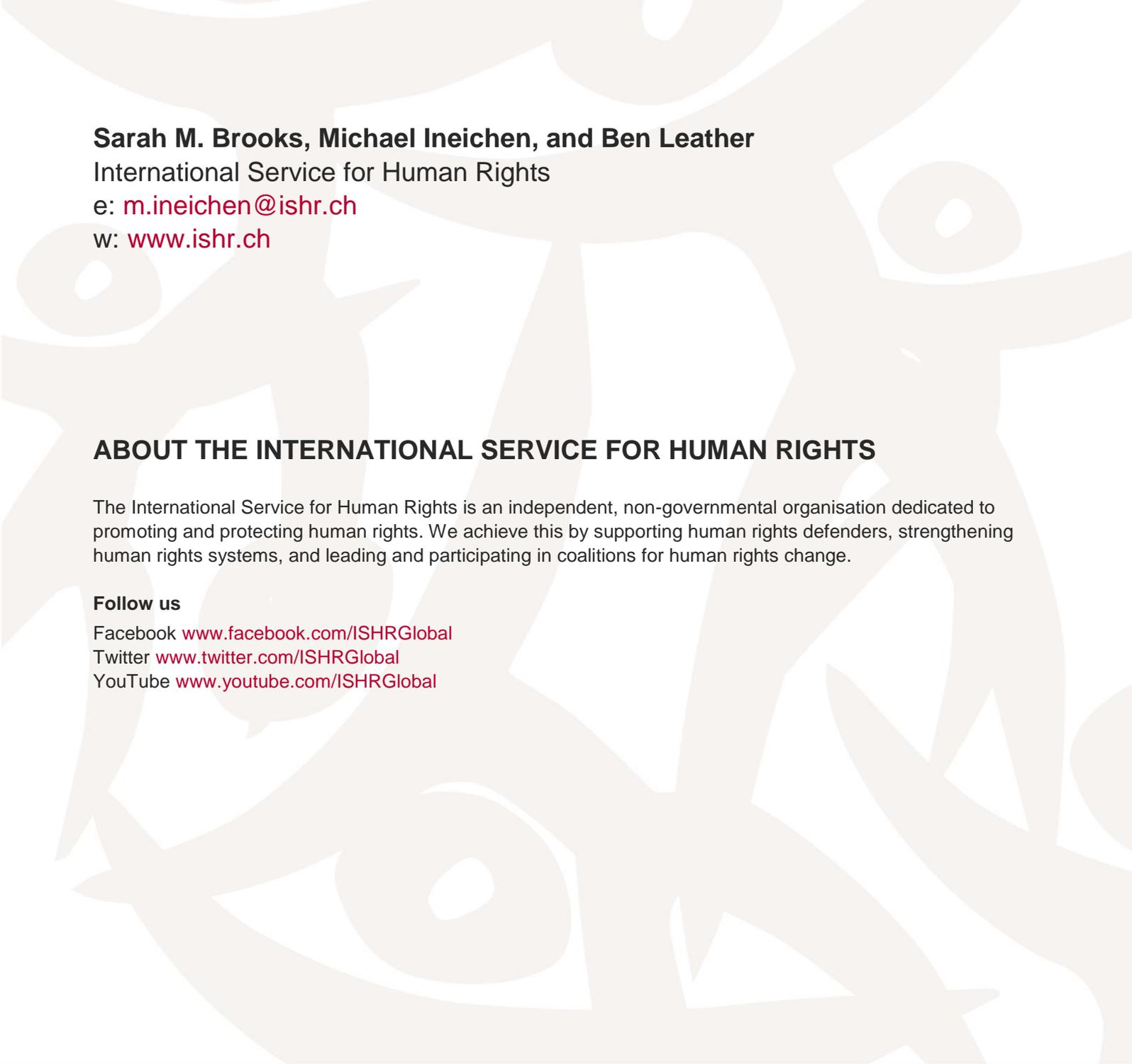


Getting Down to Business: Using the NAP to Support Human Rights Defenders and Advance Corporate Accountability

A Submission to the United States government on the development of a National Action Plan on Responsible Business Conduct

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1. Introduction

The International Service for Human Rights (ISHR) is an independent, non-governmental organisation dedicated to promoting and protecting human rights. We achieve this by supporting human rights defenders, strengthening human rights systems, and leading and participating in coalitions for human rights change.

Human rights defenders play a critical role both in promoting corporate respect for human rights and in identifying, preventing, mitigating and ensuring accountability for corporate human rights abuses. Despite this, around the world, there are reports of increasing attacks, threats and harassment against human rights defenders who advocate for corporate accountability.

ISHR's work with human rights defenders who advocate on business and human rights issues builds and strengthens their capacity to seek corporate accountability for human rights abuses. It also seeks to ensure that such defenders are adequately protected from intimidation, harassment, attacks and restrictions associated with their work.

ISHR is pleased to submit the following recommendations to the U.S. government in the context of their ongoing efforts, announced by President Obama in September 2014, to draft a National Action Plan on Responsible Business Conduct (hereafter, NAP).

2. Opportunities for an Inclusive National Action Plan

NAPs are essential tools for the protection of human rights defenders working on corporate accountability.¹ If done right, the NAP could effectively position the U.S. government to better meet its obligations with regard to the protection of human rights in relation to business (broadly, focused on Pillar I of the UN Guiding Principles on Business and Human Rights), while strengthening elements linked to the obligations of businesses to respect human rights and of both to ensure access to effective remedy (Pillars II and III, respectively).² The U.S. NAP could also result in the formulation of important procedures and models for NAPs undertaken by other countries, as well as benchmarks for future NAP revisions.³

The development of a NAP represents an important opportunity for the U.S. to continue its strong support for the business and human rights agenda and for the protection of civil society and human rights defenders. However, the U.S. government should clearly outline and embrace **general principles** for moving forward with the NAP. It should improve transparency around the elaboration of the NAP; ensure effective resourcing to enable the NAP to be a sustained, "iterative and evolving" process;⁴ and underline the continued commitment at the highest political levels to making the NAP a concrete exercise to protect and promote human rights in the context of business operations, especially for human rights defenders. At minimum, the U.S.

¹ ISHR has engaged both multilaterally and bilaterally in regard to NAPs. See input to the government of Ireland, for example, at http://www.ishr.ch/sites/default/files/article/files/ishr_submission_to_ireland_on_bhr_nap_v2.pdf.

² UN Guiding Principles. Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

³ This applies both to States who have committed to, and to those within which civil society or NHRIs have actively advocated, for the elaboration of a NAP. The list of States can be found [here](#).

⁴ <http://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/>

obligation to protect human rights should include expectations that extend to the conduct of businesses ‘domiciled in their territory and/or jurisdiction’, and that respect for human rights be cascaded ‘throughout their operations.’⁵ From that foundation, this submission outlines recommendations in terms of both process and content.

The U.S. government must ensure that human rights defenders and representatives of affected communities can safely and effectively contribute to the NAP **process**, while also empowering them to deepen engagement with the private sector, without fear of harassment or intimidation. In this regard, ISHR notes the openness of the U.S. government thus far in conducting consultations with domestic stakeholders. Civil society nonetheless continues to have concern with regard to the breadth and depth of the consultations.

In terms of **content**, the final outcomes of the NAP should be in line with the *UN Declaration on Human Rights Defenders*. The U.S. NAP should include commitments on the part of the U.S. government to take measures to ensure protection of and support for defenders working on corporate accountability, both in its foreign policy capacity and in direct relation to its role as a major purchaser of goods and services globally.⁶ The NAP should also bolster the government’s role in ensuring that U.S. businesses respect human rights, both through improving incentives for positive behaviour, and in imposing penalties for violations. Businesses must not be permitted to use the ‘corporate veil’ to avoid complying with human rights obligations or to prevent remedy for victims of business-related human rights abuses. Finally, it should strengthen the ability of defenders to monitor State and corporate obligations and seek accountability for human rights violations and abuses.

3. Getting it Right from the Beginning: Bringing Defenders into the Discussion

As laid out in the Guiding Principles and UN Human Rights Council Resolution 17/4, civil society must have a central role in elaborating, implementing, and monitoring the evolving frameworks around business and human rights, including National Action Plans. The role of human rights defenders in facilitating access to remedy was specifically highlighted in Guiding Principle 18 regarding consultation and human rights impact assessment, the commentary to which states:

“To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.”⁷

However, in many cases that we and our partners have documented, both States and corporations have chosen to forgo their obligations to engage with affected stakeholders and have instead acted to suppress local communities, harass and intimidate community leaders

⁵ UN Guiding Principle 2.

⁶ <http://www.ishr.ch/news/human-rights-defenders-must-be-core-developing-business-and-human-rights-agendas>

⁷ UN Guiding Principle 18.

and human rights activists, and subject human rights defenders to intimidation, detention, arrest, and physical violence.⁸

Defenders must be central to the process of elaborating a National Action Plan. In that regard, ISHR recommends that the U.S. government take the following steps:

- **Expand the scope of consultations on the NAP process to reach human rights defenders, grassroots activists, and marginalised communities both domestically and internationally.**

Since the announcement of the NAP, the level of engagement within and across the U.S. by government officials, with the support of civil society, academia, and the business community, has been very strong. However, there seems to be a logical disconnect between the breadth of domestic consultations, on the one hand, and the explicitly-stated intent to focus the NAP on the conduct of U.S. businesses overseas on the other.

The U.S. government should do more to engage human rights defenders and representatives of communities affected by business operations overseas. This could take the form of roundtables, surveys, panel sessions, or simply broadening the scope of the invitation to submit (e.g., publicising through Embassy websites and social media, and translating the request for input and accepting documents in languages other than English). It will be especially important to target outreach efforts and to obtain input from defenders working in countries in transition and in countries or sectors where multinational corporations domiciled in the U.S. exercise a significant degree of political or economic influence.

In order to understand the challenges faced by these individuals and communities, and thus to craft a credible NAP that corresponds to key elements of the UN Guiding Principles and the OECD Guidelines on Multinational Enterprises, further consultation by the U.S. government is essential.

- **Facilitate civil society participation in the NAP process by improving transparency, accountability, and timeliness of communications.**

The NAP is an opportunity for the U.S. to hear directly from defenders and communities about the challenges they face in ensuring that rights are respected. However, to engage effectively defenders need tools, namely a strong sense of where the NAP process is going and regular updates related to outcomes. The U.S. government should ensure that civil society can review the draft NAP and should commit to taking their inputs under consideration in good faith.⁹ Maximum transparency and public accessibility, for example through regular updating of a public, USG-hosted site, will also help to empower those disempowered groups that have an interest in the outcome, but lack the ability or resources to maintain regular contact throughout the process.

⁸ See, for example, recent reporting from ISHR (<http://www.ishr.ch/news/corporate-accountability-defenders-central-africa-troublemakers-offer-solutions>); UN experts (A/HRC/29/25, available at <http://freeassembly.net/rapporteurreports/natural-resources/>, or A/HRC/28/63, available at <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/AnnualReports.aspx>); [Global Witness](#); [PBI](#); and [HRW](#).

⁹ See also the DIHR-ICAR National Action Plan Toolkit, Sec. 6.2.2-4. <http://icar.ngo/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>.

- **Outline clear roles and protections for human rights defenders at all points in the NAP process.**

In line with the interest of the U.S. government to see the NAP as an ‘iterative process,’ the NAP must clearly identify the role of human rights defenders in the implementation and follow-up of specific action points within the NAP.

The U.S. government should commit to providing adequate protections for those who contribute, so that defenders and communities can manage the risk of reprisals, from either government or corporate actors, for their engagement with the NAP process. This is especially true for consultation done by U.S. embassies and consulates; we strongly urge the U.S. government to improve the awareness of and response to reprisals and retaliation against human rights defenders across all relevant diplomatic functions, i.e. officers in public affairs, management and security, and commercial affairs in addition to political/human rights officers.

4. Ensuring that the NAP will have a positive impact on human rights defenders and the protection of civil society space

The substance of the NAP should, in conjunction with the *UN Declaration on Human Rights Defenders*, provide sufficient protections for human rights defenders working on issues of corporate accountability and responsible business conduct, both in home and host countries. These protections should reflect freedoms guaranteed under international law, supplemented by domestic law where it is deemed to surpass international standards. Of particular interest in relation to the work of human rights defenders are the rights to freedom of association, assembly, expression, as well as the right to public participation and the right to free, prior and informed consent for indigenous communities and other affected communities. The NAP should also take into account ongoing efforts across the U.S. government to ensure policy coherence and whole-of-government commitment to responsible business conduct.

- **Recognise the essential role of, and the risks faced by, human rights defenders and civil society specifically in the area of responsible business conduct, and ensure coherence with related policy agendas.**

The U.S. NAP must include explicit attention to protecting the rights of human rights defenders working on issues of corporate accountability, and should provide resources to support and facilitate the work of those defenders and other relevant civil society organisations. While the Administration’s *Stand with Civil Society Initiative*¹⁰ (‘the *Stand Initiative*’) is an important commitment, and the Presidential Memorandum¹¹ an important means of implementing that across government agencies, there remain clear gaps in both policy elaboration and programmatic implementation as regards the *Stand Initiative*’s intersection with a responsible business conduct agenda.

The policy language and programming of the *Stand Initiative*, and of the NAP process up to date, fail to mention human rights defenders as a group of particular concern and in need of specific protections. This gap should be addressed, and there should be an

¹⁰ <https://www.whitehouse.gov/the-press-office/2014/09/23/fact-sheet-us-support-civil-society>

¹¹ <https://www.whitehouse.gov/the-press-office/2014/09/23/presidential-memorandum-civil-society>

Administration-wide commitment to using the NAP to create coherence between the *Stand* Initiative and other U.S. policy agenda, including on shared prosperity, that are essential for the promotion of human rights in the context of business activities.

In the field, Embassies and other diplomatic presences should also take an active role in promoting human rights defenders. Actions could draw from, among other documents, the EU Guidelines on Human Rights Defenders¹² suggestions for diplomatic engagement. The *Stand* Initiative already encourages Embassies to advocate for an enabling environment for civil society; they should further, under the NAP, advocate for legislation protecting human rights defenders and guaranteeing communities free, prior, and informed consent. Finally, the U.S. NAP should encourage coordination among Embassies in host countries to protect defenders working in the area of business and human rights.

- **Protect and promote the work of human rights defenders through policies, including public procurement, and provision of adequate funding support by the government to defenders and civil society working on business and human rights.**

The U.S. government as a major global purchaser must ‘walk the walk’. ISHR calls on the U.S. to build on the process envisaged in E.O. 13627¹³ and put in place requirements for government-funded grants and contracts (procurement of products and services) to endorse and adhere to the UN Guiding Principles on Business and Human Rights.¹⁴ This should include explicit language defining meaningful consultations with civil society and human rights defenders (for example, in the context of USAID grants for agricultural projects) and environmental, social, and human rights impact assessments in line with international standards (for example, expanding the practices currently used by OPIC to other agencies). There should be real sanctions for those agencies, contractors, and commercial partners that fail to meet these requirements.

The NAP must ensure that financial support for human rights defenders broadly, whether through domestic agencies or in the context of foreign assistance, includes specific attention to human rights defenders working on corporate accountability.¹⁵ While the U.S. Department of State has published an FAQ-style document on its support for human rights defenders, activities to support defenders should be mainstreamed across U.S. agencies, including those often at the table during discussions of responsible business conduct.

- **Improve access to information on human rights risks in host countries, and on human rights violations of U.S. businesses with operations overseas.**

A major concern of human rights defenders is the imbalance in access to information between local organisations and multinationals. At the same time, many small and medium enterprises doing business overseas may find it a challenge to understand their

¹² http://eeas.europa.eu/human_rights/guidelines/defenders/docs/16332-re02_08_en.pdf

¹³ Executive Order on Strengthening Protections Against Trafficking in Persons in Federal Contracts. 25 September 2012.

¹⁴ UN Guiding Principles 5 and 6.

¹⁵ ISHR has suggested this in a NAP submission to the UK (available at http://www.ishr.ch/sites/default/files/article/files/ishr_submission_to_uk_on_review_of_its_bhr_nap_final.pdf). This is also an issue that has been included in follow-up measures in the NAP developed by Finland. See http://www.tem.fi/files/41214/TEMjulk_46_2014_web_EN_21102014.pdf.

responsibility to respect human rights. Making information easily accessible and digestible makes it a key tool for human rights defenders and for businesses.

The U.S. NAP should include commitments to disseminate information related to human rights risks in a harmonised and coherent fashion, along the lines of the 'Overseas Business Risk' guides published by the UK Foreign & Commonwealth Office and UK Trade and Investment. Additional good practices from the UK model are the commitment to update materials in a timely fashion and to take into consideration the legislative frameworks related to human rights and fundamental freedoms.¹⁶ This would not necessarily require new information, but instead would consist in packaging the reporting already done by various U.S. bureaus and agencies, both annually and in the form of 'spot' reporting.

The U.S. government has already put in place measures to recognise and encourage responsible business conduct, such as the Award for Corporate Excellence. While these could be refined, a second critical element is the commitment of the U.S. government to provide information on ongoing cases against U.S. multinationals, either domestically or in the host country. This could for example include information on concluded FCPA investigations, or on labour violations of specific companies who are federal contractors and who operate in that country, regardless of whether those overseas activities consist of government or private contracts.¹⁷ The assumption underlying both these activities is that companies with a history of labour violations in one country might reasonably be expected to have gaps in policies and procedures for the protection of human rights throughout their operations. Improving accessibility of this information is key for empowering defenders and local communities.

- **Address recommendations made by relevant UN experts in relation to business and human rights and human rights defenders in this context.**

The U.S. Missions to the UN are strong supporters of the UN Special Procedures functions, and indeed the Presidential Memorandum on Civil Society calls on agencies abroad to 'enhance support for the work of the UN Special rapporteurs charged with advancing... the rights to freedom of opinion and expression, peaceful assembly and associations, and human rights defenders'.¹⁸

The NAP should include actions in response to the concrete recommendations of the Working Group on Business and Human Rights following their country visit in 2013, *inter alia*, substantive disclosure and meaningful penalties for non-disclosure under various transparency and reporting regimes;¹⁹ procurement regulations requiring security contractors to be members of the International Code of Conduct for Private Security Service Providers;²⁰ review of mechanisms to provide effective remedy²¹ (ISHR notes that this should include attention to the status of and protection for defenders working

¹⁶ For example, see the guide on China. Available at <https://www.gov.uk/government/publications/overseas-business-risk-china>.

¹⁷ This information is required to be collected by U.S. agency contracting officers under the Fair Pay and Safe Workplaces Act. The full text of the EO is available at <https://www.whitehouse.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>; the Federal Acquisition Regulations were published May 27, 2015.

¹⁸ Section 3(c) of the Presidential Memorandum on Civil Society.

¹⁹ 'Report of the Working Group on Business and Human Rights – Addendum' A/HRC/26/25/Add.4 para 102(b).

²⁰ Ibid, para 102(c)

²¹ Ibid, para 102(k)

on corporate accountability); and the investigation of and efforts to address serious human rights impacts of 'high impact business activities'.²²

Nonetheless, the Working Group is not the sole organ of the Special Procedures to have raised concerns. In December 2012, three rapporteurs sent a communication to the U.S. government in December 2012 about vulnerabilities and human rights violations of migrant farmworkers. They highlighted a case that had been brought to their attention documenting the harassment and intimidation, including threats of violence, of legal aid workers seeking access to workers facing abuse on a Maryland commercial farm.²³ The rapporteurs underlined that, in line with U.S. obligations under the ICCPR and the Declaration on Human Rights Defenders, the government has an obligation to protect the work of human rights defenders working with migrant worker communities.

The U.S. should ensure that the content of the NAP is informed by the recommendations of UN experts on issues of business-related human rights abuses, both domestically and internationally.

- **Put in place expectations for proactive U.S. business engagement to promote human rights and protect human rights defenders and civil society space.**

The U.S. NAP should include an expectation that U.S. businesses do more than 'no harm;' that they create opportunities to deepen meaningful engagement with civil society and on emerging human rights issues in countries and communities where they operate. This is not only in line with many voluntary codes of conduct with which companies mitigate their reputational risks with regard to human rights; it is also in line with the aims of the Guiding Principles, that encourage businesses to 'honour the principles of internationally-recognized human rights when faced with conflicting requirements' and to consider the risks of delayed responses when prioritizing 'actions to address actual *and potential* adverse human rights impacts.'²⁴ It would also be a powerful complement to U.S. government human rights and foreign policy goals.

Concretely, this means sending a clear message to U.S. companies that in addition to the full respect of human rights in the context of their operations, they have an obligation to use their leverage to ensure that host country governments do not take steps to constrain or violate human rights and fundamental freedoms in the context of economic development and natural resource exploitation.²⁵ Many of the sub-sections included in the Presidential Memorandum should apply at minimum, and in tailored form, to those companies which are owned or controlled by the State or that receive substantial support and services from the State.²⁶

The U.S. NAP should outline mechanisms by which the U.S. government will continue its work to convene – or support the convening of – academics, experts, human rights defenders, and affected communities on the one hand and company representatives on

²² Ibid, para 102(I)

²³ 'Communication report of Special Procedures' A/HRC/23/51, reference USA 25/2012, available [https://spdb.ohchr.org/hrdb/23rd/public - AL USA 27.12.12 \(25.2012\).pdf](https://spdb.ohchr.org/hrdb/23rd/public - AL USA 27.12.12 (25.2012).pdf).

²⁴ UN Guiding Principle 24 (author's emphasis)

²⁵ For more specific information on this issue, see the report of Special Rapporteur on Freedom of Association and Peaceful Assembly Maina Kiai A/HRC/29/25. Available at <http://freeassembly.net/rapporteurreports/natural-resources/>.

²⁶ In particular, see Section 3(a) in particular, as well as 2(b) and 3(b-c).

the other to identify joint solutions to challenges to responsible business conduct. Some recent examples include U.S. government leadership with regard to responsible investment and labour rights in Myanmar; examples in Bangladesh, Cambodia, and Honduras show a range of levels of U.S. engagement. Regardless of their explicit role, the U.S. government should find ways to catalyze, incentivize, and sustain multistakeholder engagement on human rights.

5. Summary of Recommendations for the U.S. National Action Plan

ISHR recommends that the U.S. government take the following steps to ensure that human rights defenders and civil society can contribute to the NAP process:

- **Expand the scope of consultations on the NAP process to reach human rights defenders, grassroots activists, and marginalised communities both domestically and internationally.**
- **Facilitate civil society participation in the NAP process by improving transparency, accountability, and timeliness of communications.**
- **Outline clear roles and protections for human rights defenders at all points in the NAP process.**

ISHR recommends that the NAP content include specific deliverables that will help to empower human rights defenders, protect and expand civil society space, and hold government and businesses accountable to their human rights obligations:

- **Recognise the essential role of, and the risks faced by, human rights defenders and civil society specifically in the area of responsible business conduct, and ensure coherence with related policy agendas.**
- **Protect and promote the work of human rights defenders through policies, including public procurement, and provision of adequate funding support by the government to defenders and civil society working on business and human rights.**
- **Improve access to information for both civil society and the private sector on human rights risks in host countries.**
- **Address recommendations made by relevant UN experts in relation to business and human rights and human rights defenders in this context.**
- **Put in place expectations for proactive U.S. business engagement to promote human rights and protect human rights defenders and civil society space.**

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