

Presentation on behalf of Centre for Applied Legal Studies, Wits University (CALS) & Partners

to the UN Working Group on Business and Human Rights

Open Consultation on National Action Plans on Business and Human Rights

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Joanne Bauer

*School of International and Public Affairs, Columbia University*

1. I am honored to be here today representing an impressive research team, led by the Centre for Applied Legal Studies (CALS) at Wits University with institutional partners in South Africa and Singapore including: South African Institute for Advanced Constitutional, Public, Human Rights and International Law at the University of Johannesburg (SAIFAC), The Center for Human Rights, University of Pretoria (CHR), Singapore Management University's Asia Business and Rule of Law Programme (SMU), Singapore Compact, and ASEAN CSR Network. As research institutes situated in the Global South working on business and human rights, the CALS/SMU coalition responded to the request for proposals issued by the Working Group and posted on the Business & Human Rights Resource Centre website to develop a National Action Plan template and implementation guide for use by government, business enterprises and civil society. The coalition moved quickly to do so despite the tight deadline, as we were impressed by the emphasis of the Working Group's RFP on a template derived through a consultative process originating in the Global South. We recognized the centrality of the NAPs agenda in the UN Working Group's mandate and the significance of this opportunity to critically examine issues that are underexplored in the global conversation about business and human rights. We are honored to have been selected by the Working Group to undertake this

important project, and are poised to begin as soon as the funds become available.

Due to prior commitments my colleagues from South Africa and Singapore were unable to attend this consultation. I have been involved with the CALS/SMU project since the beginning, having participated in the development of the original concept note. My remarks today draw from conversations with CALS/SMU coalition colleagues as well as preliminary interviews I have conducted with stakeholders in Colombia, Kenya, Myanmar, and the Philippines.

2. The Global South perspective shares many points in common with the Global North. But there may be differences in emphasis and priority. In particular, it is important that National Action Plans give special consideration to the particular challenges of conflict zones, to the disproportionate impact that corporate human rights violations have on women and other vulnerable groups, to public and private security accountability, to protecting and respecting labor rights, and to environmental and natural resource rights, including land acquisition and tenure and property rights.
3. While civil society in Africa and Asia welcomed the Guiding Principles, it is keenly aware of the inadequacy of the Guiding Principles in protecting these rights. At the launch of the African Coalition for Corporate Accountability (ACCA) in Accra last November, participating organizations expressed: “grave concern about the impunity with which companies continue to operate in our jurisdictions in the absence of strong State regulation and enforcement of civil and criminal liability.” In particular, they noted “the distinct and systemic human rights challenges experienced on the African continent: a persistent infringement of collective and individual rights; unregulated exploitation of natural resources; the lack of access to effective remedies; the absence of transparency and effective coherent policies in respect of financial governance; a lack of bargaining power in

contractual negotiations; and unlawful use of force by state and non-state actors.” The pronounced imbalance of power between corporations and civil society, or indeed between multinationals and host states, is a defining feature of the challenges facing Global South countries that receive foreign investment.

4. There is a need to bolster the second pillar by making human rights due diligence mandatory through policies and regulations that make it a precondition for government procurement contracts, export credit licenses, and stock exchange listing, and through the inclusion of human rights obligations of investors in bilateral investment treaties and in the investor-state dispute resolution clauses of those treaties.
5. Moreover, there is a need for legal reforms that strengthen accountability and the remedies pillar to overcome obstacles to justice. It is particularly important that states in the North prevent companies headquartered within their borders from contributing to human rights violations in the countries in which they do business by writing regulations and creating laws that provide for transnational litigation when other avenues are not available. We don't want a reproduction of colonialism, nor to deter the strengthening of these institutions within the Global South. Yet the current institutional realities within the Global South, felt most acutely in conflict and post-conflict societies, makes these actions by Global North states essential.
6. It must be recognized that there are also countries within the Global South that are also home states of companies that operate internationally both within their regions and in other regions of the Global South. These countries share these responsibilities to strengthen their legal and regulatory institutions so that companies from these countries operating internationally know that they will be held to account for their human rights impacts.

7. National Action Plans on business and human rights provide an important opportunity for states in the Global South to address their own governance gaps through a comprehensive, cross-agency business and human rights plan. In developing national action plans in the Global South, there is a need to be particularly sensitive to resource constraints. For this reason a stand-alone National Action Plan on BHR might not be desirable. Instead, it is important to identify appropriate entry points in existing policy for a business and human rights plan. One option is to incorporate business and human rights into a country's existing National Development Plan, which is often required by donors, and for the Planning Agency to take the lead in coordinating the effort, with close monitoring by the national human rights institution and NGOs to ensure that the human rights commitments are realized. A step of this kind would not only be consistent with the UN's post-2015 development agenda, but it would also help to provide the very "policy coherence" that is prescribed by the UN Guiding Principles.
8. The case for integrating development planning and business and human rights planning is bolstered by beliefs, prevalent in much of the Global South, about the role of business in society that depart from the value system that underpins global capital. Countries in both Asia and Africa hold to a strong sense of community, where business is seen as part of society, not apart from it, and as such it needs to be seen as part of the solution to social problems. Here the social responsibility of business is not optional, but mandatory. In South Africa this value system is manifested in the King Code of Corporate Governance, which integrates sustainability together with governance and strategy and is embodied in regulations in South Africa, including as a listing requirement of the Johannesburg Stock Exchange. Moreover, the Constitution recognizes that corporations as juridical persons are bound by fundamental rights, an idea that is

reflected in the new Companies Act. Likewise, in Asia, CSR regulation is a means for some states to advance their commitment to sustainable development. For example, India and Indonesia have enacted CSR legislation that makes it a statutory obligation for businesses to contribute to community development and social welfare. In these cases, “CSR” legislation is used to channel private sector revenues directly into fulfilling the state’s development objectives, such as education, healthcare, and so on. In short, in both contexts the obligations of business are viewed as going beyond simply avoidance of harm and to include an active contribution towards the realization of fundamental rights.

9. Another key process-level consideration is the challenge within many of these countries to create legitimate National Action Plans that are born out of an inclusive process. Too often states in the Global South rebuff the notion of involving NGOs and communities in the policy process, just as civil society sometimes refuses to engage with governments because they see government as colluding with business. For a National Action Plan on business and human rights to have legitimacy, the process must allow for meaningful engagement of NGOs, trade unions, and, where possible, and victims and affected communities.
10. Finally, it is not enough to have a plan – the plan must be implementable and implemented. In Myanmar, for example, international financial institutions are calling on the Myanmar government to “harmonize country safeguard systems” around issues such as land rights, involuntary resettlement, intellectual property protection, environmental and social impacts assessments, and so forth, all of which has produced a whirlwind of policy activity. The government is so pulled and stretched that policy tends to get made with minimal consultation. If asked, the current government, which is in a highly responsive mode, might well agree to develop a NAP for BHR. Yet it would be important to look carefully at the

capacity to implement the plan, let alone whether the plan is well-designed in the first place.

11. One might look to the Philippines, where the Commission on Human Rights has opted for a gradual approach: it has just begun a three-year process of collaborative learning among government, business and civil society as a way of building momentum and creating champions for a NAP for BHR.
12. To counteract the pervasive concern particularly strong in developing countries that creating a National Action Plan on business and human rights will scare away investors, there is a need to continually make the business case for business and human rights national action plans, just as we make the business case for human rights. It is important to strengthen and continually press the argument that markets grow and profits increase in societies that are stable and respect human rights. And yet, while the business case around fundamental rights may be useful in attracting the buy-in of some stakeholders, it must be said that we reject the notion that fundamental rights should be viewed instrumentally; human rights must be respected as being intrinsically valuable.
13. Global North countries have a significant role to play in making the case for a national action plan on business and human rights by developing plans that contain hard commitments that strengthen the second pillar in three ways: 1) By committing to passing legislation that makes mandatory the corporate responsibility to respect for businesses operating both at home and abroad; 2) by ensuring that government officials talk with CEOs about human rights so that business enterprises are fully aware that they must elevate the priority of human rights in their operations; and 3) by creating NAPs that contain hard commitments, clear goals, success criteria, and timelines for completion of action points, as well as an effective monitoring and evaluation procedure that is reviewed regularly and is inclusive of all stakeholders.

14. I will conclude with a note on capacity-building: To address the obstacles to developing and implementing robust national action plans, there is a need to provide funding to improve capacity for all stakeholders to claim their rights and exercise their duties, particularly at the local level. It is commendable that the UK government already has a partnership with Colombia and indicates in their National Action Plan the intention to do more “to implement the UNGPs across member states and internationally” and to “provide help to States wishing to develop their human rights protection mechanisms and reduce barriers to remedy within their jurisdiction.” I understand, Spain, which is expecting to release its National Action Plan in April, just announced a similar plan to offer technical assistance in Latin America. It would be good to see more such initiatives from states. At the same time, we cannot rely on inter-governmental technical assistance and collaboration alone. If the CALS/SMU research team were called upon to help build capacity for states in Africa and Asia to develop and implement plans, it is prepared to do so.

15. Again, we thank the UN Working Group on Business and Human Rights for the opportunity to express these views on the requirements for National Action Plans and their follow up. We look forward to undertaking the consultative process in Africa and Asia to produce a National Action Plan template and implementation guide, a process that will go a long way towards building momentum for National Action Plans in Africa and Asia and promises to yield important lessons for all countries.

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