup>

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<sup>13</sup> See generally, Delphia Lim and Geetanjali Mukherjee, *Business and human rights challenges in ASEAN: The role and modalities of the State*, in Mahdev Mohan and Cynthia Morel (ed.) ,*Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn* (Routledge, 2015)

<sup>14</sup> Bhattacharyay, Biswa N. (9 September 2010). "[Estimating Demand for Infrastructure in Energy, Transport, Telecommunications, Water and Sanitation in Asia and the Pacific: 2010-2020](#)". [Asian Development Bank Institute](#).

<sup>15</sup> Thomas Thomas and Alex Chandra, *A baseline study on the nexus between corporate social responsibility and human rights: An Overview of Policies and Practices in ASEAN, Report prepared by the study team on business and human rights of the ASEAN Intergovernmental Commission on Human Rights*, (2014), p. 2

Bali Workshop participants agreed with the ideas stated in the Working Group's draft guidance document:<sup>16</sup> that the NAP process must be led by governments, and that inter-ministerial and intra-agency coordination is key to a NAP's successful design and implementation. The coordinating ministry overseeing the NAP process may vary from State to State. A gap analysis between the UNGPs and current business and human rights policies should be undertaken before a NAP is devised or implemented. Within Asia, NAP processes have begun in Malaysia, Indonesia and South Korea. These processes have been spearheaded by the government or by the NHRI, with governments lending their support thereafter.

Due to resource constraints in the Global South, NAPs could be integrated with existing mechanisms and national action plans that ASEAN States have already committed to implementing. These could include national action plans on human rights and national development plans.

It may sometimes be impractical for governments to incorporate NAPs into existing national action plans for human rights, however. The few countries in the region that have actually adopted national action plans for human rights – for example the Philippines, South Korea and Indonesia<sup>17</sup> – have found implementation hard to achieve, as there is inadequate capacity building and resources to roll out these plans, particularly at the local/provincial level where understanding of human rights is low.

For this reason and because the actors, particularly government departments, needed to effectively develop and implement a NAP are often different for BHR than for human rights it makes sense to start a complementary process separate from that of a NAP for human rights.

In Indonesia, for example, beyond the Ministry of Law and Human Rights, the Ministry of trade, and the Ministry of State-Owned Enterprises, as well as business need to be involved in the development of NAPs for the document to have governmental 'buy-in' and thus to be meaningfully implemented. A NAP is necessary to specifically address human rights abuses by companies because Indonesia's current human rights laws and regulations are too weak to address these concerns. Recognizing this, KOMNAS HAM, the Indonesian NHRI, has launched the development of a NAP<sup>18</sup> that will facilitate collaboration between the government and the relevant stakeholders, and harmonise regulations relating to business and human rights in Indonesia.<sup>19</sup>

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<sup>16</sup>UN Working Group on Business and Human Rights, *Guidance on National Action Plan on Business and Human Rights, Version 1.0* (December 2014) available at: [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf)

<sup>17</sup> United Nations Office of the High Commissioner for Human Rights, *National Plans of Action for the Promotion and Protection of Human Rights*, available at: <http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>

<sup>18</sup> The Jakarta Post, *Human rights guidelines prepared for businesses* (20 June 2015), available at: <http://www.thejakartapost.com/news/2015/06/20/human-rights-guidelines-prepared-businesses.html>

<sup>18</sup> Available at: <http://www.suhakam.org.my/strategic-framework-on-a-national-action-plan-on-business-and-human-rights-for-malaysia-2015/>

<sup>19</sup> National Human Rights Commission of Indonesia (Press Release), *The Urgency of Developing the National Action Plan on Business and Human Rights in Indonesia* (19 June 2015), available at: <http://business-humanrights.org/sites/default/files/documents/Press%20Release.pdf>



Likewise, Malaysia, Myanmar, Indonesia and the Philippines are variously in the process of developing a NAP, have committed to doing one, or have NHRIs that have begun steps in the development of a NAP.<sup>20</sup>

### Consultation and NAPs Development

Businesses should ideally be included in the NAP dialogue and design process. NGOs in the region that promote CSR and BHR, such as the ASEAN CSR Network (“ACN”), a member of the Coalition, together with chambers of commerce and local branches of the UN Global Compact in the region, are ideally positioned to encourage businesses in the region to support the development of NAPs.

Civil society should ideally be included in the NAP dialogue process and design to ensure that the NAP is effective in addressing existing and potential human rights harms by business enterprises. The government coordinating agency that oversees the NAP process should make an effort to ensure that civil society representatives as well as business leaders are kept informed about the process, and are afforded meaningful opportunities for providing their input.

Although progress is slow, governments in Asia are increasingly engaging in dialogue with civil society on human rights issues. For example, civil society has a larger space in Myanmar society since the country’s political opening.<sup>21</sup> In Singapore, civil society groups were consulted ahead of the submission of the national report for the Universal Periodic Review.<sup>22</sup> Significantly, the ASEAN Civil Society Conference, which is a regular forum of CSOs in ASEAN Member States, has gained recognition and support from ASEAN leaders.<sup>23</sup>

NHRIs have an important role to play in coordinating civil society and business input for the development of a NAP and for its monitoring.

### Implementation of NAPs

For NAPs to be implemented particularly in developing countries, there needs to be adequate capacity building and financial support. ASEAN countries’ experiences with developing a NAP for human rights, noted above, point to the importance of resources for capacity building to ensure a NAP is implementable.

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<sup>20</sup> See this link for further details, United Nations Office of the High Commissioner for Human Rights, Working Group on Business and Human Rights, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

<sup>21</sup> Norwegian Peacebuilding Resource Centre, *Developing relations: political parties and civil society in Myanmar* (June 2014), available at: [http://www.peacebuilding.no/var/ezflow\\_site/storage/original/application/1dca6db8cbb10f8810a5146b96715142.pdf](http://www.peacebuilding.no/var/ezflow_site/storage/original/application/1dca6db8cbb10f8810a5146b96715142.pdf).

<sup>22</sup> Kok Xinh Hui, *LGBT groups consulted for report* (Straits Times, 18 June 2015), available at: <http://news.asiaone.com/news/singapore/lgbt-groups-consulted-report>

<sup>23</sup> Alexander C. Chandra, *Civil Society in Search of an Alternative Regionalism in ASEAN* (International Institute for Sustainable Development, 2009), p. 6, available at: [http://www.iisd.org/tkn/pdf/civil\\_society\\_alt\\_regionalism\\_asean.pdf](http://www.iisd.org/tkn/pdf/civil_society_alt_regionalism_asean.pdf)

Workshop participants agree with the Working Group's recommendation that there must be a multi-stakeholder monitoring and evaluation process for NAPs, pursued through constructive engagement with business and civil society.

Besides policy guidance for and by governments, the UN Global Compact and other forward-thinking business associations have a key role to play in providing timely and "user-friendly" information to the corporate sector on the UNGPs and their practical implementation mechanisms. More accurate information, education and technical training is needed to help overcome business and government departmental reluctance to recognize the relevance of human rights to their operations. The Coalition stands ready to suggest how such education and training initiatives can be structured and presented.

### The Content of NAPs

Within Asia, there is insufficient dialogue and cooperation between businesses and affected individuals and communities (and their representatives). Moreover, many companies domiciled in Asia remain unaware, ill-informed, or willfully ignorant of their obligations to undertake due diligence to avoid infringing on the human rights of others. NAPs in Asia should consider emphasising the importance of corporate engagement with their stakeholders, especially affected peoples and communities.

Greater business investment in ASEAN countries has brought increased incidence of violations of migrant worker rights, labour rights, land and environmental rights, and indigenous peoples rights. NAPs in the region have a vital role in addressing these issues.

#### *Migrant worker rights*

Migrant workers in Asia are subject to severe discrimination as well as a denial of freedom of association, freedom of speech, and freedom of movement. There are also many documented instances of workers having their work permits or similar documentation taken away if they lodge complaints against their employers for BHR breaches.<sup>24</sup> There is often no bilateral agreement between the home country and the host country where they work, and thus no legal terms of reference for the treatment of the migrant workers,<sup>25</sup> which does not create binding legal obligations. Nevertheless, this declaration could serve as a persuasive document for the promotion of migrant worker rights, just as how other declarations have done. In this regard, soft law measures should be seen as important sources of obligations that eventually crystallise into international obligations. The prevalence of this problem in Asia means that Asian NAP should strongly consider highlighting the fact that migrant workers' rights need to be protected.

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<sup>24</sup> Domestic workers in ASEAN have been misled about job opportunities, and charged excessive recruitment fees which they are then obliged to work off: Human Rights Watch, *They Deceived Us at Every Step*, available at: <http://www.hrw.org/sites/default/files/reports/cambodia1111webwcover.pdf>

<sup>25</sup> There is an ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. However, it does not contain binding obligations on ASEAN States.

### *Labour rights*

Asia is home to many of the factories that supply major brands all across the world. Within these factories there is a high incidence of labor rights violations linked to endemic problems, including weak relations management-worker relationships, poverty wages and precarious employment. Asian NAPs should consider promoting reasonable binding obligations for business for better treatment of workers and adequate remedy for business-related human rights violations. Although uptake on these policies will initially be slow, forward thinking businesses need to take the lead and set an example for other businesses.

### *Land and environmental rights*

Extractive companies, including agro-businesses, have had adverse impacts on a broad array of human rights in ASEAN countries, such as: 1) forced displacement of communities without adequate consultation and compensation;<sup>26</sup> and 2) environmental degradation, which had adverse impacts on health, sources of livelihood and access to clean water. There is currently little public access to documentation of concession and related contracts and businesses' human rights practices under them, particularly in cases relating to land rights. Asian NAPs should consider providing for greater transparency regarding both.<sup>27</sup>

### *Indigenous peoples' rights*

Development projects undertaken by the State, including both infrastructure projects and the development of natural resources, have brought about many documented incidents of displacement of indigenous people.<sup>28</sup> When businesses violate indigenous peoples' rights, it increases dispossession of lands, territories and resources.<sup>29</sup> Compensation schemes are often extended only to those only with formal legal title; thus often indigenous people or ethnic minorities are considered illegible for resettlement.<sup>30</sup> Asian NAPs should attempt to address the need to ascertain rightful land ownership, by obtaining free prior and informed consent of indigenous groups. They must consider including initiatives that recognize the rights and practices of indigenous peoples and their customary norms, including their

<sup>26</sup> See generally, Business and Human Rights Resource Centre, *Briefing: Development for all, or a privileged few? Business & human rights in Southeast Asia*, at p. 14, available at: <http://business-humanrights.org/sites/default/files/Southeast%20Asia%20Briefing%2016%20April%202015.pdf>

<sup>27</sup> ASEAN Civil Society Conference and ASEAN People's Forum, *Reclaiming the ASEAN Community for the People: ACSC / APF 2015 – CSO Statement* at para. 3.3.2; 4.4.2, available at: [http://aseanpeople.org/wp-content/uploads/2015/01/ACSC-APF2015-DraftStatement\\_FINAL25Jan.pdf](http://aseanpeople.org/wp-content/uploads/2015/01/ACSC-APF2015-DraftStatement_FINAL25Jan.pdf). The statement also recommends that laws that promote transparency and greater participation in governance should be implemented.

<sup>28</sup> For example, recently on 19 March 2015, a group of NGOs filed a complaint on behalf of the Ringinrejo people of East Java to the Swiss OECD NCP against Holcim Indonesia, which is part of the Holcim group – a Swiss company building materials – for allegedly violating the OECD guidelines and causing adverse human rights impacts to local communities: Business and Human Rights Resource Centre, *Briefing: Development for all, or a privileged few? Business & human rights in Southeast Asia*, at p. 14, available at: <http://business-humanrights.org/sites/default/files/Southeast%20Asia%20Briefing%2016%20April%202015.pdf>.

<sup>29</sup> *Protect, Respect and Remedy: The Rights of Indigenous Peoples Affected By Businesses* (Briefing Note, November 2012), available at: [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0602\\_BRIEFING\\_NOTE\\_-\\_Respect\\_protect\\_remedy.pdf](http://www.iwgia.org/iwgia_files_publications_files/0602_BRIEFING_NOTE_-_Respect_protect_remedy.pdf)

<sup>30</sup> Cynthia Morel, *Right to development: A Path to securing more effective remedies?* in Mahdev Mohan and Cynthia Morel (ed.), *Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn* (Routledge, 2015), p. 277.

systems of government (e.g. communal leaders, indigenous councils, etc.). They should also emphasize respect for customary tenure.

### Strengthening independent judicial systems and access to remedy

In Asia, when laws exist to prevent land grabs,<sup>31</sup> they are often poorly enforced. Without access to impartial courts at home, and when they have the resources and support, affected peoples can bring transnational lawsuits in the home state of the extractive company or buyer of the natural resources on grounds of complicity in the violation. NAPs should consider addressing how domestic remedies can be strengthened, while acknowledging that these remedies can, in the right circumstances, also be complemented by transnational litigation.

The UNGPs identify judicial mechanisms as fundamental access to remedy, but note that their effectiveness is dependent upon impartiality, integrity and due process.<sup>32</sup> Asian NAPs must address corruption where it exists in judicial systems in order to ensure access to judicial remedy. The average score for the ASEAN countries covered in Transparency International's 2014 Corruption Perceptions was 38 out of 100.<sup>33</sup> There have been calls on ASEAN States to establish an ASEAN Integrity Community to protect against corruption.

In terms of non-judicial remedies, the National Human Rights Commission of Thailand ("Thai NHRI") has set a new regional standard by accepting cases relating to the Koh Kong sugar plantation, the Xayaburi Dam project and the Dawei Special Economic Zone project, lodged respectively by villagers from Cambodia, Laos and Myanmar, and all of which are projects operated by Thai companies.<sup>34</sup> In the Koh Kong case, the Thai NHRI found that the land grabs were in violation of, among other things, the right to life and the right to self-determination.<sup>35</sup> In addition, The Malaysian NHRI, SUHAKAM has heard claims by Cambodian and Thai villagers made against a Malaysian company over an infrastructure project in Laos that is likely to have irreversible impacts on their communities along the Mekong River.<sup>36</sup> Komnas HAM in Indonesia has organized public hearings to provide opportunities for victims of land grabs to air grievances.<sup>37</sup>

<sup>32</sup> Sumithra Dhanarajan and Claire Methven O'Brien, *14<sup>th</sup> Informal ASEM Seminar on Human Rights*(Background Paper), p. 64, available at: <http://www.asef.org/images/docs/Background%20Paper.pdf>

<sup>32</sup> Sumithra Dhanarajan and Claire Methven O'Brien, *14<sup>th</sup> Informal ASEM Seminar on Human Rights*(Background Paper), p. 64, available at: <http://www.asef.org/images/docs/Background%20Paper.pdf>

<sup>33</sup> Where 100 is very clean and 0 is highly corrupt. See [http://www.transparency.org/news/pressrelease/transparency\\_international\\_calls\\_on\\_southeast\\_asian\\_governments\\_to\\_set\\_up\\_a](http://www.transparency.org/news/pressrelease/transparency_international_calls_on_southeast_asian_governments_to_set_up_a). In Southeast Asia, only Singapore scored above 50 points.

<sup>34</sup> Presentation by Mauricio Lazala (Deputy Director, Business and Human Rights Resource Centre), *NHRIs and Business and Human Rights*, available at:

<http://www.eidhr.eu/files/dmfile/NHRIsandBusinessandHumanRightsParallelworkinggroup4-MauricioLazala.pdf>

<sup>35</sup> Earth Rights International, *Human Rights Violations in Koh Kong Sugar Plantation Confirmed by Thai Human Rights Commission* (3 June 2015), available at: <http://www.earthrights.org/media/human-rights-violations-koh-kong-sugar-plantation-confirmed-thai-human-rights-commission>

<sup>36</sup> Malay Mail Online, *Greenies seek Suhakam's help to probe Malaysian-based firm in Laos dam project* (20 October 2014), available at: <http://www.themalaymailonline.com/malaysia/article/greenies-seek-suhakams-help-to-probe-malaysian-based-firm-in-laos-dam-proje> ; Presentation by Mauricio Lazala (Deputy Director, Business and Human Rights Resource Centre), *NHRIs and Business and Human Rights*, available at: <http://www.eidhr.eu/files/dmfile/NHRIsandBusinessandHumanRightsParallelworkinggroup4-MauricioLazala.pdf>

<sup>37</sup> Mongabay.com, *Indonesia to hear indigenous peoples' grievances on land disputes*, (22 August 2014), available at: <http://news.mongabay.com/2014/0822-ibell-indonesia-land-disputes.html>

### A regional action plan (“RAP”)

For ASEAN, a RAP, alongside country level NAPs, can enable member countries to collectively manage issues that affect the region. A RAP can be a guideline for moving ahead with the post-2015 development agenda for adhering to an AEC. A RAP requires common benchmarks among the member countries. Yet, member states should avoid setting bare minimal standards. With the proposed regional integration in 2015 as the AEC Community, ASEAN is poised to consider a RAP that builds on the Bali Concord II mentioned above.

Some Bali Workshop participants supported the idea of a RAP that includes ASEAN’s ten member countries as well as Japan, China, Korea, India, Australia and New Zealand. Others advocated for the creation for a RAP first, then for countries to follow suit with NAPs, building on the obligations inherent in the RAP. In any event, Asian NAPs should include a commitment for knowledge exchange within the region, with a view to prompting ASEAN to take action. Such a commitment supports capacity building between Member States and may help to create uniformity in business and human rights practices in the region.

### NAPs Developments in Asia

Asian states have taken steps to develop a NAP or have laid the groundwork for the future development of a NAP. Asian countries are at different stages of the NAP process:

- (a) During the Bali Workshop, discussions revealed that Indonesia is undergoing inter-ministerial talks to develop a NAP. As mentioned above, the Indonesian NHRI, KOMNAS HAM, has since stated that it is in the process of preparing a NAP, after which it expects to hold talks with various ministries to implement the NAP.<sup>38</sup>
- (b) In South Korea, consultations on a prospective NAP are underway.
- (c) SUHAKAM, Malaysia’s national human rights institution, is urging its government to start the NAP process. In March 2015, it released a “Strategic Framework on a National Action Plan on Business and Human Rights for Malaysia”<sup>39</sup> to provide a policy direction for the formation of a NAP. The Framework emphasizes the need for promoting greater respect for human rights by State and non-State actors. It likewise underscores the importance of drawing on the UNGPs as a foundational reference point for developing a NAP, highlights the inherent value of facilitating the informed and inclusive participation of all relevant stakeholders.<sup>40</sup> The strategic framework was prepared by SUHAKAM after round-table consultations with business groups, civil society and relevant government agencies through focus groups and a workshop.

<sup>38</sup> The Jakarta Post, *Human rights guidelines prepared for businesses* (20 June 2015), available at: <http://www.thejakartapost.com/news/2015/06/20/human-rights-guidelines-prepared-businesses.html>

<sup>39</sup> Available at: <http://www.suhakam.org.my/strategic-framework-on-a-national-action-plan-on-business-and-human-rights-for-malaysia-2015/>

<sup>40</sup> Human Rights Commission of Malaysia, *Strategic Framework On A National Action Plan on Business and Human Rights for Malaysia* (March 2015), para. 32

This initiative forms part of the Malaysian government's broader commitment to work with NGOs in order to address the country's BHR issues. In this regard, the Malaysian government has stated that it is prepared to engage NGOs in the NAP process. According to the Minister in the Prime Minister's Department, Datuk Paul Low, this signifies a "paradigm shift" for the government and CSOs.<sup>41</sup>

- (d) In the Philippines, the government has initiated a NAP process, in which the Commission of Human Rights in the Philippines "is playing a significant role".<sup>42</sup> The process means putting in measures to assess the impact of different businesses coming into the Philippines on human rights and the environment.<sup>43</sup>
- (e) In July 2011, India launched the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities ("NVGs"), a set of nine principles that offer businesses an understanding and approach to responsible business conduct. Further, the Indian National Human Rights Commission has shown a keen interest to develop a NAP. Recently, it was announced that the Indian government was planning to create a venture capital industry to help fund social sector initiatives relating to sustainable development, with a view to encourage investment that general a measurable social or environmental impact.<sup>44</sup>
- (f) In China, the government has adopted several international human rights and CSR standards, including those of the International Labour Organisation and the UNGPs, and has developed guidance for multinationals operating abroad based on these standards. In 2012, it also adopted a national action plan on human rights, which contains some labor provisions. In 2014, the Chinese Chamber of Commerce of Metal, Minerals and Chemicals Imports and Exports also released its Guidelines for Social Responsibility in Outbound Mining Operations, which comprises standards on labour, environmental protection and supply chain due diligence.<sup>45</sup>
- (g) At the Bali Workshop, the economic adviser to the President of Myanmar, Professor Aung Thun Thet, announced Myanmar's intention to develop a NAP. Prof Aung is also the Myanmar President's Focal Point on Responsible Business Conduct.

<sup>41</sup> The Sun Daily, *Government Prepared to Engage with NGOs* (24 March 2015), available at:

<http://www.thesundaily.my/news/1364271>

<sup>42</sup> Presentation by Mauricio Lazala (Deputy Director, Business and Human Rights Resource Centre), *NHRIs and Business and Human Rights*, available at:

<http://www.eidhr.eu/files/dmfile/NHRIsandBusinessandHumanRightsParallelworkinggroup4-MauricioLazala.pdf> .

<sup>43</sup> Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *National Human Rights Institutions* (30 June 2015), available at: <http://rwi.lu.se/nhris/>; Although it was not articulated at the Bali Workshop, the Philippines has opted for a gradual approach of a three-year collaborative process of learning among government agencies, business and civil society as a way of building momentum and creating champions for a NAP: see Joanne Bauer, *Where Do National Action Plans on Business and Human Rights Belong in the Corporate Sustainability Movement* (CSRwire Talkback, 17 March 2014), available at:

<http://www.csrwire.com/blog/posts/1262-where-do-national-action-plans-on-business-human-rights-belong-in-the-corporate-sustainability-movement>

<sup>44</sup> DNA India, *Government may form VC industry to fund social sector projects: Jayant Sinha* (10 August 2015) available at: <http://www.dnaindia.com/money/report-govt-may-form-vc-industry-to-fund-social-sector-projects-jayant-sinha-2112833>

<sup>45</sup> Global Witness, *New Chinese Guidelines Offer Mineral Companies Chance to Reduce Conflict, Corruption Risks and Show Value to Host Communities* (23 October 2014), available at:

<https://www.globalwitness.org/archive/new-chinese-guidelines-offer-mineral-companies-chance-reduce-conflict-corruption-risks-and-0/>

Myanmar has also made a recent effort to adhere to the OECD Guidelines on Multinational Enterprises and standards of responsible business conduct.<sup>46</sup> The Myanmar Investment Commission has overseen the passing of several notifications,<sup>47</sup> some of which require certain business activities to be accompanied by an environmental impact assessment, thus aligning Myanmar with global procedural standards regarding environmental impact.<sup>48</sup> It is also in the process as well as a new Myanmar Investment Law (that is set to be passed in due course), which aims to promote environmentally and socially sustainable economic growth.

### ***The African Consultation***

On 23 and 24 February 2015 the African Regional Consultation on National Action Plans for Business and Human Rights was held at the University of Pretoria in Pretoria, South Africa (“Pretoria Workshop”). The Pretoria Workshop drew representatives from government, NHRIs, civil society and businesses from across the African continent: Chad, the Democratic Republic of Congo, Ethiopia, Kenya, Nigeria, Tanzania, South Africa and Zimbabwe. It was organised by the Centre for Applied Legal Studies at the University of the Witwatersrand and the Centre for Human Rights at the University of Pretoria.

As discussion at the Africa consultation proceeded, interest among participants in NAPs for Africa grew. Throughout the consultation the desirability for further meetings with key actors such as emerging market investors in the continent— e.g. Brazil, Russia, India, and China — was noted. There was also discussion of specific ways in which the Working Group could support these efforts through further convenings.

A summary of the issues raised and the comments made at the Pretoria Workshop follows.

### **The Rationale for NAPs in Africa**

Socio-economic development is on the African agenda — the African Union’s Constitutive Act includes, on the list of the African Union’s (“AU”) objectives, the promotion of “*sustainable development at the economic, social and cultural levels as well as the integration of African economies*”.<sup>49</sup> It is clear from this that there are three interrelated items. The first is sustainable development; the second is development related to economic, social and cultural conditions; and the third is economic integration. It is imperative that all of these objectives are met; NAPs can be a way to guard against economic exploitation (or the elevation of economic development above all other forms of development and in a manner that is unsustainable) by both foreign and domestic investors. NAPs can be used to

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<sup>46</sup> See OECD, *Myanmar: Responsible Business Conduct and the OECD Guidelines for Multinational Enterprises*, available at: <http://www.oecd.org/daf/inv/mne/2014-Myanmar-Responsible-Investment-Conference-Background-Note.pdf> and Dr Roel Nieuwenkamp, *Responsible Investment in Myanmar* (23 October 2013), available at: <https://mneguidelines.oecd.org/Nieuwenkamp-Speech-Myanmar-Oct-2013.pdf>

<sup>47</sup> For example, Notification No. 49/2014 reduced the number of prohibited and restricted business activities for foreign investors.

<sup>48</sup> Notification 50/2014 of the Foreign Investment Law No. 21/2012

<sup>49</sup> African Union, Constitutive Act, article 3(j).

negotiate investment contracts in a “balanced” way that meets all of the objectives of the AU Constitutive Act.

Africa's resource boom also provides a strong impetus for the development of a NAP, particular the discovery of new resources in developing economies. According to some: Uganda, Kenya, South Sudan, Ethiopia, Tanzania and Mozambique have emerged as prolific oil and gas exploration regions in the world over the last 10 years.<sup>50</sup> It would serve prudent for these countries to develop policies to ensure that human rights are not harmed in the process of its oil and gas exploration and extraction. A NAP can serve to (i) set out the conditions for foreign direct investment by foreign extractive corporations; (ii) establish fair benefit-sharing agreements; and (iii) spur a discussion on decent work and inclusive community engagement. In this way, development imperatives can serve as an impetus for the initiation of a NAP.

The development of National Development Plans can also serve as an impetus the discussion on human rights standards. Some African governments, such as Tanzania and Kenya, have human rights and rule of law sections in their National Development Plans and thus included human rights considerations in their development agenda.<sup>51</sup> The processes for the development of these instruments could also provide a prime opportunity for countries to initiate discussions around a NAP.

Conflict resolution and post-conflict rehabilitation, can also benefit from the development of a NAP: it can serve as a rationale and stimulus for its development. In these circumstances, a NAP can demonstrate to investors a change in the method of operation in a country marking a transition from a country that has been devastated by conflict to a more stable market based on rule of law.

Natural resource discovery, development, and conflict resolution are among the rationales listed above for the development and initiation of NAPs; they also indicate African countries interest in the integration of business and human rights. It should be noted however that among African states there is strong support for the development of a legally binding treaty on business and human rights. During the 2014 session of the UN Human Rights Council when the treaty proposal went to a vote, 10 of 13 African countries at the UN Human Rights Council voted in favour of a binding treaty.<sup>52</sup> At the same time, through the African Union, African states also demonstrated a commitment to “*expedite the implementation of the [UNGPs]*”.<sup>53</sup> In fact, the two processes can be mutually supportive: for states that have developed a NAP, non-compliance with that NAP could potentially be raised with a treaty

<sup>50</sup> See <http://www.standardbank.com/Article.aspx?id=-337#sthash.JUq32zHC.dpuf>; <https://www.visiongain.com/Report/1310/East-African-Oil-Gas-Market-2014-2024>; and [https://www.controlrisks.com/~media/Public%20Site/Files/Our%20Thinking/east\\_africa\\_whitepaper\\_LR\\_web.pdf](https://www.controlrisks.com/~media/Public%20Site/Files/Our%20Thinking/east_africa_whitepaper_LR_web.pdf)

<sup>51</sup> United Republic of Tanzania, *National Development Vision 2025*, available at <http://www.tzonline.org/pdf/theTanzaniadevelopmentvision.pdf>, at p 13. Government of the Republic of Kenya, *Kenya Vision 2030*, available at [http://www.vision2030.go.ke/cms/vds/Popular\\_Version.pdf](http://www.vision2030.go.ke/cms/vds/Popular_Version.pdf), at p 23. See also National Planning Commission of South Africa, *National Development Plan, 2030*, available at <http://www.gov.za/issues/national-development-plan-2030>.

<sup>52</sup> See <http://business-humanrights.org/en/binding-treaty/un-human-rights-council-sessions>. See also UN Human Rights Council, *Resolution on the Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/26/L.22/Rev.1.



body created in terms of the binding treaty. In turn, the failure of a state to draft and implement a NAP may be seen as a failure to advance the aspirations of the binding treaty, depending on the form that such a binding instrument would take.

Adoption of NAPs by African governments could serve to standardise business and human rights across the continent. Workshop participants echoed what Her Excellency Dr Aisha L. Abdullahi, Commissioner for Political Affairs of the African Union Commission said at the African Regional Forum on Business and Human Rights that “[w]hat is needed now is to translate these standards into concrete action plans”.<sup>54</sup> Unlike the ASEAN region where a regional action plan on business and human rights is probable, Africa is viewed by some as being too diverse for the development of a regional action plan at this time. It should be noted however, that economic integration is an objective of the African Union, and through it, African states. Evidence of this can also be found in the New Partnership for Africa's Development, Continental Free Trade Area, and the Programme for Infrastructure Development in Africa.<sup>55</sup>

### Initiating NAPs

The first step in initiating and drafting NAPs within Africa is for government, NHRIs, civil society and business operating on the continent to be educated on the content, meaning and impact of human rights generally and business and human rights specifically. Rights education is especially important on the African continent where knowledge about corporations' responsibilities vis-à-vis human rights is weak. Civil society can play a key role in ensuring that government, business and communities grasp the human rights held by Africans, the potential for human rights' realisation and violation, and the recourse and remedy available to such abuse.

African government officials tend to see NAPs and BHR generally as an obstacle to investment. For this reason, the push for NAPs needs to come from civil society. Where civil society is weak, NHRIs can play a critical role in making the case for a comprehensive policy to deal with business and human rights.

In many ways, African NHRIs have started taking that role. In 2011, the Network of African National Human Rights Institutions (“NANHRI”) began its work on BHR by adopting the Yaoundé Plan of Action on Business and Human Rights which called upon each NHRI to:

- (a) Conduct BHR education, outreach and sensitisation;
- (b) Build capacity on BHR; and

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<sup>54</sup> Africa-EU Partnership on Democratic Governance and Human Rights, *Joint Press Statement: African Union and European Union to Promote the UN Guiding Principles on Business and Human Rights*, available at <http://pa.au.int/en/sites/default/files/AU-EU%20Press%20Statement-Geneva%2003%2012%2014.pdf> (18 May 2015).

<sup>55</sup> <http://www.nepad.org/nepad/frequently-asked-questions>; <http://www.afdb.org/en/blogs/integrating-africa/post/taking-stock-of-the-proposed-continental-free-trade-area-13893/> and <http://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/programme-for-infrastructure-development-in-africa-pida/>.

- (c) Integrate BHR issues into its strategic plans and programmes in the areas of labour, land, and environmental rights.<sup>56</sup>

The Yaoundé Plan could serve as the means by which a NAP is initiated. The Ghanaian, Mozambican, South African, and Tanzanian NHRIs have already taken steps on BHR; some have begun capacity building on BHR, others BHR gap analysis and others still the development of NAPs.<sup>57</sup> Mauritius and Nigeria have also reportedly begun involvement in NAP development.<sup>58</sup>

The involvement of NHRIs, government and affected communities in the NAPs process is obvious. However, businesses also need to be part of the NAPs process. NGOs in the region report difficulties in engaging them. The UN Global Compact local networks in Africa can be a useful intermediary. So too, could associations between businesses, government and affected persons.<sup>59</sup> Progressive companies in Africa may stand behind a NAP if they see it as a means of stopping unscrupulous companies from undercutting them in the market.

### NAPs Process

A multi-stakeholder mapping of existing policies can serve to raise awareness of NAPs across all sectors, which can in turn help to begin a NAP development process. Mapping and gap analysis is familiar to Africans. The Yaoundé Plan recommends that a country undertake a “human rights audit” of its government policy strengths and weaknesses. An audit will also help plan, allocate and manage resources. The highest risks should be prioritised and the country’s performance should be evaluated in terms of national legislation and international obligations.

The Yaoundé Plan process also offers a useful precedent for NAPs in terms of mapping stakeholders’ capacity to advance BHR: in 2013, NANHRI conducted a mapping of the capacity of its member NHRIs to deal with business and human rights issues and found that “no surveyed NHRI rated its capacity to work on business and human rights as adequate and most expressed strong desire to strengthen this”.<sup>60</sup> The subsequent report recommended capacity building, knowledge sharing and advocacy, outreach and institutional integration.<sup>61</sup>

<sup>56</sup> Network of African National Human Rights Institutions, *Yaoundé Plan of Action on Business and Human Rights*, (1 October 2011), available at [http://nhri.ohchr.org/EN/IHRS/HumanRightsCouncil/20/Review/Info%20by%20NANRHI%20SP.pdf?Mobile=1&Source=%2FEN%2FIHRS%2FHumanRightsCouncil%2F20%2F\\_layouts%2Fmobile%2Fdispform.aspx%3FList%3D3854d106-5897-4ed0-b4e8-3d72398f8a6a%26View%3Dae0586a3-b00a-4fda-9d82-3cdd3e29b199%26ID%3D30%26CurrentPage%3D1](http://nhri.ohchr.org/EN/IHRS/HumanRightsCouncil/20/Review/Info%20by%20NANRHI%20SP.pdf?Mobile=1&Source=%2FEN%2FIHRS%2FHumanRightsCouncil%2F20%2F_layouts%2Fmobile%2Fdispform.aspx%3FList%3D3854d106-5897-4ed0-b4e8-3d72398f8a6a%26View%3Dae0586a3-b00a-4fda-9d82-3cdd3e29b199%26ID%3D30%26CurrentPage%3D1).

<sup>57</sup> See <http://shiftproject.org/project/building-capacity-un-guiding-principles-ghana>; <https://businesshumanrightsireland.wordpress.com/2014/09/19/developing-a-national-plan-on-business-and-human-rights/>; <http://www.csr21.org/news/geopolitical/tanzania-devises-national-action-plan-business-human-rights>; and <http://www.sahrc.org.za/home/21/files/Guide%20Final%20final.pdf%20March%2019.pdf>.

<sup>58</sup> See <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

<sup>59</sup> For example the South African National Economic Development and Labour Council, available at <http://new.nedlac.org.za/>.

<sup>60</sup> Network of African National Human Rights Institutions, *Report of the NANHRI Mapping Survey on Business and Human Rights*, available at <http://www.nanhri.org/phocadownload/mapping%20survey%20on%20bhr%20-%20role%20of%20nhri%20-%20final%20version.pdf>, at 13.

<sup>61</sup> *Ibid*, at p. 13-15.

While a NAP must be driven by the government, it is the government's responsibility to ensure that the process is inclusive of all stakeholders including affected workers and communities. The principle of participation is extensively reflected in African regional instruments (e.g. article 19(1)(b) and (c) of the Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("Women's Protocol"), and article 14(2)(e) of the African Youth Charter) and should be adhered to in NAP development. Pointedly, the Women's Protocol provides that women participate in all levels of development i.e. conceptualisation, decision-making, implementation and evaluation of development policies and programmes.<sup>62</sup> The same may be said for stakeholders in the NAPs process, i.e. stakeholders should be involved throughout the process including the conceptualisation phase of the process to be undertaken in the development of a NAP.

### Monitoring and Evaluating NAPs

Just as the process for NAPs development needs to be multi-stakeholder, so too must the periodic monitoring and evaluation of implementation of NAPs. Precedents for such a process exist across the African continent, for example in South Africa with regards to the National Strategic Plan on HIV, STIs and TB. In some countries, such as Ethiopia, monitoring occurs through multi-level governmental departments, multi-departmental structures or even through multi-stakeholder processes, this is in line with the Youth Charter which provides for participation across at "local, national, regional, and continental levels".<sup>63</sup>

NHRIs have the power to monitor and evaluate, as required by the Paris Principles. They are thus in an optimal position to monitor NAPs and in so doing to ensure that the participation of all stakeholders in that process. Of the 44 African NHRIs who are NANHRI members, 18 are accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights;<sup>64</sup> however, non-accreditation does not deprive African NHRIs of their right to ensure participation of all stakeholders.

Using processes like the Universal Periodic Review ("UPR"), the African Peer Review Mechanism ("APRM") and the treaty bodies, civil society can also play a key role in monitoring NAPs through shadow reports. Where a NAP is not already in place, the UPR and APRM can be used to encourage governments to develop one. Conversely the monitoring process of a NAP can also highlight business and human rights areas the government needs to improve upon in preparation for the UPR and APRM processes.

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<sup>62</sup> African Union, Protocol on the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, at article 19(b).

<sup>63</sup> African Union, African Youth Charter, at article 11(2)(b)

<sup>64</sup> Network for African National Human Rights Institute, *Members of the Network of African Human Rights Institutes*, available at

[http://www.nanhri.org/index.php?option=com\\_content&view=article&id=107&Itemid=828&lang=en](http://www.nanhri.org/index.php?option=com_content&view=article&id=107&Itemid=828&lang=en) read with International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Chart of the Status of National institutions*, available at <http://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart.pdf>.

## NAPs Content

NAPs should not be limited in content to the UNGPs. States may incorporate more stringent rules into the NAP, particularly if their constitutions already permit it. One example sits in the constitutions of Gambia, Ghana, Malawi and South Africa which impose positive duties on business with regard to human rights.<sup>65</sup> Another sits in the African Union wherein the notion of criminal liability for corporations exists.<sup>66</sup> In terms of the newly adopted (but not yet ratified) Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, corporate criminal liability may be found for the following crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression. Acts of criminality include instigation, accessory, attempt, organisation, direction, and the financing of criminal acts. The extended jurisdiction of the African Court will become effective after the ratification of the protocol by 15 African States.<sup>67</sup>

The content of NAPs may be a way for African states to actively fulfil their human rights obligations. The African Commission for Human and People's Rights said in the *SERAC* decision that:

“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from the damaging acts that may be perpetrated by private parties. . . This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments.”<sup>68</sup>

However, the multi-stakeholder development and comprehensive content of a NAP is not enough. The greatest challenge on the African continent is not creating laws and policies related to human rights but their implementation.<sup>69</sup> A NAP faces the same reality. As such, it is imperative that a NAP contains specific goals and timetables and that resources be made available necessary to achieve them and thus obviate the African Commission's criticism to the following effect: “a state can be held complicit where it fails systematically to provide protection of violations from private actors”.<sup>70</sup> Systematic protection demands implementation.

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<sup>65</sup> Section 17(1) read with section 230(2)(a) of the Gambian Constitution, section 12(1) of the Ghanaian Constitution, section 15(1) of the Malawian Constitution, and section 8(2) of the South African Constitution.

<sup>66</sup> African Union, Preamble, *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, EX.CL/846(XXV) Annex 5.

<sup>67</sup> *Ibid*, articles 48A, 28N, and 11 respectively.

<sup>68</sup> *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001), at para 56.

<sup>69</sup> African Union, *Governance of Integration in Africa: Challenges and Way Forward*, available at <http://www.au.int/en/sites/default/files/Issue%20paper%20on%20Governance%20of%20Integration%20%20en.pdf>, at para 2.

<sup>70</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005), at para 160.

To ensure that a NAP incorporates high standards, best practices of corporations, communities and government should be sought and adopted during the drafting consultations.

A NAP should highlight what the consequences for business may be if they fail to comply with it. They should also articulate government, civil society, NHRI and affected communities' right to hold corporations accountable for human rights violations; this should be explicit in the NAP.

A NAP could include a provision for all companies to report on their human rights due diligence.

### Key Issues for Africa: Gender, Developing Economies and Conflict

In its proposal to the Working Group, the Coalition proposed to explore three specific issues in relation to NAPs: gender, developing economies and conflict. The African Consultation confirmed the importance of highlighting these three issues in NAPs on the continent. We conclude this submission with an outline of the issues raised.

#### *Gender*

- (a) Businesses' human rights impact on gender may be both internal to the business itself in terms of its employees and external to the wider community in which that business operates.
- (b) Progressive businesses must balance endorsing gender equality in their engagements with communities and respecting a community's cultural and traditional standards, which may be inconsistent with the company's gender standards. However, it should be noted that the African Women's Charter and the Southern African Development Community Protocol on Gender and Development make clear that tradition and culture may not impair or be used to impair women's human rights.<sup>71</sup> Businesses — as employers, community members, advertisers, policy influencers — are also in the position to change, over time, a society's gender norms and standards.
- (c) A NAP should ideally provide guidance to companies on how to straddle the line between endorsing gender equality and respecting communities' stance on gender equality.<sup>72</sup> It can also, to the extent appropriate, direct businesses on how to progressively influence societies' gender norms.

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<sup>71</sup> Articles 2(2) and 21(1) of the African Women's Charter and the SADC Protocol on Gender and Development respectively.

<sup>72</sup> CALS' Community Engagement Policy, available at [http://www.wits.ac.za/files/25qim\\_168271001427097717.pdf](http://www.wits.ac.za/files/25qim_168271001427097717.pdf), includes examples of how this may be done at p. 22.

### *Developing economies*

- (d) As with the Bali Workshop, participants at the Pretoria Workshop highlighted the need to situate a NAP within development planning. Economic development without human rights is not development in its true sense, nor is it development that meets the needs of Africans.<sup>73</sup> According to the NANHRI's Strategic Plan:

“Developments by States or non-state actors do not take into account the effects on the people, while constructing buildings and dams, carrying out oil exploitation or other mining activities.”<sup>74</sup>

NAPs can be used to ensure that human rights and development are discussed, addressed and met simultaneously and aligned. In many cases, a NAP might be best served by being situated in a country's national development plan.

- (e) NAPs should highlight the role played by the informal sector, and steps should be taken within a NAP to address the human rights' impact of this sector.
- (f) Micro, small and medium sized enterprises (“MSMEs”) can draw certainty from a NAP and thus view it not as an additional regulatory hurdle, but as a guiding document on how to operate in a particular country.
- (g) The NAP of a developing economy can also highlight the importance of equal treatment i.e. that a multinational corporation should operate in the same way in a host country as it does in the home country. It can also make it clear that it is development-orientated and that development is aligned and founded on principles of human rights. As the African Commission said in *Endorois* the right to development requires the fulfilment of five criteria equity, non-discrimination, participation, accountability and transparency, with equity and choice as important, over-arching themes.<sup>75</sup> Equal treatment is evidently aligned to that decision. As noted above, it can serve as a country's defence against exploitative business practices.
- (h) A NAP in a developing economy should:
- i. Be inclusive of all people, in particular people most vulnerable to social exclusion;
  - ii. Fight poverty; and
  - iii. Be aligned with and aim to implement the post 2015 the Sustainable Development Goals.

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<sup>73</sup> See in this regard articles 3(j) of the African Union Constitutive Act, 22 of the African Charter, 19 of the African Women's Charter and 10(1) of the African Youth Charter.

<sup>74</sup> Network for African National Human Rights Institute, *Strategic Plan 2012-14*, p 10.

<sup>75</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) at para 277.

## *Conflict*

- (i) Conflict can take place between nations, groups of citizens or communities, the state and its citizens, and businesses and trade unions.<sup>76</sup> Therefore, every country is susceptible to conflict. The potential for conflict should be noted in a NAP and it should set out steps to prevent and address conflict wherever and however it may occur.
- (j) Again, the NAP can and should serve as means for a country to emerge from conflict in a human rights and development friendly manner, by engaging collectively, charting out a shared vision and collectively working towards the realisation of that vision.

## ***The Value of the Consultations for NAPs Development***

In December 2014, the Working Group released the preliminary version of its Guidance Document (Version 1.0). The final version of this document (the “Final Guidance”), which, is due to be released next year (in 2016), will serve as the main guidance document for countries which are in the process of creating NAPs.

The Bali and Pretoria Workshops have shown that any NAP process in the Global South will need to reflect the unique context and realities present in these regions. Any NAP process in the Global South has to be dealt with patiently and with modesty of ambition. Further, the consultations have highlighted that NAPs (on business and human rights) must be set apart from general national action plans on human rights to avoid the risk of diluting the intended effect of the UNGPs. This is because the actors and considerations for both are different.

NAPs processes in the Global South are at nascent stages of formation and development. But the Bali and Pretoria Workshops have revealed that there is an appetite for NAPs in the Global South. There have been positive developments, and are likely to be more based on the available data. Yet, any development is to be approached with cautious optimism due to the economic, cultural and political issues<sup>77</sup> that have been highlighted in this submission, and which remain in a state of flux.

Reasonable deviations from Guidelines that set out normative practices, such as those that will be set out in the Final Guidance, should be carefully analysed in collaboration with local or regional experts who are aware of these realities, which are prone to change. To this end, the Coalition is heartened to note that the Guidance Document (Version 1.0) has

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<sup>76</sup> Article 28D(c) includes the following the list of armed conflict:

- i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- iii) Taking of hostages; and
- iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

<sup>77</sup> These concerns, in particular a suspicion towards human rights and lack of political will, are also present in Columbia, which is set to be the first South American country to release a NAP: Paloma Munoz Quick, *Why implementing the UN Guiding Principles is an uphill battle* (27 June 2015), available at: <https://bhramericasblog.wordpress.com/2015/07/27/colombia-why-implementing-the-un-guiding-principles-is-an-uphill-battle/>

acknowledged that there is no “one-size-fits-all” approach to NAPs.<sup>78</sup> In fact, the Working Group member, Professor Michael Addo, who has spearheaded and supported the importance of including a contextual appreciation of NAPs, and what they can be expected to achieve, has stated that there should be a “smart mix” of measures tailored to national circumstances.<sup>79</sup>

There is also a more general concern that the message intended by the UNGPs may be lost or diluted if different actors perceive and interpret these principles according to their own private interests. According to some commentators, the “risk of manipulation” of the UNGPs is high, with different actors having contrasting views on the legal obligations of the State, on the one hand, and the ‘social’ responsibilities of corporations, on the other.<sup>80</sup> At both workshops, discussions quickly turned to the issue of how best to mitigate such risks and follow up on the feedback received in the consultations through further convenings in the two regions. Both workshops have also provided a valuable opportunity to initiate discussion within both regions regarding how NAPs can serve Asian and African interests. Having members of the Working Group present at both meetings enabled participants to engage directly with the Working Group ask direct questions regarding NAPs and the strategic support that the Working Group can provide for those who seek to champion NAPs in their countries.

Dialogues within the respective regions need to be honest, and inclusive of all relevant stakeholders. Cross-national dialogue within regions is also important to overcome common challenges, to facilitate knowledge exchange, and provide technical assistance. Our consultations have highlighted the relevant stakeholders who are participating in the NAPs processes in their respective Global South countries.

The findings of these consultations, as well as the primary and research that has been undertaken by the Coalition in connection with the Project will, we hope, contribute to a better informed, nuanced and holistic progressive update of the Final Guidance. In particular, the consultations will aid the Working Group to better understand the state of play in the Global South with respect to the implementation of the UNGPs. Put simply, NAPs must be sensitively designed in the Global South based on empirical data.

As such, the progressive update of the Final Guidance will be applicable to a more diverse range of countries; and the “risk of manipulation” and selective invocation of the UNGPs will be reduced. The two workshops – and this project as a whole – are a first-step in the establishment of continent and region-wide epistemic communities on NAPs in Asia and Africa.

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<sup>78</sup> UN Working Group on Business and Human Rights, *Guidance on National Action Plan on Business and Human Rights Version 1.0* (December 2014) at p. ii.

<sup>79</sup> Statement by Mr. Michael Addo, Chairperson, UN Working Group on the issue of human rights and transnational corporations and other business enterprises (69<sup>th</sup> session of the General Assembly, Third Committee, Item 68 (b&c)), available at: <https://papersmart.unmeetings.org/media2/4654260/michael-addo.pdf>

<sup>80</sup> Damiano de Felice and Andreas Graf, *The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights*, *Journal of Human Rights Practice* (2015) 7(1) 40-71, available at: <http://jhrp.oxfordjournals.org/content/7/1/40.full.pdf+html>



The Coalition’s findings will be discussed at a day-long side-event to the upcoming ASEAN Responsible Business Forum in Kuala Lumpur, co-organised by the ASEAN CSR Network, SMU and the British Institute of International and Comparative Law. The Coalition’s findings will also be featured at a side-event on NAPs at the 2015 annual UN Forum on Business and Human Rights in Geneva, and referenced at the formal session where the UN Working Group launches its Final Guidance.

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