



Sharing Stories, Developing a Joint Narrative

Report of a Multi-Stakeholder Dialogue
on Security and Human Rights in
Kenya's Extractives Sector



Institute for
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1. Introduction

Kenya's nascent extractive industries continue to be the subject of debate. Most notably, the emerging oil and gas sector faces growing public expectations of significant local and national benefits including increased revenue, employment creation and income, social investment and overall economic development.

At the same time, rising social and political tensions are more likely if resources and revenues are not managed transparently, accountably and equitably.

Direct human rights risks may result as well if the possible damaging effects of exploration activities are not avoided and if community concerns are not recognised and addressed.

A major human rights challenge in this context is whether and how appropriate security arrangements are being followed and developed in Kenya, with the protection of onshore and offshore oil and gas installations needing to be matched with a commitment to upholding the rights of all citizens, including those affected by exploration.

Allegations and incidents of rights abuses involving public security forces as well as private security providers in Africa and elsewhere linked with extractive industries have a long history.

As Kenya's oil and gas exploration prepares the way for eventual production in the coming years, there is a crucial need to learn lessons from elsewhere and develop good practices which can help ensure effective security and human rights policies and implementation strategies.

On 6-7 October 2014, the Institute for Human Rights and Business (IHRB)¹, in partnership with the Kenya National Commission on Human Rights (KNCHR) and the support of the British High Commission in Nairobi, held a multi-stakeholder dialogue² to discuss the challenges and opportunities for ensuring a human rights approach to security in Kenya's extractives sector, focusing on oil and gas.

The event, involving expert presentations and interactive debate, was held as part of the 'Nairobi Process'³, a joint IHRB-KNCHR initiative to promote impartially across all stakeholder groups support for responsible business in the oil and gas and wider extractives sector in Kenya and East Africa.

2. Executive Summary

The likelihood of positive policies and practices on issues relating to security – as in other areas crucial to Kenya's governance of oil and gas – depends largely on the effective participation and interaction of interest groups and affected stakeholders.

This event provided a vital opportunity for a range of representative participants to share perspectives, air differences, voice hopes and concerns and search for common ground.

2.1 Starting a joint discussion

The gathering assembled a wide span of representatives from ministries, parliament, county governments, oil and gas and mining companies, extractive industry associations and civil society organisations, as well as police, defence forces and security providers and relevant regulatory bodies. The event was held under the so-called Chatham House rule⁴ to facilitate openness and trust in the discussions.

Significantly, the meeting marked the first time many of the participants had shared and discussed jointly their views with other stakeholder groups – itself an encouraging sign of good will that suggests the potential is there for all relevant parties to sustain dialogue in the future on promoting responsible business in the extractives sector.

Discussions benefited too from insights shared by a range of government, business, non-governmental, wider civil society and human

rights leaders from other African countries, including Tanzania, Uganda, South Sudan, Ghana and Nigeria. West African representatives shared the lessons of their advocacy to press their governments to join the Voluntary Principles on Security and Human Rights (VPs).

Significantly, the meeting marked the first time many of the participants had shared and discussed jointly their views with other stakeholder groups - itself an encouraging sign of good will.

Currently chaired by the United Kingdom, which is preparing to host the VPs' next annual plenary assembly on 17-18 March 2015, the Voluntary Principles are an international multi-stakeholder voluntary initiative aimed at supporting extractive industry companies to uphold international human rights standards in their security arrangements.⁵

Ghana has recently become a government member of the VPs – the first to do so in Africa – and is now expected to develop a national action plan to implement in practice adherence to the principles.

Raising awareness of the VPs and possible membership in the initiative are also underway in other African countries, with the support of the international diplomatic community. A number of participants in the VPs made presentations at the IHRB-KNCHR dialogue. They spoke of their own experiences of taking part in

1. IHRB is a global 'think and do' tank promoting the application of human rights standards in business policy and practice, as well as the associated duty of states to protect human rights in this context. It provides a trusted, impartial space for multi-stakeholder dialogue and conducts independent analysis to deepen understanding of the human rights issues and challenges facing responsible business conduct. www.ihrb.org

2. The event's official title was 'Building a secure environment for responsible investment in Kenya's extractives sector'.

3. See nairobiprocess.org

4. www.chathamhouse.org/about/chatham-house-rule?gclid=ClylwMW51MICEXQ_atAodiUUafw

5. For full information, see voluntaryprinciples.org

the VPs initiative and promoting the principles in relation to the extractive industry companies from their countries operating in sensitive environments both abroad and at home.

The possible relevance and appropriateness of the VPs for Kenya was also considered in terms of their potential contribution to dealing with security as a key aspect of wider international human rights frameworks addressing business and human rights challenges more generally.

This included consideration of the United Nations Guiding Principles on Business and Human Rights, endorsed by the UN in 2011 as an authoritative key international reference point setting out state duties to protect against rights abuses involving non-state actors, business responsibilities to respect all human rights through ongoing due diligence processes, and the importance of access to effective judicial and non-judicial remedies.⁶

Following presentations on the creation and approach of the VPs, the roles and responsibilities of stakeholders under the

initiative, and debate of its strengths and weaknesses, the event considered the potential relevance and value of the VPs' underlying principles – if not the immediate likelihood of official membership of the VPs process – in Kenya.

The dialogue event also included a presentation on the multi-stakeholder International Code of Conduct Association (ICoCA).⁷ This Switzerland-hosted non-profit body oversees the International Code of Conduct on Private Security Service Providers (ICoC), which sets out human rights policy and practice expectations specifically in relation to private security companies, whose presence is rising worldwide in security provision across many sectors.

Consideration of such international initiatives on security and human rights was used to inform a detailed discussion of the national arrangements in place or needing to be developed and introduced by Kenya in relation to its oil and gas and overall extractive sector. Companies gave presentations on the strengths and weaknesses of the approach they had taken so far. The discussion covered the roles of, and relationship between, public and private security, as well as the regulatory and accountability structures required to uphold the public interest, including in relation to the link between business conduct and human rights.

This led to a debate of how security should be understood and defined.

Several experts and participants stressed that any security approach, if it were to be effective in the long term, ought to take into proper account and be linked to the wider, systematic efforts required to address the underlying conflict dynamics affecting Kenya – including those emanating from human rights risks as the extractives sector is developed.

2.2 Standardising positive approaches?

The event culminated with an industry association in Kenya bringing to the attention of participants its plans to develop and present in 2015 a sector-wide memorandum of understanding (MoU) on security and human rights for onshore oil and gas exploration for cross-governmental agreement and application (following a previous agreement on offshore activities).

While some companies already have individual agreements, the advantage of such an overarching MoU is that it could help standardise positive approaches on security and human rights across the sector, building on the commitment of companies that are already signatories of the VPs.

Companies and government would de facto be leading actors in discussions on this new MoU in view of its bearing on their overall commercial and economic interests. At the same time, event participants noted that wider stakeholder support might be needed to help encourage official recognition of the concept of a 'standard' MoU, and that the overall process of developing, introducing and reviewing implementation of any

MoU might provide opportunities for wider stakeholder input and participation, depending on the receptiveness of the main players involved.

It was agreed that an initiative such as the Nairobi Process could play a valuable role in helping to explore the feasibility of, and facilitate opportunities for, such an inclusive approach. But whatever the space available for wider discussion during immediate MoU drafting, the interested parties might need to balance the desirability of wider consultation with the interests of companies and government in keeping decision-making manageable and effective from their point of view.

Another opportunity identified for standardising effective policy and practice on security and human rights could be for stakeholders to engage with pressure to fast track the creation of County Policing Authorities under the 2011 National Police Service Act. It is envisaged such bodies would involve the representation of national government, county leadership, youth groups and civil society organisations among others, providing a channel for wider stakeholder input, participation and coordination.

2.3 Promoting a 'national conversation'?

Overall, the event raised the fundamental question of whether and how Kenya would be able to avoid the so-called 'resource curse' that has afflicted many African countries, turning the discovery of oil and gas instead into a 'blessing'

Several experts and participants stressed that any security approach, if it were to be effective in the long term, ought to take into proper account and be linked to the wider, systematic efforts required to address the underlying conflict dynamics affecting Kenya – including those emanating from human rights risks as the extractives sector is developed.

6. See www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf and <http://business-humanrights.org/en/un-guiding-principles>
7. www.icoca.ch/en/mandate

for the nation. Underpinning the discussions was a consensus that the security and human rights challenge should not be addressed in isolation but in wider analytical context. Participants grappled with key issues such as the need for transparent and accountable governance of the oil and gas sector; the implications of Kenya's new constitution and decentralisation (in which the country is still working out county-national powers and accountability relationships); and the relationship between extractive activity and the emergence or exacerbation of conflicts.

Participants advocated the need for a broader and deeper 'national conversation' on the future of the oil and gas sector, linking the promotion of genuinely representative voice at local levels with stronger input into a more participatory and responsive policy process in Nairobi. Only through such a critical mass of debate would effective action emerge to integrate stronger business and human rights policies and practices into the current 'upstream' exploration stage, thus ensuring the resulting benefits could be sustained in future oil and gas production.

The event identified several areas – what the participants called the five 'Cs' – as priorities for such local-national debate and action. They were:

- **Civil society involvement and consultation** to ensure bottom-up voice in decision-making on oil and gas and the wider extractives sector;
- **Community engagement and participation** as an on-going systematic requirement for state duties and business responsibilities on human rights to be met;

- **Communication** – involving a wider and deeper process of exchange and debate to address information gaps and misinformation, raise public awareness and create the conditions for the stronger citizens' involvement referred to in the first two Cs above;

- **Constitution** – making optimal use of its provisions on public participation providing greater scope for citizen empowerment and the public scrutiny of power-holders;

- **Contracts** – providing an opportunity to negotiate appropriate and fair levels of revenue; resolve apparent tensions over national-county-community revenue sharing; include provisions on responsible business practice (as in the area of security and human rights); and strengthen transparency and accountability through public disclosure not compromising legitimate commercial confidentiality.

With a view to defining how to respond effectively, the policy-makers, businesses, civil society organisations and security officials present at the event also shared views on the challenges facing their respective roles and responsibilities. The discussion shed light on the challenges and the opportunities involved, including the possibility of new forms of interaction between stakeholders and their adoption of more collective approaches.

Finding such common ground would be part of the 'national conversation' advocated at the event. The insights shared at the event are explored in full detail in the remainder of this report, following the synthesis below of the conclusions, proposals and key points that emerged.

2.4 Conclusions, proposals and key points

2.4.1 Next Steps

- Open discussions and the trust displayed at the event suggest strong potential for stakeholders from business, national government, counties, parliament, oversight bodies, civil society, communities and security-providers to sustain dialogue in the future, with a view to consolidating joint approaches to promoting responsible business and security provision in the extractives sector.

- Promotion of such interaction and coordinated approaches should involve future multi-stakeholder dialogues to explore in greater depth and formulate specific proposals on key issues identified at the event affecting security and human rights. This would make more concrete the implications of the overall analysis the event had conducted. Such issues might include policies on local content and the need for stronger community engagement by all actors.

- The plans of oil and gas companies to draft and negotiate with government an overall memorandum of understanding on security and human rights for onshore oil and gas activities in 2015 provide an important avenue for standardising best practice across the sector, including with possible wider stakeholder support and input.

- To support and enhance continued interaction and follow-up, an audit of the much wider stakeholder environment might be desirable, given the increasing number and range of actors having or needing a stake in discussions on the future of the oil and gas and wider extractives sector. Such actors play different roles, enjoy different levels of influence, legitimacy, technical knowledge and policy expertise, and may have different support needs and socio-economic interests in participating or becoming involved.

- Whether or not such an audit could be facilitated under the Nairobi Process, stakeholder ownership would be crucial to its value in nurturing plans for wider, deeper and effective multi-stakeholder participation. For example, the setting up of any working group to promote positive learning and action through uptake of the Voluntary Principles on Security and Human Rights might lack proper effectiveness if it were not based on genuine stakeholder impetus and commitment to impact.

- The Kenyan government, business and civil society should be kept fully engaged in relevant outcomes and learning from the Voluntary Principles on Security and Human Rights. For example, the Kenyan government could be invited and encouraged to attend the VPs' March 2015 plenary assembly to be hosted by the United Kingdom, which will then pass responsibility for chairing the initiative for the next period to the United States.

2.4.2 Towards a stronger enabling environment

- A stronger overall enabling environment should be nurtured in Kenya for the potential value of extractive activities to benefit communities and be recognised by them. To this end, stronger national and county investment is needed in local employment, education, training and services.

- Businesses cannot reasonably be expected to address solely the complex range of social and economic development, conflict and human rights challenges affecting communities in which they operate. It is mainly up to government and the state over time to tackle such challenges and ensure the interests and rights of all citizens are represented and upheld.

- Current legislative opportunities should be taken up to promote the transparent and accountable governance of oil and gas and other extractive resources, ensuring both equitable benefit-sharing and the protection of human rights.

- The government and companies should make human rights an essential part of environmental and social impact assessments for extractive projects, programmes and strategies.

2.4.3 Opportunities for business, civil society and policy-maker influence and collaboration

- Addressing gaps in policy, legislation and regulation provides an opportunity to set a

level playing field for business compliance with human rights standards. This could avoid poorer business practice putting stronger performers at a competitive disadvantage and ensure companies enjoy much firmer 'social licence'.

- Companies can use their collective influence, for example through industry associations, to encourage policy-makers at national and county levels to create such an enabling environment.

- Despite frequent differences between companies, civil society organisations and communities, opportunities may exist to establish and exploit common ground in promoting the policy conditions whereby extractive activities can better contribute to economic and social development and human rights.

- Such efforts could involve seeking and building alliances, where possible, with supportive policy-makers and political leaders at national and county levels, whilst guarding against the risks posed by the competitive nature of Kenyan politics.

2.4.4 Reframing business-community relations

- Companies should understand rigorously the complexities of the environment in which they operate and analyse the human rights impacts and risks on an ongoing basis, drawing on a range of independent advice and reliable information sources, including contact with organisations dealing with human rights issues affecting communities.

- To boost commercial and social sustainability

and prevent human rights risks, extractive companies have an interest in strengthening their community engagement and supporting the need for community representation that is robust and legitimate.

- The value of increasingly recognised approaches such as Free, Prior, Informed Consent could be explored.

- Corporate social responsibility needs to shift from an approach often focused on benevolent charitable initiatives to one that contributes to a process of social and economic development in which communities are seen as rights-holders, and in which support for human rights is a core part of company policies, decision-making and operations.

2.4.5 From revenue tensions to aligning resources with economic and social development

- There is a need to resolve national-county-community differences over revenue-sharing so that they do not exacerbate or become a source of tension, conflict and potential human rights risks. Tensions, conflicts and risks need to be properly understood in view of their complex intra-communal, inter-county, local-national and cross-border nature.

- Oil and gas and other extractive revenues – as well as future CSR spending – should be aligned with county development plans designed and implemented with the representative participation and involvement of citizens and stakeholder interest groups. Legitimate multi-stakeholder platforms are required to strengthen local voice.

2.4.6 Local-national voice and the vital role of communication

- Policies and strategies are needed to ensure access to, and exchange of, reliable and relevant information, to boost stakeholder communication and to raise public debate on the extractives sector, with a view to stimulating a local-national conversation on the issues at stake.

- This communication challenge involves civil society organisations and networks strengthening their capacity to represent and empower communities, including by amplifying their voice in information materials, advocacy, communication tools and links with local and national media.

- Companies, where necessary, can also strengthen their communication, providing crucial information in local languages and accessible formats and moving from a public relations approach to one more focused on fostering dynamic community dialogue and participation.

- Ensuring access to reliable sources of information, supporting evidence-based communication strategies and effective use of media are of major importance in relation to security and human rights, as rumour, distortion and misinformation can inflame tensions and cause conflict. Such problems can undermine positive efforts by state and non-state stakeholders to promote responsible business and security provision.

2.4.7 Defining security, addressing human rights and African lessons on the VPs

• Security and human rights should not be seen as mutually exclusive, but as interrelated challenges in which the rights of all are upheld. Security cannot therefore be merely seen as a discrete professional task but needs to involve a wider policy approach.

• Such a policy approach should be based on a solid understanding of the conflict dynamics, governance problems and human rights risks affecting the extractives sector and involve concerted strategies and measures to address these.

• Stronger financial resources and training are required to meet the security and human rights challenge, and security provision – whether public or private – must operate within a publicly agreed framework and ideally be subject to independent oversight.

• To promote and standardise effective policy and practice on security and human rights, stakeholders could engage with pressure to fast track the creation of County Policing Authorities as it is envisaged that such bodies would involve broad-based stakeholder representation.

• The underlying principles of international initiatives such as the VPs (providing human rights guidance on extractives security provision) and ICoCA (on private security provision generally) may be useful tools for Kenyan stakeholders to consider, whether or not Kenya's government decides to join

countries such as Ghana in becoming a formal government member of the VPs process itself.

• In the absence of progress to address governance and conflict problems, the VPs should not be seen as a 'magic bullet' but as a potentially valuable tool in the wider strategies required to advance human rights.

• Lessons from security and human rights advocacy in Ghana and Nigeria suggest a critical mass of stakeholder understanding, public awareness and pressure across key policy institutions is required to secure progress, bolstered by effective media relations work and the nurturing of 'champions' committed to the cause.

• Some companies have worked with and sought the advice of NGOs specialising in conflict and human rights to strengthen their implementation of the VPs, including through support for more effective approaches to community engagement and consultation as a prerequisite for avoiding conflict and security and human rights problems. Positive lessons of such experiences can be identified, shared and promoted.

3. Security and human rights: debates, perspectives, insights and proposals

3.1 A 'one-shot chance'

Inaugurating the dialogue event in an open public session⁸, the British High Commissioner, Dr Christian Turner, drew attention to the 'potential and pitfalls' of oil and gas in Kenya. The term 'extractive industry' was problematic, he noted, in that it suggested that exploration and production would involve 'taking away' wealth from the people when the discovery of such resources had the potential to 'add value' and 'give back' to everyone in the country.

However, lessons from other countries indicated that while a booming extractives sector could boost gross domestic product and fuel growth in other sectors, there was also the danger that it could distort the economy (the so-called 'Dutch disease') and foster conflict and insecurity. Oil and gas, he said, quoting the managing director of the International Monetary Fund, was a 'one-shot' chance for Kenya to drive inclusive economic growth, in pursuit of Kenya's Vision 2030 of becoming a leading extractives production, logistics, trade, services and manufacturing hub in Africa.

The High Commissioner stressed the crucial importance of 'managing expectations and tensions' and encouraged Kenya to join Nigeria, Tanzania, Zambia and Mozambique in becoming members of the Extractive Industries Transparency Initiative (EITI), an international multi-stakeholder initiative promoting the transparent management of extractive revenues.⁹

3.2 Adding to tensions or creating cohesion?

Invited experts and participants emphasised that policies and practices on security and human rights in Kenya's oil and gas sector were both crucial and acutely sensitive in oil exploration areas. This was particularly the case in remote areas of Kenya characterised by traditionally very high levels of poverty, a frequent sense of national marginalisation, insecurity and the interplay of a complex range of communal, inter-communal and cross-border conflicts.

It was noted that some of the latter were also taking on international geo-political ramifications, as in the case of piracy or the impact of religious extremism emanating from neighbouring Somalia and security responses to this threat.

Exploration activities, it was agreed, could both spark new sources of friction or exacerbate existing tensions both at the local level and in terms of local-national relations, thus further complicating Kenya's efforts to embed a new political settlement based on the new constitution, including the decentralisation of powers.

Extractive activity could be a divisive or cohesive force.

8. In contrast with the rest of the dialogue, held under the Chatham House rule, this session was the only one in which it was agreed that the identity and affiliation of the speaker would be on public record.

9. www.eiti.org

During the first day of the event, civil society organisations, community representatives, local government officials and oil and gas companies presented and exchanged experiences and examples of the social and environmental impacts and security and human rights risks already involved in exploration, as well as of business approaches and efforts to prevent and mitigate them.

3.3 Extractive impacts, company responses

Civil society organisations highlighted a range of problems and perceived concerns affecting communities. These included the risks of pollution; restrictions on traditional access to land, grazing rights and fishing waters; inappropriate land acquisition and community displacement; the damage from seismic tests on fish stock availability; and the removal of bushes providing crop windshields.

As well as disruptions to local livelihoods, participants stressed the need to tackle the problems of major inward migration and labour importation to the sites of oil and gas exploration. A lack of understanding of local cultural practices threatened social cohesion and also posed major risks in terms of HIV/AIDS and the effects of sex work and sexual abuse, particularly on women and girls.

For their part, representatives of companies stressed the crucial importance of strengthening all aspects of risk management and community engagement to minimise, pre-empt and address such effects.

They gave examples of company-level mechanisms being put in place to address concerns and grievances, and of schemes combining anticipation of risks with livelihood benefits for communities. In Ghana, communities had been paid to keep beaches clean of any debris in order to minimise the hurdles to the speedy emergency responses required in the event of any oil spillage accident.

Highlighted, in recognition of disruptions to local livelihoods, was the importance of wider strategies for alternative employment creation. Insofar as business was able to make its own contribution through extractive activity, some participating companies stated that they were making significant individual progress in upholding the formal policy commitments they had made to boosting the level of so-called 'local content' in the labour, professional personnel and auxiliary services they hired or contracted.

Overall, however, whatever the value of the specific efforts of particular companies, much more remained to be done across the board to address local content – understood as sourcing from the exploration areas where communities were based rather from outside. The issue was identified as a highly sensitive one in the context of the other human rights impacts noted above and it was noted – particularly in terms of direct employment in the extractives sector – that it would take sustained time, resources and effort to develop and put in place the specialist skills and expertise needed.

Employment creation, as in other key areas of public policy and action on extractives, would require a much wider process of outside support for local economic and social development, not just from business and civil society but also, crucially, from county governments and the state nationally.

3.4 Need for an enabling environment – assessing governance opportunities and gaps

Indeed, local content was just one of several issues that raised the ever-present question of whether an effective overall enabling environment was being nurtured in Kenya to pave the way not just for the presence of extractives companies to be accepted locally but also welcomed and supported.

Such conditions would require a strategic range of public policy support measures to maximise local linkages and benefits, ensure responsible business practice, or at least cushion negative impacts where these occurred or could not be avoided. Investment would be required to increase support for local employment creation, education, training and local services, for example.

This challenge prompted stakeholders to share a range of views and insights on governance gaps and opportunities in relation to extractives and to their own potential role in addressing them now and in the future. It was in this overall context affecting policy and practice that participants discussed security and human

rights issues in detail.

At various times during the event, several policy-makers and holders of public office at national and county levels, while acknowledging real difficulties and obstacles, highlighted current legislative opportunities to promote the transparent and accountable governance and regulation of oil and gas and other extractive resources.

Such policy discussions covered issues such as land, the environment, local content and revenue-sharing, while the provisions of the new constitution – in which extractive resources are declared a national public asset – afforded Kenyans the right to participate in public affairs and scrutinise the decisions that were made in their name.

It was also noted that an official pledge had reportedly been given at the highest level to make oil contracts public and open to public participation.¹⁰ Progress in all these areas would enable management of oil and gas and other extractive sectors to move in the right direction.

Notwithstanding such good will and cautious optimism within policy circles about the emergence of an enabling environment for responsible business, civil society participants in particular pointed to the frequent eruption of tensions and apparent conflicts of interest between investing businesses and local communities as indicative of the challenges.

10. <http://politicsofpoverty.oxfamamerica.org/2014/08/absolutely-kenya-president-backs-full-oil-contract-disclosure/>

They claimed the policy process had hitherto been too centred on politicians striking high-level deals in Nairobi with companies, without proper public involvement and oversight. It was alleged some agreements had involved corruption at national and local levels. In response, other participants asserted that companies had in place effective governance processes to ensure compliance with home country anti-corruption legislation. A far more significant risk, in their view, was the bearing of county-level politics where some politicians were alleged to exploit local concerns and grievances over jobs and investment for their own gain.

Whether continuation of such practices would be in the longer-term interests of companies was open to debate. While this might have suited operators taking advantage of what one expert called a 'briefcase approach', other participants – including from business – noted that this situation, rather than being an advantage, had often proved problematic and challenging for exploration companies genuinely keen to adopt better practices in order to ensure they have an effective 'social licence to operate'.

3.5 The challenge of community voice and community engagement

Several participants from extractive companies pointed to the difficulty of identifying representative local leaders who could speak for and negotiate legitimately and effectively on behalf of their whole communities and not just specific sections of them. This in turn questioned the durability – if not the legality – of any agreements reached and undermined the need for their wider social and political recognition in a complex operating environment.

Having the support of communities, not just their consent, was in the interests of companies, some business representatives said, as was the need for robust community representation when differences of interest have to be negotiated. 'It is better to have a competent adversary than one with weak representative legitimacy who will easily give way, as this gives an indication of the real

problems and challenges that are at stake for both sides,' said one company representative.

Commenting on the need for proper participation and consultation, a county government leader noted that a failure to communicate and involve stakeholders properly on an iron ore concession had led to major protests, time-consuming review of the licence and an investment standing idle for a lengthy period of time.

The growing use and recognition of the concept of Free, Prior, Informed Consent (FPIC) was also raised as a potentially effective tool in the extractives sector to tackle the constraints affecting the sustained, meaningful participation and representation of communities in decisions at all stages of extractive industry projects. Traditionally invoked in relation to the rights of indigenous peoples, FPIC's conception and application is now being interpreted more flexibly and broadly, including in Africa.¹¹

Such exchanges led to an illuminating debate on how companies were striving to strengthen 'community engagement' in response to such 'social licence' challenges and their associated human rights risks. Stressed was the crucial need for companies rigorously to understand the complexities of the environment in which they operate and to analyse thoroughly the resulting human rights impacts and risks on an ongoing (rather than one-off basis). This should also entail drawing on independent advice and systematic contact with a range of reliable information sources, including those dealing with human rights issues affecting communities.

3.6 Company responsibilities, state duties and the 'limits of CSR'

There was widespread recognition among participants, including on the part of extractive industry companies, that business could do much to strengthen its role in addressing security-related challenges. But some cautioned strongly that it was 'unrealistic and inappropriate' for stakeholders to expect companies to show a stronger commitment to community engagement and effective community representation than the strategic investment and support for local communities that ought to be required of government.

Corporate responsibility, this latter viewpoint argued, should not be confused with or supplant the need for states to fulfil their own obligations. Businesses have their 'bottom line' to achieve and cannot be reasonably expected solely to address the complex range of structural issues affecting communities in which they operate. It is up to the government and the state, in performing their duties to ensure that the interests of all citizens are properly represented and their rights upheld, to address the challenges of this wider environment.

In turn, further nuances were shared on the respective responsibilities of business and the obligations of the state. Some participants argued that extractive companies had not always engaged – or not been properly expected or required to engage – with communities in ways that recognised people as rights-holders.

11. See, for example: <http://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF>

'It is better to have a competent adversary than one with weak representative legitimacy who will easily give way, as this gives an indication of the real problems and challenges that are at stake for both sides.'

- Company representative on the importance of effective community representation

Meanwhile, others argued that oil and gas exploration had in fact simply proceeded apace in the context of what had been an obsolete legislative, regulatory and policy environment and therefore in somewhat of a vacuum. This meant that licenses had often been issued and local agreements reached without proper local input, ownership and recognition.

This was alleged to characterise the approach of some to 'corporate social responsibility' (CSR).

It was suggested that both companies and governments too often view CSR as consisting only of benevolent acts of charity rather than contributing to a wider process of social and economic development as a core part of business operations that empowers local communities and strengthens the conditions in which human rights could be upheld.

Company funding for schools and roads, for example, was certainly often welcome and might be well intended. But, if such financing was not maintained, these contributions proved to have limited value in the longer-term and did not provide sustainable solutions to community needs. Such problems often caused frustration if not resentment.

Lack of clarity about the responsibilities of business and those of the state for local development and services has proved to be problematic for companies as well. Companies fear that in some cases they may come to be seen as a replacement for the state and become the target for local grievances.

Highlighting the difficulties associated with insufficient official investment in local services, as well with the inability of companies structurally to make up the gap, one participant shared a story in which a company could not help a seriously ill community member who had arrived at its premises requesting urgent medical aid not

immediately accessible locally. At the same time, a counter-argument was made that numerous examples exist of companies having gone out of their way to help non-employees and that the value of company support for wider initiatives, such as anti-malaria and vaccination campaigns, should be welcomed rather than dismissed.

3.6 Finding common ground, shaping policy?

The fact that both business and civil society were negatively affected by what is seen as insufficient official investment in local areas led to discussion on the potential for working together to press for positive levels and forms of state support in local areas and communities. This in turn prompted a debate about the extent to which and how companies could get involved in lobbying government for local development measures of this kind.

In one view, 'business is business' and foreign companies in particular would be better advised to remain apolitical, steering well clear of involvement in influencing local political decisions, lest it be perceived as illegitimate interference that would unnecessarily damage their commercial interests.

On the other hand, others noted that companies did in fact often use their influence in the political arena, for example in relation to the terms of contracts or tax arrangements.

By this logic, it ought to be possible for businesses to exercise greater voice over wider development and human rights challenges that ultimately affected their operations and indeed it might be in the companies' interests to do so.

It was noted that insufficient community engagement and support – either by business or by the state – had its commercial costs in the form of protests, stalled operations, latent conflict and human rights incidents and overall weaker 'social licence'. Companies, while they might wish to remain 'apolitical', de facto get drawn into dealing with the effects of political, social, economic, ethnic and religious tensions. It is therefore better, said some participants, to anticipate and address such issues through informal channels of influence companies often have at their disposal.

It was generally appreciated, however, that company involvement in efforts to encourage more effective and supportive state action on development and human rights issues was a highly sensitive matter that needed to be handled carefully. Action by individual companies could leave them exposed to a withdrawal of political support or even retaliation, as well as at a commercial disadvantage if competitors failed to follow suit. One way round this challenge, it was suggested, would be for companies to coordinate pursuit of progress through business and industry associations, which could push for a competitive level playing field setting higher standards for overall policy and practice.

3.7 Political pressures and commercial incentives

Raised pointedly and repeatedly in this context was an underlying deep concern among participants that the immediate incentives of politics, commercial cycles and current economic circumstances in Kenya played forcefully against the major time, resources and effort needed to address the structural challenges of creating a supportive enabling environment for responsible business in the extractives sector.

'Our problem is not with oil and gas or mining. It's with the short-cuts taken.'

- Representative of a human rights organisation

The problem was summed up by a human rights organisation representative, who said: 'Our problem is not with oil and gas or mining. It's with the short-cuts taken.'

A human rights expert warned:

'There is a danger of a race to control resources, with the need to protect human rights seen as a barrier standing in the way.'

Meanwhile, one company official expressed grave worries that, for all the laudable value of initiatives such as the Nairobi Process, the pressure for rapid extraction in a context where the governance gaps identified were unlikely in his view to be filled at the same pace was a worrying challenge. Stakeholder action would need systematically to grapple with these realities to be effective.

The government, for example, currently faces fiscal challenges in economic management and is therefore considered by some to be keen on quicker progress towards extraction in order to start benefiting from rising revenues. Companies, for their part, had expended significant resources in exploration and understandably expected, but had no guarantee of, as rapid a return as possible on their investment.

Meanwhile, the fiercely competitive, client-based dynamics of Kenyan politics, some participants suggested, also needed to be taken into account as a major factor affecting the governance of oil and gas and its implications for business conduct and human rights. As well as the link between financial resources, elections and political power nationally, local politics also exert their own pressures concerning decisions on the extractives in the sensitive context of political decentralisation.

3.8 From revenue tensions to representative county development plans

A central topic of political debate in Kenya involves the system for revenue sharing and revenue distribution. Current proposals envisage 75 per cent of revenues being retained nationally, with county governments enjoying discretion over 20 per cent and the remaining 5 per cent going to communities.

Some county government representatives contended at the event that it would be both legitimate and fair for them to receive a higher share. The more general point made during the discussion on this theme, however, highlighted that pending revenue distribution decisions are a potentially major source of local tensions that, whatever the merits of the distributional arguments, is open to possible political manipulation by various sides. This, in turn, poses challenges in the area of security and human rights.

Whatever the final arrangements on revenue distribution, several participants argued that county spending, as at the national level, needed to be planned and managed in representative ways so that it responded to the interests and needs of communities.

A proposed way forward, in the context of decentralisation, would be to align oil and gas and other extractive revenues – as well as future CSR spending – with county development plans developed and

implemented with the representative participation and involvement of citizens and stakeholder interest groups. Such an approach would be more effective in supporting local development and services and thereby create more propitious conditions for human rights, including through the emergence of an enabling environment for responsible business conduct as local grievances and potential tensions were addressed.

3.9 Information needs, communication tasks

Another proposal to help create a stronger enabling environment for responsible business conduct and to ease national and local tensions surrounding the management of extractive activities and revenues called for strategies to ensure broader access to, and exchange of, relevant, reliable and meaningful information. This would support efforts to boost all aspects of stakeholder communication and public debate, with a view to stimulating a local-national conversation on the issues at stake.

It was observed, for example, that extractive industry contracts needed to be publicly disclosed as a key tool in holding public authorities and other actors to account for the appropriateness of their terms and conditions. Similarly, county governments and stakeholder platforms, if they were to develop, carry out and monitor county development plans effectively, needed to know how much income ought to be available for agreed budgets and how the money could and should be spent. It was hoped

that freedom of information legislation under discussion following the new constitution would be approved.

Meanwhile, specifically in relation to the impact of business conduct on human rights, a global trend was noted in which both state and non-state stakeholders increasingly expect companies to provide information and communicate on their involvement and efforts to address human rights risks and impacts.¹²

While several participants from companies stressed that major investments in communication were being made as part efforts to strengthen meaningful ‘community engagement’ in their operations, others claimed that too often companies took a public relations approach. One civil society organisation representing communities stated that company communication needed to move beyond ‘singing the song of how good the company is’ and ensure that essential information is made accessible in formats and languages that people understand.

‘Assuming that managing expectations equals happy communities is not a recipe for success.’

- Representative of an NGO working in East Africa

The importance of communication was underscored by a recent civil society survey of community perceptions relating to the impacts of extractive activity. The survey revealed lack of community understanding and awareness as a top concern, alongside highly tangible human rights issues such as insecurity, displacement and loss of land.

12. For example, in the UN Guiding Principles on Business and Human Rights, effective communication is identified as a key requirement of ‘due diligence’ (in which companies are expected to ‘know and show’ that they assess and address human rights risks and impacts) and of non-judicial systems for remedy.

At the same time, it was observed that civil society and human rights organisations also faced challenges in the communication needed to represent local communities and engage with companies, policy-makers and the general public effectively, including on issues such as business conduct and security and human rights.

Indeed, policies and practices in the oil and gas and wider extractive industries were not only politically sensitive but also technically complex, and this made efforts to support and involve communities in advocacy on the subject challenging. Investment was required to develop or strengthen the requisite local knowledge and expertise needed to assess and monitor impacts at grassroots level, as well as to connect representative community voice with advocacy demands made nationally.

This would include efforts to scale up impact through civil society networks as well as work with the mass media, though some participants countered that media capacity was weaker at local levels and lacked nationally the capacity or inclination to scrutinise more critically a Nairobi-focused narrative said to be too premised on the automatic benefits of oil and gas.

Meanwhile, some company representatives questioned the extent to which civil society claims and messages concerning extractives were always properly evidence-based, fair and accurate.

3.10 'Managing' expectations and tensions

The event also stressed the importance of communication to 'manage expectations' in relation to an anticipated economic boom arising from Kenya's oil and gas sector, a need conversely highlighted since by concerns surrounding the implications of falling oil prices for exploration and production plans and anticipated revenues.

But this challenge raised the question of how the term 'managing expectations' should be understood and what approach to communication would be involved. Would it mean undertaking a national dialogue that would transparently establish the public policy priorities for equitable benefit-sharing and put in place a process to address over time those demands and expectations seen as legitimate and reasonable?

Or would it involve a drive to encourage public realism about the benefits, whilst leaving such demands and expectations largely unmet?

'Assuming that managing expectations equals happy communities is not a recipe for success,' claimed an NGO representative. Clarity over such matters was important in a context such as Kenya where strong evidence exists to suggest links between inequality and the risks of conflict and human rights problems.

In terms of reducing conflict, the meeting stressed that ensuring access to reliable sources of information and supporting effective communication strategies was of major importance. Indeed, rumour, distortion and possible misinformation could easily inflame tensions, posing risks in relation to security and human rights in the extractives sector.

It was noted that the nature of communication affected security providers, whether public or private, as they were potentially in danger of being caught between a wide range of competing or conflicting perceptions and narratives.

3.11 Securing assets and securing people

Public officials and leaders in charge of security speaking at the event pledged their commitment to acting in the public interest, remaining independent from all vested interests and lobbies to uphold the rights of all citizens. 'If you are naked and I am well dressed, it does not matter. I must respect you, and you me,' said one official.

At the same time, several experts on security and human rights stressed that, whatever the specific professional role of security agencies, a broader policy approach on security was required that was based on a solid understanding of the conflict dynamics and governance challenges outlined in this report affecting management of the extractives sector. Public security forces, companies hiring private

security, policy-makers and regulatory bodies overseeing security provision operations face considerable risks if they ignore the implications of the complex interrelationship between local and national drivers of conflict and human rights risks.

Assessing this challenge, one participant proposed that a wider conception of security – human security – was needed in which security and human rights were seen as interrelated and not mutually exclusive. Security would mean not just appropriately protected installations but rest on the much firmer foundations of companies having a 'happy bottom line'. Meanwhile, a company representative added that security was based on ensuring 'good relations' with communities and stakeholders.

'If you are naked and I am well dressed, it does not matter. I must respect you, and you me.'

- Leading public security official

As with other issues begging questions of the best ways to create an enabling policy environment for responsible business in the extractives sector, it was noted that many questions remain about the appropriate roles of, and the relationship between, the state and business in security provision and the importance of ensuring adherence to human rights standards. Referring to the danger of the apparent gaps in local-national dialogue on security and human rights, and the challenge of business and the state engaging in early, systematic discussion and planning to address them, one company representative warned starkly against ad hoc crisis management.

He said: 'We can't just involve the government by asking it to bring in the troops when things go wrong.'

3.12 Security systems, accountability arrangements

Participants discussed the extent to which budgetary and training shortages affecting public security in Kenya and in other countries, as well as perceived needs for specialised security arrangements for oil and gas as a sector of vital strategic importance, have encouraged a growing trend towards the private financing of security or the hiring of private security companies to protect installations.

The appropriateness and effectiveness of the arrangements taking shape were debated, including whether company payments for public security protection in a particular location represented a conflict of interest in terms of the need for security service personnel to conduct their duties in an unbiased way.

One participant asserted that private security providers had several advantages in that they brought fresh, well-trained professional expertise that could be made readily available to extractive companies. However, private security clearly has also become a commercial commodity, he said, and independent regulation is required to ensure its compliance with public interest requirements.

Legislation to this end was being introduced in

Kenya where overall security oversight had hitherto been the absolute responsibility of central government rather than an autonomous institution.

A county government leader, voicing apparent accountability concerns, insisted that all security forces – public or private – needed to work within a publicly agreed framework.

3.13 Soft law and the challenge of hard results on security and human rights

The role of 'soft law' approaches to the regulation of security services relevant to the extractives sector was also debated. This included the possible relevance of international voluntary multi-stakeholder initiatives such as the Voluntary Principles on Security and Human Rights relating specifically to the extractives sector and the International Code of Conduct Association providing human rights guidance for private security service providers as well as non-judicial grievance mechanisms for complainants in relation to private security provision generally.

The ICoC for private security companies operating in complex operating environments is based on international human rights and humanitarian law standards and emerged in the wake of human rights problems arising from the conflicts in Afghanistan and Iraq. These conflicts were marked by a significant increase in the use of private security providers by combatant states.

In term of the VPs initiative, although Kenya may not be in a position to join as a government member at present, participants discussed the relevance of its underlying principles to the security and human rights challenges in the country. One company taking part in the event noted that there had been positive experiences of collaborating with NGOs specialising in conflict in adopting the approach of the VPs elsewhere in East Africa, though the challenge of securing official membership of the initiative had proved challenging in several African contexts. Nevertheless, there were also positive signs that progress could be made, with case studies and valuable lessons on VPs promotion shared at the event.

3.14 VPs and valuable lessons: the cases of Ghana and Nigeria

Human rights organisations from Ghana and Nigeria gave presentations on the sustained rounds of multi-layered, bottom-up advocacy they had undertaken to promote understanding, awareness, recognition and membership of the VPs in their respective countries. This involved:

- Production of a baseline study on knowledge and awareness of the VPs;
- Use of the findings in workshops to promote civil society understanding and media coverage;
- Use of social media and participation in radio interviews;
- Roundtables with key ministries and regulatory bodies;

- Engaging parliamentarians, meetings with human rights and lawyers' groups;
- Engaging stakeholders involved in the EITI in Nigeria; and
- Production and dissemination of awareness-raising materials in local languages.

In Nigeria, such efforts had led to a shift from 'ignorance and apathy' on the VPs to official opposition and now greater receptiveness to considering their value and adoption. Meanwhile, presentations from Ghana noted the government had formally agreed in March 2014 to join the VPs process; this would offer further opportunities for advocacy as the country prepared to develop its national action plan over the coming year. One lesson of the advocacy was the importance of identifying and working with 'champions' in government and official institutions, as well as in the other stakeholder constituencies. Another was the value of demonstrating the relevance of the VPs to other key processes relevant to governance and human rights in the extractive sector such as the EITI and the UN Guiding Principles on Business and Human Rights.

Such experiences were welcomed at the event as the kind of positive examples that could be highlighted at the VPs plenary assembly of governments and non-state stakeholders that the UK government would be hosting in March 2015. An official from a member government of the VPs explained the creation and approach of the VPs and how the initiative operated, setting out the

roles and responsibilities of government, business and civil society stakeholders.

It was noted that, for the UK government in its current role as chair of the initiative, the VPs are seen to provide a useful management tool to mitigate human rights risks and reduce the danger of conflict and also create a more stable operating environment that would be attractive to investors.

They also provided a potential space for stakeholder collaboration, mutual learning and problem-solving. It was noted that security problems in the extractives sector not only often involved serious human rights impacts for individuals and communities but also had commercial and reputational costs for companies. According to one study, the resulting delays in major extractive projects could cost as much as US\$20 million per week.

3.15 Biting the bullet: towards agreements on security and human rights in Kenya?

Representatives of NGOs involved in conflict prevention acknowledged at the event the value of the VPs, particularly in terms of clarifying and promoting the shared responsibilities of governments, companies and civil society organisations. But they cautioned that the VPs should not be seen as a technical 'magic bullet' as political barriers often stand in the way of their implementation. Even if it was beneficial that the principles were taken up, this was no

guarantee that the underlying causes of conflict and human rights violations would be addressed. It was stressed that major efforts were required to tackle such structural factors, including the need for more inclusive forms of governance.

In the light of such exchanges, participants discussed the action required in Kenya to address the challenges and opportunities identified during the meeting relating to security and human rights in the country.

The event culminated with an industry association in Kenya bringing to the attention of participants its plans to develop and present in 2015 a sector-wide memorandum of understanding (MoU) on security and human rights for onshore oil and gas exploration for cross-governmental agreement and application (following a previous agreement on offshore activities). While some companies already have individual agreements, the advantage of such an overarching MoU is that it could help standardise positive approaches on security and human rights across the sector, building on the commitment of companies that are already signatories of the VPs.

Companies and government would de facto be leading actors in discussions on this new MoU in view of its bearing on their overall commercial and economic interests. At the same time, event participants noted that wider stakeholder support might be needed to help encourage official recognition of the concept

of a 'standard' MoU, and that the overall process of developing, introducing and reviewing implementation of any MoU might provide opportunities for wider stakeholder input and participation, depending on the receptiveness of the main players involved.

It was agreed that an initiative such as the Nairobi Process could play a valuable role in helping to explore the feasibility of, and facilitate opportunities for, such an inclusive approach. But whatever the space available for wider discussion during immediate MoU drafting, the interested parties might need to balance the desirability of wider consultation with the interests of companies and government in keeping decision-making manageable and effective from their point of view.

Another opportunity identified for standardising effective policy and practice on security and human rights could be for stakeholders to engage with pressure to fast track the creation of County Policing Authorities under the 2011 National Police Service Act. It is envisaged such bodies would involve the representation of national government, county leadership, youth groups and civil society organisations among others, providing a channel for wider stakeholder input, participation and coordination.

Further information

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