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Security and Human Rights in Kenya's Extractives Sector

This briefing paper, produced by the multi-stakeholder Nairobi Process initiative (see overleaf), is part of a series to raise awareness of key human rights concerns linked to the emerging oil and gas sector in Kenya as well as wider developments relating to extractive industries in the East Africa region.

Introduction

A critical consideration for the sustainability of any oil, gas or mining project is how security challenges are addressed. At the same time, the protection of installations needs to be matched with a commitment to upholding the rights of citizens. Indeed, whether and how companies recognise and ensure in practice the link between security and human rights plays an important role in their ability to obtain and maintain a 'social license to operate'.

Security is a right in itself – for communities, and employees of companies. Companies have to rely on public security bodies – police, army or navy[1] – and often, private security providers, to assure the safety of their operations. Yet, unlike most of their other processes, extractive companies do not have direct control over public security around their operations.

Likewise, companies usually have limited control or influence over the systemic causes of unstable environments in which they operate, such as ethnic conflict, the presence of non-state armed actors, under-resourced or poorly trained security forces and the overall human rights and socio-economic environment in any given country or region.

Without undertaking thorough 'due diligence' to identify, assess and address human rights risks and impacts – including with regard to contractors and security providers – and by ignoring the need for best practice in community engagement, a company may create and

1 There have historically been some concerns about the naval forces in East Africa with regards to how they treat local fishermen who can be suspected of being pirates and mistreated.

exacerbate tensions and conflict. As a result, the company and its operations, as well as public institutions facilitating their work (such as local security forces), can become a target for hostility and protest.

The Kenyan authorities and oversight institutions have a due diligence obligations too. Central government has traditionally had absolute responsibility for public security provision, and legislation has recently been introduced to create an independent public institution to ensure compliance with public interest requirements.

Moreover, the rising use of private security means that the government has a duty to regulate the operations of providers as well as to make known and uphold its expectations that extractive companies' hiring and deployment of private security should not infringe human rights.

WHAT IS THE NAIROBI PROCESS?

The Nairobi Process: A Pact for Responsible Business[1] is an initiative of the Institute for Human Rights and Business (IHRB) in collaboration with the Kenya National Commission on Human Rights (KNCHR). Aimed at embedding corporate human rights due diligence into the emerging oil and gas sector in Kenya, it is a multi-stakeholder initiative that engages with the three main constituencies involved – business, government and civil society – and fosters dialogue and interaction between them.

The objectives of the Nairobi Process are:

1. To bring together oil and gas companies to address collaboratively key human rights concerns through application of the UN Guiding Principles on Business and Human Rights and other relevant standards.

2. To work with governments to ensure that human rights concerns are embedded in proposed legislation and policies relating to natural resource development and the extractive industries.

3. To build the capacity of local civil society organisations to address business and human rights related concerns in their awareness-raising work with host communities, in their dialogue with companies and in their advocacy work with governments.

Since its launch in April 2013, the Nairobi Process has brought together most of the oil and gas companies which have been issued exploration licenses in Kenya, with the purpose of addressing the human rights dilemmas facing the sector. Through this process of engagement and dialogue, security has been identified as a priority human rights issue.

Working with companies to address security concerns with particular attention to human rights, the Nairobi Process has initiated dialogue focused on the Voluntary Principles on Security and Human Rights (VPs)[2], an international multi-stakeholder initiative guiding extractive industry companies on upholding international human rights standards in their security arrangements (see Section 3). The aim is to demonstrate how the VPs can help companies plan and maintain the security and safety of their operations within a framework that encourages respect for human rights.

2 www.nairobiprocess.org
3 www.voluntaryprinciples.org

1. Context of the oil and gas sector in Kenya

Kenya is experiencing an upsurge in oil and gas exploration and the prospects are encouraging based on the discoveries announced to date, though recently falling oil prices internationally may have dampened expectations. So far, all the commercially viable discoveries have been made in Turkana County, considered to be the poorest region in Kenya. Turkana is a remote and arid area of northwestern Kenya, characterised by under-development, perennial drought, and inter-ethnic conflicts, due in part to rampant cattle-rustling.

Thus, for Turkana residents, more so than those in other counties in Kenya, there are huge expectations that oil discoveries will transform their lives for the better. Expectations of local communities focus on employment by the oil companies and their service contractors, supply of goods and services, flow of revenues to both the County and National government that will be used to finance public services, and social investment by companies.

Tensions surrounding expectations have already led to protests by communities against the exploration companies, most notably against Tullow Oil in October 2013 that led to the overrun of the accommodation camp, destruction of property, and eventual work stoppage and evacuation of staff. Minor protests have also been experienced by other companies and in other sites such as Mandera and Garissa.

For communities directly affected by exploration activity, social protests and blockades are some of the ways to express dissatisfaction and draw attention to their concerns. This has led to different views of the immediate and underlying causes of unrest and how they should be addressed, including in relation to security.[4]

For some, the government and companies have reached agreements on exploration without sufficient public involvement, particularly communities, and not done enough to manage expectations, create trust and demonstrate that demands and expectations seen as legitimate and reasonable will be addressed over time. For others, certain demonstrations have been politically motivated, coordinated by local political figures keen to bring attention to their campaigns or to generate revenues for their own means by being vocal.

Though some unrest has been accompanied by violence and loss of or damage to property, some experts warn against exploration companies operating in Kenya viewing such acts primarily as security incidents. They argue that responses by the government and companies focused on the increased presence of security forces around the installations can lead to heightened tensions and prolonged conflict, though this is not necessarily the approach that companies have always taken.[5]

Various sides have also proposed that companies should invest in genuine community engagement that will foster a better understanding of the complex interaction between the company, its staff and contractors and public security. Advocated is the need for companies to be mindful of diverse social pressures, including inter and intra-communal conflicts, and how these might exacerbate security and human rights issues.

Meanwhile, many stakeholders argue that government at national and country levels ought to play a stronger role – both in ensuring and supporting community engagement based on meaningful dialogue, and in promoting the overall conditions required for the potential benefits of extractive activities for communities to be recognised and realised. Stepping up investment in local training and services, for example, could ease tensions and create a more sustainable basis for tackling security concerns.

4 This section draws on views expressed at a multi-stakeholder dialogue held by the Nairobi Process on 6-7 October 2014, which generated multiple perspectives and insights on the wider governance challenges affecting security and human rights in the extractives sector. See http://www.ihrb.org/pdf/2015-02-02-Sharing-Stories-Developing-a-Joint-Narrative.pdf

5 For example, during the unrest in Turkana in late 2013, Tullow Oil requested that the Kenyan Government not deploy any additional forces.

2. Key human rights risks and challenges in the oil and gas sector

Both the inaugural meeting of the Nairobi Process, held in April 2013, and a major multi-stakeholder dialogue event on security and human rights in Kenya's extractives sector held in October 2014[6], identified several human rights risks and challenges associated with the exploration phase of the emerging oil and gas sector in Kenya. The issues needing attention include:

- Responsibilities relating to the use of public and private security forces;
- Managing and addressing the expectations of local communities and the general public;
- Undertaking meaningful community engagement based on dialogue, participation, communication and access to information;
- Addressing calls for local content;[7]
- Taking additional steps to ensure respect for the rights of marginalised or vulnerable groups;
- Conflicts concerning land acquisition and use;
- Impacts associated with corporate water management and use; and
- Tensions surrounding benefit-sharing in relation to extractive revenues.

These issues, if not managed properly, could lead to actual or potential human rights abuses as has been documented in many other countries with extractive industries. Governments (both from the home countries of investor companies and Kenya as the host), business and civil society must actively collaborate to develop strategies to identify, prevent, mitigate and address risks and impacts, embedding responsible practice right at the outset of the development of Kenya's oil and gas sector.

For example, the acquisition and use of community land highlights the complexities around land ownership, compensation and the lack of clarity on how communities can access remedies if they feel their rights have been violated. Related issues such as restricted access to water, pasture, and other resources from these community lands will certainly exacerbate the risks further.

Protection of cultural heritage and environmental conservation are also key concerns for affected local communities. Furthermore, existing human rights related risks such as infiltration of small arms, cattle rustling, precarious physical security, and economic under-development compound the overall risk matrix for companies.

There are also systemic socio-economic factors, which can heighten tensions with local communities and associated human rights risks, such as high youth unemployment, lack of economic opportunities, high illiteracy levels and endemic poverty.

All these factors present challenges for companies operating in such a context. Nevertheless, perhaps the greatest challenges involve managing and tackling the high levels of community expectations in gaining the 'social license to operate'. While there is no standard or generally accepted definition for 'social license', it is commonly viewed as existing when a development project has the ongoing acceptance of local communities. This is in addition to the government or legally granted right to operate.[8]

6 See http://www.ihrb.org/publications/reports/sharing-stories-developing-a-joint-narrative.html

7 Local content is described as the range of benefits the oil and gas industry can bring to the areas where it operates. Companies can provide measurable benefits by providing e - ployment and training local people, buying supplies and services locally and supporting community development work. (www.ipieca.org)

8 Marianne Voss and Emily Greenspan, Oxfam America Research Backgrounder, 'Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior and Informed Consent (FPIC)'

3. Relevant international human rights standards and frameworks

UN Guiding Principles on Business and Human Rights

Having gained unanimous endorsement by the UN Human Rights Council in 2011, the UN Guiding Principles on Business and Human Rights (UNGPs) provide a recognised overarching framework to guide governments and businesses on their respective duties and responsibilities to protect and respect human rights.

The UNGPs are based on and seek to operationalise in practice a 'Protect, Respect, Remedy' policy framework on business and human rights, providing detailed guidance to define human rights commitments; ensure supportive business conduct through due diligence processes and implementation of their outcomes; and provide judicial and non-judicial remedy in cases when human rights are negatively affected.

The UNGPs are based on the three pillars of 'Protect, Respect, Remedy' involving:

1. States' existing obligations to **protect** people from human rights abuses involving third parties, including business;

2. The responsibility of all business enterprises as specialised organs of society performing specialized functions, to comply with all applicable laws and to **respect** human rights through ongoing due diligence processes;

3. The need for rights and obligations to be matched with appropriate and effective **remedies** when breached.[9]

A core concept in the UNGPs is **human rights due diligence** which is the process whereby businesses identify, prevent, mitigate and account for potential and actual human rights adverse impacts and prevent or avoid complicity in rights violations.

Corporate human rights due diligence involves the following:

- **Identifying and assessing human rights impacts:**

taking proactive, ongoing steps to understand how existing and proposed business activities may cause or contribute to human rights impacts, as well as how business operations may be directly linked to such impacts.

- **Integrating findings:** across relevant internal functions and processes within business.

- **Taking action:** appropriate actions will depend on the relationship between the business and impacts on the rights of individuals or communities.

- **Tracking the effectiveness of responses:** monitoring and auditing processes permit a business to track ongoing developments.

- **Communication:** externally communicating how the business has addressed adverse impacts. For example, UN Global Compact participants are required to submit an annual Communication on Progress in implementing the Compact's ten principles in the areas of human rights, labour and environmental standards and anti-corruption.

The UNGPs provide a broad, robust framework valid for all types of businesses and are applicable to both civil and political rights and economic, social and cultural rights. Application of the UNGPs is fundamental to responsible management of security and risk mitigation.

Voluntary Principles on Security and Human Rights[10]

The Voluntary Principles on Security and Human Rights (VPs), developed by a group of governments, companies and NGOs and launched in 2000, are a set of principles

9 For a detailed presentation of the UNGPs see OHCHR publication: http://www.ohchr.org/Documents/Publications/GuidingPrinciples-BusinessHR_EN.pdf
See also an animation developed by the Danish Institute for Human Rights providing a useful unofficial introduction to the UNGPs: https://www.youtube.com/watch?v=BCoL6JVZHrA

10 For a detailed description of the VPs see http://www.voluntaryprinciples.org

specific to the extractives sector, designed to provide useful operational guidance to ensure human rights are taken into account when addressing security issues.

The three constituencies of the VPs initiative are business, civil society and government. They interact nationally but also come together globally in an annual plenary assembly hosted by the current chair of the VPs.

The key features and stated benefits of the VPs are as follows:

1. The VPs aim to help **companies** be 'better able to align their corporate policies and procedures with internationally recognised human rights principles in the provision of security for their operations'.

2. Through implementation of the VPs, companies are expected to 'communicate to employees, contractors, shareholders, and consumers their commitment to the Principles: (1) through sharing of best practices and lessons learned with one another, and (2) by collaborating on difficult issues'.

3. The VPs recognise the crucially important role played by **civil society** as voices and interpreters of societal concerns. NGOs participating in the VPs are expected to help raise awareness on key issues associated with human rights and security concerns. NGOs are expected also to engage with companies and governments to promote the implementation of the Principles.

4. For **governments** the VPs support efforts to fulfill their human rights obligation of proactive action in the protection of human rights and are thus 'well-aligned with their policy objectives… promoting development, and avoiding or reducing conflict'.[11]

The VPs can be seen as a complementary tool to help governments and businesses ensure that their approaches specifically in relation to security are in line with the UN Guiding Principles dealing with the wider range of business human rights issues. Under the VPs companies, for example, can manage and address security and human rights challenges by:

- Conducting a comprehensive assessment of human rights risks associated with security arrangements;

- Engaging with public and private security providers and surrounding communities;

- Developing human rights screening and training for security forces; and

- Developing systems for investigating and reporting allegations of human rights abuses.

Other standards and guidelines

There are other standards and guides that specifically complement and help companies address security and human rights issues. A particularly important new standard is the International Code of Conduct for Private Security Service Providers (ICOC) whereby signatory companies commit to the responsible provision of security services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients.[12]

The ICOC sets out the elements for due diligence on the part of security providers and identifies the key issues concerning governance and the regulatory framework expected from states to help companies establish adequate interaction with governments on the issues of private security. This includes guidance on contracting and the supervision of security provision.

11 Voluntary Principles, ibid.

12 http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf

4. Examples from Africa and Latin America on promoting and adopting the VPs

Conflic -affected regions or countries which have experienced high levels of security and associated human rights risks around the oil and gas industry, such as Nigeria or Colombia, provide a host of lessons both positive and negative for Kenya at this early stage of the sector's development. Tools such as the VPs could help Kenya meet the security and human rights challenges.

Whether or not Kenya wishes to become an officia government member of the VPs initiative itself is a matter for the Kenyan government and interested stakeholders to decide.

Putting the question of formal membership to one side, however, the underlying guidance provided for stakeholder action under the VPs could be very useful for companies and civil society to consider in Kenya. Several companies and NGOs operating in the country have experience of collaborating in adopting the value of the VPs' overall approach in other African countries.

At the moment only one country in Africa – Ghana – has applied to become an official member of the VPs initiative. Having been admitted as an officiall engaged member in March 2014, Ghana is now expected to prepare a national action plan over the next year in order to become a full participant in the official VPs process itself. Such progress has involved considerable effort by concerned stakeholders.

VPs advocacy: lessons from Ghana and Nigeria

Ghana and Nigeria offer two interesting experiences of efforts to promote understanding, awareness and recognition of the VPs, as well as (in the case of Ghana) eventual membership of the initiative itself. In each case, human rights organisations have undertaken multi-layered, bottom-up advocacy campaigns to promote adoption of the VPs.[13] These have involved:

- Production of a baseline study on stakeholder knowledge and awareness of the VPs;
- Use of the findings generated in workshops to promote stronger civil society understanding and greater media coverage;
- Use of social media and participation in radio interviews to promote public debate as an additional means of encouraging policy-maker interest;
- Roundtables strategically targeting key ministries and regulatory bodies;
- Engaging parliamentarians;
- Meetings with human rights and lawyers' groups;
- Production and dissemination of awareness-raising materials in local languages.

In Nigeria, such efforts, in the words of one human rights organisation, have led to a shift from alleged 'ignorance and apathy' on the VPs to official opposition and now greater receptiveness to considering their value in stakeholder work on security and human rights.

Meanwhile, advocacy in Ghana has helped encourage the government to decide to join the VPs process. This will lead to further opportunities for advocacy to promote positive approaches to security and human rights in the extractives sector as the government develops its national action plan in 2015.

One lesson of the advocacy has been the importance of identifying and working with 'champions' in government and official institutions, as well as in the other stakeholder constituencies. Another has been the value of demonstrating how the VPs are not an isolated tool but rather have complementary relevance to other key processes aimed at strengthening governance and human rights in the extractives sector such as the Extractive Industries Transparency Initiative (EITI)[14] and the UN Guiding Principles on Business and Human Rights.

13 These experiences were presented at a multi-stakeholder dialogue on security and human rights held by the Nairobi Process on 6-7 October 2014.

14 https://eiti.org/

Linking the VPs with these wider processes has been a way of stimulating the interest and commitment of a greater number of stakeholders so that the security and human rights challenge can be tackled in the wider governance and human rights setting. The VPs cannot be a 'magic bullet' by themselves.

Colombia

Internationally, an important experience is Colombia, whose government is an official member of the VPs initiative. After years of tension and confl ct, companies, government and civil society organisations have worked together to support implementation of guidelines and recommendations on specific security and human rights issues, through a grouping known as the Comité Minero Energético de Seguridad y Derechos Humanos (CME, Mining and Energy Committee for Security and Human Rights).

Initially, two extractive companies in Colombia (El Cerrejón Coal and Occidental Petroleum), with the guidance of the NGO International Alert, piloted the implementation of *Conflict Sensitive Business Practice*, a toolkit for risk assessments in con ict areas developed by International Alert. These were the first steps towards due diligence on security and human rights issues. Today the three stakeholder groups meet regularly, have a work agenda on key issues and produce by consensus guidance documents developed through their working committees.[15]

The CME follows the framework of the UNGPs and, more specifically, the VPs. While the CME operates separately from Colombia's participation in the member-driven global plenary of the VPs, it nevertheless expects companies to adhere to the VPs framework and its associated good practices. Companies have indicated their interest and willingness to follow the principles and work towards raising standards of responsible practice within the extractives sector in Colombia.

Collaboration between government and companies in Colombia has helped to produce guidance and recommendations for companies and public institutions such as the army, for example, to meet operational needs within human rights legal framework. Such collaboration has been helpful for the government and the state (including public security, police, military and private security oversight bodies) in that companies are encouraged to strengthen their understanding of the social, political and cultural context in which they plan to operate, thus potentially reducing the likelihood of exacerbating existing tensions and confl cts. Companies also found that they could discuss public security and human rights concerns more candidly.

The interaction of the three stakeholder groups takes place in several working committees that reflect the working agenda:

- Companies and Public security;
- Compliance and verification of commitments;
- UN Guiding Principles and implications for CME and its members;
- Dialogue with civil society;
- Extortion and kidnapping risks;
- Communication and dissemination.

These committees have so far produced recommendations in the following areas:[16]

- Security-related human rights risk management;
- Interaction with public security;
- Contracting private security;
- Support to the military in the training and implementation of their own human rights policy;
- Performance indicators;
- Engagement with NGOs; and
- Correct use of the Red Cross emblem.

15 For detailed information on composition, agenda, institutional set up etc. see www.cmecolombia.co

16 CME ibid

5. Key lessons and recommendations for companies, government and civil society

Dynamic multi-stakeholder dialogue and engagement in the early stages of Kenya's oil and gas development can play a crucial role in catalysing effective action by governments, companies and civil society to ensure that is based on progress towards the protection and enjoyment of rights for all. Sound policy, legislation and regulation, as part of stronger overall governance based on transparency, participation and accountability, are required. But there is much that stakeholders can already do to address responsibly the complex and sensitive security and human rights challenges.

Evidence gathered by the Nairobi Process in Kenya and internationally, including the experiences highlighted in Section 4, offers several main lessons for the management of security and the mitigation of risk of human rights abuses:

1. Collaboration of government, state agencies and companies is vital for a joint commitment to respect human rights to become a reality
It is more difficult for companies to work in a hostile environment if governments do not commit to approach the provision of security in ways that are in line with the protection of human rights. However, even if there is commitment, the absence of collaboration involving formalised channels between companies and government will make risk management more complex and often complicate governance in sensitive areas.

2. Security and human rights challenges must be analysed comprehensively, based on ongoing risk assessments that should be held from the earliest stages of projects and involve meaningful stakeholder engagement, dialogue and participation
Risk assessments often merely analyse hazards and security threats. This is necessary but insuf icient. Comprehensive risk assessment is needed to identify the underlying causes and immediate drivers of security and human rights risks and to determine effective responses to address them. An extractives operation could exacerbate existing problems of weak governance or social, political or ethnic con ict. Risk assessments failing to get to grips with contextual issues lead to misguided responses when security and human rights problems occur.

A robust understanding of context before initiating any field operations allows for stronger prevention and provides a better basis for companies' communication with the authorities and their dialogue with community representatives and civil society organisations.

3. Ensure due diligence in the extractives value chain
Extractive companies hire contractors to carry out specific pieces of work and to provide services. These often have a larger and deeper footprint than the direct one of companies themselves. Extractive companies need to make sure that their contractors are aware of the security and human rights standards, commitments and competencies required, especially when operating in sensitive areas.

4. Governments should engage effectively with communities, civil society organisations and local officials where projects will be deployed in anticipation of the presence of companies
Often, local communities and governments as well as civil society organisations feel left out of decisions that have major impact on people's lives. The absence or weakness of engagement can lead to the frustration and resentment of local stakeholders who may block and disrupt projects as the only way they feel their views can be properly heard. Local communities need to see that central government is committed to hearing their concerns and grievances and to supporting their informed participation in decisions on land, employment, local contracts and environmental impacts. Early engagement with local communities is also vital for managing and addressing local expectations in relation to the potential bene its of exploration and eventual production.

5. Demonstrate a commitment to working with non-governmental and other civil society organisations
NGOs and the local civil society organisations they work with often have deep knowledge of the issues, expectations and human rights concerns of communities. Drawing on this knowledge, and the fact that NGOs and civil society organisations often have strong roots in communities, is essential for sound impact identification and risk management by governments and companies.

NGOs and other civil society organisations, in taking an evidence-based approach and engaging professionally with other stakeholders, can help prevent and mitigate human rights impacts through early warning and denunciation when abuses take place.

Governments and companies can better appreciate the potential role of NGOs and civil society groups if they engage at an early stage with them, striving to build trust and strengthen interaction around the challenge of undertaking due diligence. Yet governments and companies often seek to engage NGOs too late, during the project development and operation stages when local stakeholders have already come to harbour misgivings and grievances.

6. Adherence to standards and access to grievance mechanisms and remedy

Central to the sustainable and equitable development of the extractives as an important sector is the provision of public and private security in accordance with international standards to protect human rights. Within this provision, there must be adequate access to grievance mechanisms and remedy for any alleged victims of abuse by those security forces.