



# **BUSINESS AND HUMAN RIGHTS: ADDRESSING HUMAN RIGHTS IMPACTS OF BUSINESS IN EASTERN AND SOUTHERN AFRICA**

**WORKSHOP REPORT, 10 & 11 April 2018**

**Dar Es Salaam, Tanzania**



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## **BACKGROUND**

*This report contains a summary of the outcomes of the workshop titled “Addressing human rights impacts of business in Eastern and Southern Africa”, which was held in Dar es Salaam, Tanzania on 10 and 11 April 2018. The workshop was part of the project: “Implementing the United Nations Guiding Principles on Business and Human Rights in Sub-Saharan Africa”, implemented by the Centre for Research on Multinational Corporations (SOMO); the Danish Institute for Human Rights (DIHR); the Kenya National Commission on Human Rights (KNCHR); Kenya Human Rights Commission (KHRC); Commission for Human Rights and Good Governance (CHRAGG) Tanzania; and Business and Human Rights Tanzania (BHRT). The project is funded by the Bureau of Democracy, Human Rights and Labor of the US Department of State and implemented in Kenya and Tanzania. The workshop was co-funded by the Swedish International Development Cooperation Agency (SIDA)-funded project: “Responsible business for sustainable development - Implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in the 2030 Agenda” implemented by DIHR.*

The two-day workshop brought together 56 participants from six countries in Eastern and Southern Africa: Kenya, Mozambique, South Africa, Tanzania, Uganda and Zambia. The participants represented a variety of institutions: national-level civil society organizations, international non-governmental organizations, inter-governmental organizations, national human rights institutions, and governments<sup>1</sup>. Also attending the workshop were experts from academia foreign missions and embassies who were there for part of the workshop.

The workshop provided a forum for participants to share experiences and learning on addressing adverse impacts on the rights of communities and workers created by business activities, in particular the extractives sector and other land intensive industries. Participants discussed the potential of different instruments and tools in preventing and improving access to remedy for adverse human rights impacts. These included global and regional normative developments such as national action plans on business and human rights (NAPs), the African Union’s draft Policy Framework on Business and Human Rights and the draft State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter.

To frame the two-day discussions, the workshop started with a panel session that introduced participants to drivers and challenges of business and human rights issues in the region as well as global trends.

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<sup>1</sup> See Annex 1 for the workshop program

## **1. BUSINESS AND HUMAN RIGHTS IN THE REGION**

This session had panellists from the UN Working Group on Business and Human Rights, African Commission Working Group on Extractive Industries, Environment and Human Rights, Network for African National Human Rights Institutions (NANHRI), African Coalition for Corporate Accountability (ACCA), and the Centre for Applied Legal Studies (CALs), University of Witwatersrand, South Africa.

### **1.1. INTRODUCTION**

The continent's high dependency on foreign investments in natural resources, including in large-scale agriculture and the development of infrastructure, means that key business and human rights (BHR) issues relate to land, environment, participation, consultation and access to information, as well as benefit sharing.

According to ACCA – the main civil society network on BHR issues in the region – regulatory gaps contribute to the challenges that further exacerbate lack of workable remedies. To push the debate forward, ACCA commissioned two reports on access to remedy and free prior and informed consent (forthcoming). These reports will contribute to publicly available research by African scholars, an objective shared by CALs. A lot remains to be done to build the capacity of actors, including governments, for them to play their oversight role better, and in raising awareness among impacted communities to demand respect for their rights and accountability for harm.

The African region member of the United Nations Working Group on Business and Human Rights (UNWG) indicated that the UNWG has observed that there is increasing awareness of the United Nations Guiding Principles on Business and Human Rights (UNGPs) as the main standard of reference for business and human rights. In addition, there is increased uptake of the UNGPs within other UN treaty body mechanisms – e.g. through general comments by the UN Committee on the Rights of the Child (UNCRC) and by the Committee on Economic Social and Cultural Rights (CESCR) – signalling greater coherence within the UN human rights system on state obligations and the responsibility of businesses. The Universal Periodic Review (UPR) process is also playing an important role in the advancement of the UNGPs. States are making BHR-related recommendations that are triggering positive action – e.g. the recommendation on developing a National Action Plan (NAP) on BHR made by Norway to Kenya during the latter's second UPR cycle contributed to the commencement of the NAP process in

Kenya. Other UN special procedures are also linking more to BHR, e.g. General Comment No. 16 (2013) of UNCR<sup>2</sup> and General Comment No. 24 (2016) of CESCR<sup>3</sup>.

Since its inception, the UNWG has advocated for the implementation of the UNGPs by encouraging countries to draft NAPs, and by designating priority issues or themes for further unpacking, with contributions from practitioners, experts, and other stakeholders including impacted groups. Some current areas of focus include gender<sup>4</sup> and access to remedy, with plans to add human rights defenders and the Sustainable Development Goals (SDGs).

## **1.2. STATUS OF UNGPS IMPLEMENTATION IN THE AFRICAN REGION**

Notwithstanding the progress made, many challenges remain. For example, despite the September 2014 commitment from the African Union (AU) calling on member states to implement the UNGPs, participants observed that it is concerning that the uptake of the UNGPs by African governments remains low, with only Kenya at the NAP drafting stage and commitments to develop a NAP from Zambia and Tanzania. The planned visit by the UNWG to Kenya in July 2018, the second on the continent after Ghana, may give new impetus to the uptake of the UNGPs in the region. Country visits are important in raising the profile of BHR, and because they bring different stakeholders together, they can be the start of national initiatives aimed at improving policy and practice long after the conclusion of the visit. Panellists urged that moving forward; more traction from all players will be needed.

## **1.3. AFRICA'S INVOLVEMENT IN THE DISCUSSIONS ON A BINDING TREATY**

In June 2014, the Human Rights Council (HRC) adopted Resolution 26/9 by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises". The Intergovernmental Working Group (IGWG) has had three sessions to date, and has produced draft elements of the proposed treaty. A fourth session is scheduled for October 2018 during which a draft treaty text should be presented. South Africa and Ecuador are leading the process and a lot of progress has

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<sup>2</sup> [https://www.unicef.org/csr/css/CRC\\_General\\_Comment\\_ENGLISH\\_26112013.pdf](https://www.unicef.org/csr/css/CRC_General_Comment_ENGLISH_26112013.pdf)

<sup>3</sup>

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en)

<sup>4</sup> The UNWG will host workshops on gender, and that of the African region will be later in the year

been made on the substance and the process. It was noted that it is positive that the UNWG and the IGWG are seeking collaboration with the view that a treaty could complement the UNGPs, and in particular fill some of the existing gaps such as those associated with extraterritoriality.

According to the panellists, the low level of engagement by African countries has been a concern: some African civil society organizations (CSOs) have been participating in the sessions, less so governments and NHRIs. Workshop participants were informed that there is an initiative at the African Commission regional level to discuss and put forward a common position on the treaty. Participants agreed that national level discussions should precede to build greater understanding and ownership of BHR issues. Additionally, some participants were of the view that CSOs should take the initiative to engage robustly with the treaty discussions even as they continue to push for the implementation of the UNGPs through NAPs.

Participants heard that within the African Commission, the Working Group on Extractives, Environment and Human Rights (WG) has prioritized BHR issues in relation to the extractives sector. The WG's mission includes addressing key impacts of extractives and undertaking stakeholder engagement to obtain insights on key issues. The WG has developed draft state reporting guidelines for Articles 21 and 24 of the African Charter on Human and People's Rights (ACHPR) that guide how state parties should provide information in their Periodic Reports to the African Commission generally and with specific reference to the operations of extractive industries in their territories in particular. Noting the linkages between the mandate of this WG and other regional mechanisms, there are ongoing discussions among the different mechanisms on creating synergies and closer collaboration. Likewise, the WG is also working towards creating more synergy with the UNWG.

Additionally, the AU has also developed a draft Policy Framework on Business and Human Rights modelled on the UNGPs that is yet to be adopted by the regional body.

#### **1.4. BHR IN AFRICAN NATIONAL HUMAN RIGHTS INSTITUTIONS**

NHRIs in the African region are organized under the umbrella organization Network for African National Human Rights Institutions (NANHRI). Following the 2010 Edinburgh Declaration on the role of NHRIs in addressing BHR, NANHRI held its first conference on BHR in October 2011, which led to the adoption of the recommendations on the plan of action on BHR<sup>5</sup>. NHRIs identified four priority issues: labour, land, environment, and

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<sup>5</sup> The Recommendations and Plan of Action on Business and Human Rights can be found at, <http://www.nanhri.org/our-work/thematic-areas/business-human-rights/>

capacity building, in addition to establishing focal points. Many NHRIs in the region now work on BHR, though a lot remains to be done.

One example of such work is the 2012 Bumbuna Inquiry into mining by the Human Rights Commission of Sierra Leone<sup>6</sup>. NHRIs have also been leading and supporting efforts in the implementation of the UNGPs by advocating for NAPs. For instance, in 2016 the Zambia Human Rights Commission in collaboration with DIHR published a National Baseline Assessment (NBA) that focused on the Government's efforts in implementing the UNGPs and that made recommendations on how to close the identified gaps, including by adopting a NAP<sup>7</sup>.

## **2. PROGRESS TOWARDS UNGPS IMPLEMENTATION IN THE REGION: TAKING STOCK OF NATIONAL BASELINE ASSESSMENTS AND NATIONAL ACTION PLAN PROCESSES**

This session had participants from Kenya, Tanzania and Zambia sharing their experiences on NAP and NBA processes.

These two processes are different but related. An NBA is a facts-based analysis on the implementation of the UNGPs at a given time; it should cover all three pillars of the UNGPs. CSOs, NHRIs or government bodies can conduct an NBA.

A NAP is a forward-looking plan in which a state articulates the priorities and actions that it will adopt to support the implementation of the UNGPs. Where a NAP cannot cover all the gaps or issues identified in an NBA, there may be a need to prioritize by theme or sector or in another way suitable in a particular context. It is important that BHR NAPs connect to other action plans e.g. those on human rights, or other processes, e.g. the SDGs, as this can improve implementation and make sure they complement other government initiatives. Existing guidance on NAPs recommends that they should be firmly based on the UNGPs framework<sup>8</sup>.

Both the NBA and NAP are based on the UNGPs and complement one another; an NBA identifies the gaps and a NAP sets the priorities for closing the gaps. Even where there

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<sup>6</sup> <http://www.hrcsl.org/PDF/Resources/HRCSL%20Bubuna%20Public%20Inquiry%20Report.pdf>

<sup>7</sup> <https://www.humanrights.dk/projects/national-baseline-assessment-business-human-rights-zambia>

<sup>8</sup> UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights, December 2014, [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf), International Corporate Accountability Roundtable (ICAR) and DIHR, National Action Plans on Business and Human Rights Toolkit, 2017

is no government commitment for a NAP, an NBA can be useful to initiate and build a dialogue on BHR in the country context.

## **2.1. ZAMBIA**

In 2016, an NBA for Zambia was published by the Zambia Human Rights Commission (ZHRC), which undertook the study in 2015/2016, with technical support from DIHR. Representatives of ZHRC shared with workshop participants that part of the push to conduct the NBA was created by a trend analysis of the complaints received by ZHRC, which revealed that over two-thirds of them related to labour issues in the private as well as the public sector. ZHRC wanted to inquire into these complaints and make recommendations as to how they could be addressed. The process involved a number of steps described below:

- i. Preparatory phase: assessment of availability of necessary resources to undertake the NBA, such as internal technical capacity and funds. Properly structured NBAs involve both primary and secondary research and can be quite expensive. Often, strong partnerships can help bridge the gap.
- ii. Definition of scope of the NBA: consideration of which sector or issue to cover. If the NBA is NHRI- or CSO-lead, there is a need to consider whether it is intended to be used to advocate for a NAP, in which case the government should be able to rely on it.
- iii. Involvement of stakeholders: stakeholder mapping and planning for stakeholder participation, which includes their views on their role in the process. It is important that the NBA has ownership from a wide variety of stakeholders including government. Inclusion of government contributes to creating ownership of the results.
- iv. Definition of methodology and tools to undertake the NBA: the UNWG has developed guidance on NAPs<sup>9</sup>. Likewise, DIHR and ICAR have developed a toolkit that includes guidance on conducting NBAs that is aligned to that of the UNWG<sup>10</sup>.

Dissemination: remember the NBA can be a catalyst to action so have a strategy that will raise the profile of the report. For example, in the case of Zambia during the 3<sup>rd</sup> UPR process in November 2017, a recommendation was made to the Government to develop a NAP based on the NBA, which was supported<sup>11</sup>.

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<sup>9</sup> [https://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](https://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf)

<sup>10</sup> <https://www.humanrights.dk/projects/national-action-plans-business-human-rights>

<sup>11</sup> [https://www.upr-info.org/sites/default/files/document/zambia/session\\_28\\_-\\_november\\_2017/responses\\_to\\_recommendations\\_upr28\\_zambia.pdf](https://www.upr-info.org/sites/default/files/document/zambia/session_28_-_november_2017/responses_to_recommendations_upr28_zambia.pdf)

## 2.2. KENYA

Kenya is currently at the NAP drafting stage, having commenced the process in April 2016 based on a UPR recommendation in 2015. The NAP will not only guide the implementation of the UNGPs but also that of Article 20 of the Constitution of Kenya (2010) which states that the Bill of Rights binds all persons, including corporate entities. Kenya deploys a consultative UPR process bringing together the state, civil society and other interest groups to discuss issues and propose recommendations prior to the formal process before the HRC. Thus, the recommendation for a NAP was known beforehand and a concept paper detailing how it would be undertaken had already been prepared and presented to the Attorney General.

From there the process has followed the steps laid down in the existing guidance for NAP development.

- i. Formal statement by the Government.
- ii. Establishment of a steering committee: the UNWG and other partners conducted a training for committee members on BHR and the relevant human rights frameworks.
- iii. Publication of NBA: development of the NBA was undertaken by a CSO but adopted by the NAP Steering Committee. Additionally, the CSO also produced a report on the impacts of business on human rights which together with the NBA helped to define the priority areas.
- iv. Stakeholder mapping and regional consultation: initial briefing of the major stakeholder groups was done at which they helped identify other stakeholder groups that needed to be included. Eight regional consultations in different parts of the country have been undertaken. There have also been consultations with subject matter experts, including discussions on integrating the SDGs and the country's economic blueprint, Kenya Vision 2030. KNCHR maintains a dedicated NAP website<sup>12</sup> with all the details and documents on the process. The NAP process is triggering changes, e.g. in Turkana the communities are engaging the oil and gas exploration companies and government about their concerns around the oil exploration project.

The process has not been without challenges some of which include:

- i. 98% businesses are SMEs and they are quite informal making it difficult to engage with them.
- ii. Inadequate financial and technical expertise: this was overcome by planning ahead and making use of partnerships

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<sup>12</sup> [www.nap.knchr.org](http://www.nap.knchr.org)

- iii. Inconsistent government leadership: consistency gives confidence that the NAP will be implemented.
- iv. Gaining trust of CSOs: through continuous engagement, government has shown commitment to finding common ground to work with CSOs for the success of the NAP.

### **2.3. TANZANIA**

An NBA for Tanzania was published in late 2017 and is a result of collaborative efforts between CHRAGG, which led the process, and BHRT and DIHR, supporting the process. The NBA development is a reflection of the Government's commitment to 'develop policies on business and human rights'<sup>13</sup> contained in the National Human Rights Action Plan (whose lead implementing department is the Attorney General's chambers). In the Action Plan, CHRAGG is tasked with providing leadership for advocacy on BHR issues<sup>14</sup> and it is in pursuance to that, that the NBA, as a prerequisite to a NAP, was developed. As the lead institution in the development of the NBA, CHRAGG shared the following lessons:

- i. Set aside ample time: consultations with stakeholders and drafting took one year.
- ii. It is possible to include new approaches: the NBA includes case studies in three sectors – extractive industries, tourism and agribusiness – that help further inform the information collected through documentary reviews. Undertaking the case studies was useful for engaging directly with impacted communities and authorities around those communities. Additional consultations were held with key government organizations, companies, and businesses through their umbrella organizations.
- iii. Lack of trust impedes engagement: CHRAGG opines that the insufficient cooperation from business was because; business and CHRAGG have not worked together in the past, which made businesses cautious.
- iv. Inadequate awareness about the UNGPs among stakeholders: awareness about rights and responsibilities gives people a framework against which to measure performance.
- v. Related to the above, field research may yield too much data that has to be analysed and condensed into a workable document e.g. the NBA had to condense nine months of work without leaving out important details.

A common gap noted in all the three country experiences is the inadequate engagement with parliament on BHR issues. The role of parliament in law and policymaking makes it

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<sup>13</sup> [http://www.chragg.go.tz/docs/nhrap/NHRAP\\_Final\\_December\\_2013.pdf](http://www.chragg.go.tz/docs/nhrap/NHRAP_Final_December_2013.pdf)

<sup>14</sup> Ibid

a key institution in the push for the adoption of NAPs and any other regulatory frameworks that have an impact on business conduct. Additionally, the challenge of having an engaged private sector remains and it is important to strategize on how to engage businesses. Participants agreed that creating alliances with the United Nations Global Compact (UNGC) national offices and business membership organizations is a strategy to consider in overcoming this gap.

#### 2.4. HOW CAN NAPs ADDRESS SOME OF THE BHR CHALLENGES?

NAPs are not a panacea for all BHR challenges. However, there are a number of ways through which a properly structured NAP can address some of the challenges. Below are some highlights of the views of workshop participants on a number of given themes.

<b>Theme</b>	<b>Issues to be addressed</b>	<b>Strategies</b>	<b>Opportunities for cross-country/regional collaboration</b>
<b>Gender</b>	<ul style="list-style-type: none"> <li>- Community impacts from business activities not taking into account gender issues</li> </ul>	<ul style="list-style-type: none"> <li>- Gender disaggregated consultations</li> <li>- Gender specific grievance mechanisms</li> </ul>	<ul style="list-style-type: none"> <li>- Get all groups at the table to discuss gender dynamics</li> <li>- Link to the SDG 5 on gender equality</li> </ul>
<b>Environment and land</b>	<ul style="list-style-type: none"> <li>- Multiple land tenure systems</li> <li>- Lack of resettlement and compensation frameworks in many jurisdictions in the region</li> </ul>	<ul style="list-style-type: none"> <li>- Harmonization of formal and informal land tenure systems especially the recognition in law of the latter</li> <li>- Advocate for resettlement and compensation framework</li> </ul>	<ul style="list-style-type: none"> <li>- Sharing lessons and developing joint approaches between different countries</li> <li>- Monitor how companies are dealing with land and resettlement issues and advocate that companies working cross border adopt similar approach</li> </ul>
<b>Access to information</b>	<ul style="list-style-type: none"> <li>- Non-transparency of contracts in practice, despite many legal frameworks now requiring this</li> </ul>	<ul style="list-style-type: none"> <li>- Continue advocacy for contract transparency in law and practice</li> </ul>	<ul style="list-style-type: none"> <li>- Build cross-border networks</li> </ul>
<b>Bilateral Investment</b>	<ul style="list-style-type: none"> <li>- No reference to human rights in BITs</li> </ul>	<ul style="list-style-type: none"> <li>- Include human rights responsibilities of</li> </ul>	<ul style="list-style-type: none"> <li>- Increased collaboration</li> </ul>

<b>Theme</b>	<b>Issues to be addressed</b>	<b>Strategies</b>	<b>Opportunities for cross-country/regional collaboration</b>
<b>Treaties (BITs) and state-owned enterprises (SOEs)</b>	<ul style="list-style-type: none"> <li>- Instead of leading by example, SoE's use their links with state as shield from accountability</li> </ul>	<ul style="list-style-type: none"> <li>investors in future BITs</li> <li>- Bring action against SoEs that do not respect human rights</li> </ul>	<ul style="list-style-type: none"> <li>between north-south NGOs on the issue of BITs and SoEs especially where the latter have investment from the north</li> </ul>
<b>Public service delivery</b>	<ul style="list-style-type: none"> <li>- Commercialization of basic public services without following public procurement procedures</li> <li>- No accountability on part of service providers</li> </ul>	<ul style="list-style-type: none"> <li>- Advocate for a culture of transparency</li> <li>- Empower users and communities</li> </ul>	<ul style="list-style-type: none"> <li>- Increased research making the human rights link – this can be through north-south collaboration</li> <li>- Build capacity of the media</li> </ul>
<b>Access to remedy: Judicial</b>	<ul style="list-style-type: none"> <li>- Challenges in accessing courts due to physical and procedural factors</li> <li>- Lack of representation for affected communities</li> <li>- African Court of Human and People's Rights has limited jurisdiction – only 8 countries have submitted to its jurisdiction</li> </ul>	<ul style="list-style-type: none"> <li>- Include specific actions on judicial remedy in NAPs</li> <li>- Increase funding to the judiciary</li> <li>- Increased funding to pro bono and paralegal schemes</li> </ul>	<ul style="list-style-type: none"> <li>- Advocacy for more states to recognize the competency of the African Court</li> <li>- Sharing lessons learned about effective strategies for accessing remedy through national judicial systems in various countries</li> </ul>
<b>Access to remedy: Non-judicial</b>	<ul style="list-style-type: none"> <li>- Imbalance of power between company as owner of mechanism and communities</li> <li>- Lack of awareness of regional and international state-based non-judicial grievance mechanisms</li> </ul>	<ul style="list-style-type: none"> <li>- CSOs to monitor effectiveness of operational level mechanisms based on UNGPs criteria</li> <li>- CSOs to raise awareness on all available NJMs</li> <li>- Include specific actions on non-</li> </ul>	<ul style="list-style-type: none"> <li>- CSOs can collaborate through international remedy networks active in the region such as OECD Watch (focus on OECD Guidelines/NCPs), the International Advocates Working Group (IAWG, focus on development</li> </ul>

Theme	Issues to be addressed	Strategies	Opportunities for cross-country/regional collaboration
	<ul style="list-style-type: none"> <li>- Lack of enforcement power – no sanctions or consequences for companies/ governments that do not participate or do not comply with rulings</li> </ul>	<ul style="list-style-type: none"> <li>- judicial remedy in NAPs</li> <li>- NAPs can recommend governments give more “teeth” to NJGMs so there are consequences for non-compliance</li> </ul>	<ul style="list-style-type: none"> <li>- finance), and the African Coalition for Corporate Accountability (ACCA, focus on remedy generally)</li> </ul>

### 3. IMPROVING ACCESS TO REMEDY

The discussions on access to remedy were held in two parts. In the first, participants discussed barriers to remedies and strategies to overcome them, and the second was a panel presentation highlighting different grievance mechanisms. This Panel comprised representatives from the following institutions: UNWG, African Commission WG on Extractives, Environment and Human Rights, KNCHR, African Court on Human Rights, Compliance Advisor/Ombudsman (CAO) and SOMO. The panel sought to strengthen participants’ knowledge on some of the available grievance mechanisms.

#### 3.1. BARRIERS TO ACCESSING REMEDIES

##### Barriers to judicial and non-judicial mechanisms

For this, session participants reflected on the effectiveness and barriers to existing judicial and non-judicial remedy mechanisms. Additionally, they suggested some strategies for overcoming the shortcomings.

Country/Barriers	Judicial	Non-Judicial
<b>Zambia</b>	<ul style="list-style-type: none"> <li>- Gaps in the law</li> <li>- Low awareness on rights and avenues for remedy</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of impartiality of company led operational-level grievance mechanisms</li> <li>- Lack of awareness of regional and international non-judicial grievance mechanisms</li> <li>- Lack of enforcement of decisions/settlements</li> </ul>

<b>Country/Barriers</b>	<b>Judicial</b>	<b>Non-Judicial</b>
<b>Tanzania</b>	<ul style="list-style-type: none"> <li>- Case backlog</li> <li>- Corruption</li> <li>- Low awareness of rights</li> <li>- Few public interest cases as a result of low funding for legal aid</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of impartiality of company led operational-level grievance mechanisms</li> <li>- Lack of awareness of regional and international non-judicial grievance mechanisms</li> <li>- Lack of enforcement of decisions/settlements</li> </ul>
<b>Mozambique</b>	<ul style="list-style-type: none"> <li>- Lack of subject matter expertise e.g. on informal mining</li> <li>- Cost of accessing court is high and there are few pro bono lawyers of paralegal</li> <li>- Few of reprisals from the state</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of impartiality of company led operational-level grievance mechanisms</li> <li>- Lack of awareness of regional and international non-judicial grievance mechanisms</li> <li>- Lack of enforcement of decisions/settlements</li> </ul>
<b>Kenya</b>	<ul style="list-style-type: none"> <li>- Case backlog</li> <li>- Inadequate funding of the judiciary</li> <li>- Lack of subject matter expertise including in the judiciary</li> <li>- Complexity of legal system a barrier especially for rural communities</li> </ul>	<ul style="list-style-type: none"> <li>- Lack of impartiality of company led operational-level grievance mechanisms</li> <li>- Lack of awareness of regional and international non-judicial grievance mechanisms</li> <li>- Lack of enforcement of decisions/settlements</li> </ul>
<b>African Court on Human and People's Rights</b>	<ul style="list-style-type: none"> <li>- A narrow jurisdiction: only 8 countries recognise the court</li> <li>- Lack of resources</li> <li>- Lack of legal aid to enable victims access court</li> <li>- Lack of enforcement</li> </ul>	
<b>African Commission on Human and Peoples' Rights</b>		<ul style="list-style-type: none"> <li>- Lack of awareness</li> <li>- Lack of enforcement of decisions/settlements</li> </ul>
<b>National Contact Points (NCPs) for the OECD Guidelines</b>		<ul style="list-style-type: none"> <li>- Lack of awareness</li> <li>- Lack of enforcement of decisions/settlements</li> </ul>
<b>Compliance Advisor/Ombudsman (CAO)</b>		<ul style="list-style-type: none"> <li>- Lack of awareness</li> <li>- Lack of enforcement of decisions/settlements</li> </ul>

### Strategies for overcoming the barriers

- Review laws to address gaps
- Decentralization of courts to ease physical accessibility
- Need to generate more public revenue to fund courts/judiciary – NAP could address this
- Training on UNGPs and BHR – protect, respect, remedy – for judiciary and civil servants and other stakeholders
- Advocate for more funding for judiciary
- For countries formulating NAPs include a strong proposals on enhancing access to remedies
- Consider traditional forms of alternative dispute resolution and build them in to judicial and non-judicial
- Mechanisms

### **3.2. HOW THEY WORK: FOCUS ON SELECT REMEDY MECHANISMS**

In introducing the discussion, the panellists made the following observations.

- Of the three pillars of the UNGPs, Pillar 3 on access to remedy is the least implemented, yet the question of remedy is what dominates many BHR conversations.
- Pillar 3 does not provide remedy, only mechanisms towards remedy. The remedies themselves predate the UNGPs: what Pillar 3 does is restate the importance of remedies for harms caused by business, categorize the different mechanisms available, and provide criteria for assessing the effectiveness of the mechanisms.
- Pillar 3 is an integral part of pillars 1 and 2 that are constructed as a preventative. That is, in Pillar 1 states must prevent harm from third parties and in Pillar 2, companies are called upon to undertake due diligence and prevent or redress issues identified. In this way, remedy is not only under Pillar 3 but built into the other two pillars.
- There is a bouquet of options in terms of the different remedy mechanisms available. What is applicable will depend on the specific situation and what the rights-holder views as effective. It is also important that everyone – rights-holders, duty-bearers, human rights defenders and CSOs – create awareness on remedy.

The section below highlights a few of the available mechanisms.

- National Human Rights Institutions: national law defines each NHRI's mandate. The Global Alliance for National Human Rights Institutions (GANHRI) describes the general role of NHRIs as "to address discrimination in all its forms, as well as to

promote the protection of civil, political, economic, social and cultural rights”<sup>15</sup>. Adding that the “core functions of NHRIs include complaint handling; human rights education; and making recommendations on law reform”<sup>16</sup>. KNCHR’s mandate includes undertaking public inquiries, which it has used to inquire into cases of systemic violations. NHRIs apply national human rights standards but where there are gaps they use international human rights standards and call on the state to amend its laws to conform to the latter. For more information, visit <https://nhri.ohchr.org/EN/Pages/default.aspx>.

- African Court on Human and Peoples’ Rights: is an organ of the AU and its member states. The Protocol on the Establishment of an African Court on Human and Peoples’ Rights was adopted by Member States of the then Organization of African Unity (OAU) in June 1998. It came into force on 25 January 2004. The Court issues opinions on contentious issues as well as advisory opinions wherever sought by individuals, states or CSOs recognised by the AU. For more information, visit <http://www.african-court.org/en/>.
- African Commission on Human and Peoples’ Rights: is established under the African Charter and has the mandate to promote, protect and interpret Charter rights. It receives individual complaints against states from individuals or CSOs. Anyone (individual or organization) can submit a complaint on behalf of an African victim. The African Charter on Human and Peoples’ Rights guides both the African Court and the African Commission. Under the Charter, group rights are also justiciable, as has been seen in the cases of Endorois and Ogiek communities from Kenya. In terms of remedies, the African Commission and the African Court can issue all types of orders, compensation, restitution and so forth, but the challenge of enforcement remains. For more information, visit <http://www.achpr.org/>.
- Compliance Advisor/Ombudsman (CAO): is the independent recourse mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA). Individuals or groups can submit complaints if they are affected, or think they are affected by, a company receiving financial support from IFC or MIGA. NGOs can also submit complaints but they need to prove they have a mandate from affected people. While there is a complaint letter template available online, the complaint does not have to be submitted using only that specific format and no proof of harm has to be presented from the outset, just express the concerns specific to the project. The standard of assessment is the IFC Performance

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<sup>15</sup> <https://nhri.ohchr.org/EN/Pages/default.aspx>

<sup>16</sup> <https://nhri.ohchr.org/EN/Pages/default.aspx>

Standards<sup>17</sup>, which concern environmental and sustainability issues. For more information, visit <http://www.cao-ombudsman.org/>.

- UNWG: technically the UNWG is not mandated to receive and address communications like other UN human rights special procedures. However, CSOs are sharing specific instances or cases with the UNWG, which then in turn liaises with other special mechanisms that can bring the matters to the attention of concerned governments. As of 1 August 2017, there are 56 UN mechanisms<sup>18</sup>; these can also be used for BHR-related violations where the issues are relevant. Under the UN mechanisms respondents are states only; international human rights law is restrictive in this regard. The framework of reference or standard of assessment are the UN human rights treaties. The UNGPs do not create new obligations, but instead provide authoritative guidance on how treaty obligations should be implemented in the context of business-related human rights abuses, and what the responsibility is of companies when it comes to human rights. For more information, visit [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).
- National Contact Points (NCP) of the Organisation for Economic Cooperation and Development (OECD): OECD member countries are required to have in place an NCP that receives complaints relating to projects and activities implemented by companies whose home states are OECD countries. Any individual or organisation can bring a case (specific instance) against a company where the company is operating or based, regarding the company's operations anywhere in the world. The NCP can also be used pre-emptively, to address risks and potential impacts. The main users have been NGOs and labour unions. The NCP's framework of assessment is the OECD Guidelines. NCPs provide problem solving through mediation and do not make orders for compensation. However, this does not mean that compensation cannot be agreed upon within a mediated settlement. For more information, visit <http://mneguidelines.oecd.org/ncps/>.

### 3.3. CASE STUDIES

A presentation of two on-going cases of alleged human rights violations by companies in Eastern Africa illustrated some of the factors that hinder access to remedy:

- Lack of knowledge by impacted communities of their rights and of the responsibilities of businesses for human rights

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<sup>17</sup> For more on the Performance Standards, see, [https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES)

<sup>18</sup> <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

- Lack of clarity on beneficial ownership thus victims do not know who to pursue
- Time lapse – time barred
- The requirement to exhaust local remedies, prior to engaging the international human rights regime
- Fear of reprisals on part of the victims or CSOs working with them
- Lack of information or knowledge on the existing grievance mechanisms
- Power differentials between the communities and companies
- Some cases require scientific evidence that is difficult for communities and CSOs assisting them to collect
- Lack of capacity in documentation of impacts

For each of the cases presented, a number of opportunities for further action were suggested:

#### Agriculture case, Kenya

- Involve the government in particular the AGs office and discussions with KNCHR who is already aware of the case
- Communication to the UNWG and other special rapporteurs
- Leverage shareholders to hold company to account; or hold shareholders to account for their connection to the HR impact

#### Uranium case, Tanzania

- Submit formal complaint to CHRAGG
- Use media to build pressure on those powerful actors that benefit from the status quo
- Leverage shareholders to hold company to account; or hold shareholders to account for their connection to the HR impact
- Direct engagement with the company when problems and demands are well formulated

## **4. CONCLUSION**

Many communities around the continent continue to experience negative impacts of business activities across all sectors. Remedies, however, remain rare for a number of factors including lack of information rights, responsibilities of business, and on available mechanisms, ineffective judicial systems, lack of independence of operational-level grievance mechanisms, lack of enforcement of decisions and so forth.

Furthermore, African countries seem to be lagging behind in formulating NAPs for the implementation of the UNGPs, a key step in closing governance gaps. Nevertheless,

African NHRIs and CSOs are taking on this challenge. Through collaborative initiatives with international organizations, they are assessing the status of UNGPs implementation and recommending action by governments, investigating systemic and individual cases of harm and seeking avenues for redress including exploiting the mandates of the NHRIs. A lot remains to be done and projects such as this one are contributing significantly in shaping BHR policy and practice.

## ANNEX 1



### WORKSHOP ON BUSINESS AND HUMAN RIGHTS: ADDRESSING HUMAN RIGHTS IMPACTS OF BUSINESS IN EASTERN AND SOUTHERN AFRICA

Venue: HOLIDAY INN, 10-11 April 2018, DAR ES SALAAM, TANZANIA

#### Program

##### 10 April: Business and Human Rights frameworks in Eastern and Southern Africa

9:00	<b>Word of welcome and opening</b> <ul style="list-style-type: none"> <li>➤ Bernard Patrice Marcelline, Commission for Human Rights and Good Governance, Tanzania</li> </ul>
9:30	<b>Introductory panel: BHR in Eastern and Southern Africa</b> <ul style="list-style-type: none"> <li>➤ Prof. Michael Addo, UN Working Group on Business and Human Rights</li> <li>➤ Erick Kassongo, African Commission on Human and Peoples' Rights Working Group on Extractive Industries, Environment and Human Rights Violations</li> <li>➤ Wandisa Phama, Centre for Applied Legal Studies</li> <li>➤ Pasience Mlowe, African Coalition for Corporate Accountability</li> <li>➤ Marie Ramtu, Network of African National Human Rights Institutions</li> </ul>
11:00	<i>Coffee break</i>
11:15	<b>Presentations of lessons learned with BHR baseline processes and NAP development</b> <ul style="list-style-type: none"> <li>➤ Maryann Njau-Kimani, Kenyan Department of Justice</li> <li>➤ Foster Hamuyube, Zambia Human Rights Commission</li> <li>➤ Constantine Mugusi, Commission for Human Rights and Good Governance, Tanzania</li> </ul>
12:45	<i>Lunch break</i>
14:00	<b>Presentation: African Union Draft Policy Framework on Business and Human Rights</b> <ul style="list-style-type: none"> <li>➤ Aderomola Adeola, Independent consultant on the AU Policy Framework on Business and Human Rights</li> </ul>
15:15	<i>Coffee break</i>
15:30	<b>Small group discussions: cross-country exchange on key themes in national action plans</b> <ul style="list-style-type: none"> <li>➤ Key themes include: environment &amp; land, corporate and tax law, investment and trade agreements, state-owned enterprises, public service delivery, gender and the rights of women and girls, access to judicial and non-judicial remedy</li> </ul>
17:00	<b>Close of day 1</b>

## 11 April: Improving Access to Remedy in Eastern and Southern Africa

9:00	<b>Recap of Day 1</b>
9:10	<p><b>Introductory panel: available international and regional remedy mechanisms relevant for BHR in Eastern and Southern Africa</b></p> <ul style="list-style-type: none"> <li>➤ Prof. Michael Addo, UN Working Group on Business and Human Rights</li> <li>➤ Prof. Michaelo Hansungule, African Commission on Human and Peoples' Rights Working Group on Extractive Industries, Environment and Human Rights Violations</li> <li>➤ Pasience Mlowe, African Coalition for Corporate Accountability</li> <li>➤ Dr. Zelalem Mogessie Teferra, African Court on Human Rights</li> <li>➤ Andrea Repetto Vargas, Office of the Compliance Advisor Ombudsman</li> <li>➤ James Mwenda, Kenya National Commission on Human Rights</li> <li>➤ Dr. Joseph Wilde-Ramsing, OECD Watch and Centre for Research on Multinational Corporations (SOMO)</li> </ul>
11:00	<i>Coffee break &amp; mechanism market place</i>
11:30	<p><b>The long road to remedy: presentations on challenges for communities to access remedy</b></p> <ul style="list-style-type: none"> <li>➤ Elizabeth Kariuki, Kenyan Human Rights Commission</li> <li>➤ Flaviana Charles, Business and Human Rights Tanzania</li> </ul>
12:00	<b>Group discussions on national level challenges and opportunities for access to remedy</b>
13:00	<i>Lunch break</i>
14:30	<b>Plenary: sharing lessons country by country</b>
15:30	<p><b>Call to action for advancing access to remedy in Africa</b></p> <ul style="list-style-type: none"> <li>➤ Flaviana Charles, Business and Human Rights Tanzania</li> </ul>
15:45	<i>Coffee break</i>
16:00	<b>Action planning for BHR work at the national level</b>
17:00	<b>Close of the workshop</b>