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## Pillar II

The Corporate Responsibility to Respect Human Rights in Kenya's Extractive Sector



## 3. Pillar II: The Corporate Responsibility to Respect Human Rights in Kenya's Extractive Sector – A Field Perspective

### 3.1 Introduction and Link to the UN Guiding Principles on Business and Human Rights

Pillar II of the UN Guiding Principles sets out the global expectation that companies respect human rights. The expectation applies to all companies operating everywhere, in all sectors. It therefore applies to large and small companies operating in the extractive sector in Kenya. While some of the larger multinationals operating in the country have experience in addressing human rights issues and implementing the steps set out in the UN Guiding Principles under the corporate responsibility to respect, there are still many challenges in applying the highest operational, environmental, social and human rights standards throughout company operations on a day-to-day basis. For smaller and national companies, complying with national laws is a first step on a path to reducing negative impacts and enhancing environmental, social and human rights performance to attract new business partners. As these small companies are often operating among their neighbours, paying attention to the key issues discussed below is a way of demonstrating respect of and improving relations with workers and communities.

The corporate responsibility to respect entails a three step process of: (i) developing an appropriate policy commitment to human rights and embedding it throughout the company; (ii) carrying out human rights due diligence; and (iii) providing for or cooperating in remedies, including through providing operational level grievance mechanisms. The human rights due diligence process in turn is comprised of a number of sub-steps, which include: (i) identifying and assessing actual and potential human rights impacts; (ii) integrating and acting on the findings; (iii) tracking performance; and (iv) communicating this to stakeholders. There is an increasing range of guidance available for the extractive sector, large and small, to support extractive sector companies in developing their approach to respecting human rights that can provide useful guidance for operating in Kenya.<sup>260</sup> The following two sections on the impacts of the mining and oil & gas sectors on human rights in the country provide important input into the due diligence process, highlighting human rights concerns that companies should consider and address as part of their human rights due diligence on their Kenya operations.

Under the UN Guiding Principles, the responsibility to respect extends to business relationships, as companies are directly linked to the human rights impacts of their

business partners – their contractors, suppliers, and exploration partners for example. So it behooves companies large and small to assess and address the actions of their business partners that are supplying goods or services or which participate in their operations.<sup>261</sup> Larger multinationals with experience in addressing human rights can play a proactive role in developing capacity and sharing lessons learned with local extractive sector companies and other business partners in applying good practice and in their engagement of Kenyan workers. Local companies are likely to need clear messaging, contractual requirements and enforcement, coupled with capacity building support to take on board relevant international norms.

## 3.2 Human Rights Impacts of the Mining Sector – A Field Perspective

The human rights impacts – negative and positive – of the mining sector will vary over the life-cycle of specific projects. Each stage has its own distinct challenges but there are also cross-cutting challenges throughout, particularly around community engagement. The discussion below draws on the field research using the methodology outlined in Annex 1.

### *3.2.1 Groups at Risk*

#### **Women**

Women, as a group, are particularly at risk to be negatively impacted by the mining sector from a human and environmental perspective for a number of reasons. First, women are often the lifeline of their families, providing food, water, child rearing, and elder care. Yet, women in Kenya typically also have unequal access to the resources necessary to effectively protect and carry out these responsibilities, such as education, productive assets (notably land), capital, technical skills, and as members of a patriarchal society, a voice.<sup>262</sup> Women have fewer livelihood options than men, due to social status, family and cultural roles and expectations, as well as lower literacy levels, and as a result are disproportionately affected by poverty.<sup>263</sup> Further, the livelihood options that have developed for women around mining present challenges related to personal safety, sexual harassment, and time away from the family. Discrimination against women in the typical patriarchal society in Kenya, can be seen from the commencement of life, where preference is given to the male child.

There are limited opportunities for women available in the mining industry, and of those opportunities, the vast majority are in the artisanal mining sector. Although women are not assigned the risky roles of going into the mining pits, the mining surface activities they carry out have significant impacts on their wellbeing. First, in the gold mines of Migori, women are part of the value chain, which normally entails washing the ore powder with mercury to extract the gold particles. The World Health Organization (WHO) lists mercury as one of the top ten chemicals that poses a major public health concern.<sup>264</sup> Exposure to mercury – even small amounts – is known to cause serious health problems, including toxic effects on the nervous, digestive and immune systems, as well as on the lungs, kidneys, skin and eyes. It is also a threat to the development of the child *in utero*

and early in life.<sup>265</sup> Women handle this substance numerous times a day, for days, weeks and months on end, and often without the requisite personal protective equipment.

Second, women interviewed for this Report told of bartering sex and/or sexual favors for ore. Women who depend on this method of procurement for a living are at risk for contracting STDs and HIV/AIDS. Third, with the development of large-scale mining operations and the rapid development of mining towns comes the arrival of a transitory male workforce, which brings with it additional human impact challenges such as a rise in transactional sex, sexually-transmitted diseases and potential violence.

Women also spoke of men migrating for employment, leaving their households in search of work in other mining sites, and often not coming back, leaving women to search for work outside of the home to support the family. This in combination with the patriarchal environment and the accompanying cultural dependency women have on the men of their communities, results in their reluctance to access recourse mechanisms and make their voices heard. Women reaching out to their community representatives reported feeling their interests were not truly represented. Few of the NGOs that focus on women rights have addressed the role of women in the mining industry.

## Children

Children in mining are mostly found in the artisanal mining industry where they are brought by their parents to the mines for labour to help support the family's income generation. This has three clear implications on the welfare of the children: (1) it violates the child's right to be free from exploitation, (2) it deprives the child from obtaining an education, and (3) it exposes the child to hazardous chemicals and dangerous working conditions.

According to a child welfare officer in Migori County, there are over 5,000 children working in the gold mines, either in actual extraction or in ancillary services such as selling food. The number one reason provided to explain why children are employed to help out at the mines is that they are less expensive than hiring more adult workers. Moreover, it was reported that it is culturally acceptable to expect children to contribute to the family chores and duties. Parents who spend their days toiling in mines often do not see a problem with having their children help them, given the added benefit of furthering the family's economic position.

*"A parent will find it hard to send a boy to school when that boy can bring back income that very evening when employed at the mine,"*

– Local education officer, Migori

Many children accompany their parents to the mining site and help their parents with light duties at the mines, including transporting materials and food into the mine. During the research for this study, children were observed to openly carry out chores around the gold mines, which raises concerns about the effectiveness of Government child welfare departments in curbing this practice.

The Government reintroduced free and compulsory primary education in January 2003. Moreover, the 2010 Constitution in Article 53 restates that promise. While the County



Social Services Department said that efforts have been made to educate the miner-parents on allowing their children to attend school for the duration of school hours, the presence of children around the mines for whole days and weeks suggests there could be a high rate of truancy. Indeed, one local organisation interviewed indicated that truancy cases have been reported in some areas of Migori gold mines.

The presence of children at the mines, exposes them to dangers to their health and wellbeing particularly when they are moving around in and out of the mining pits. Children who work around mines are exposed to dangerous physical environments, including uneven terrain, jagged rocks on the ground, and falling rocks, as well as harmful air-borne, river borne and ground present toxins. Such exposure is especially dangerous for children, and children who work in or around mines often suffer gastroenteritis, inflammation of the lungs, respiratory infections, spinal damage, damage to the back and neck, while employed and later in life, as well as frequent cuts, bruises and damage to joints.<sup>266</sup>

Children involved in artisanal mining activities were observed to have no more protection than the adults. In the gold mines of Migori and Turkana, scores of children could be seen helping out in several activities around the mines and in most cases these children were scantily dressed and had no personal protective equipment (PPE). When asked why children were allowed to work at the mine sites, miners provided a justification that the children join the mine camps voluntarily and only perform the light jobs. However, at the Masara gold mines in Migori, several children were seen milling around mouths of the gold pits, which are very deep. The miners claimed the children are not allowed into the pits, but admitted the children help in pulling out the ore using string and buckets.

## Youth

One of the greatest concerns observed for youth is the lack of employment opportunities. As the large scale mining industry continues to develop, specific vocational training and capacity building opportunities will be needed to acquire the skills to be hired for these roles. Moreover, if youth lack employment opportunities to build capital, they will be unable to save the financial resources needed to start a small scale mining operation of their own.

## Persons with Disabilities

Very little was observed or learned during this study about the integration of persons with disabilities into the mining industry. The sheer invisible nature of these persons speaks to the serious need for dialogue around how the extractive industry can most effectively support development efforts for this population. This may prove challenging since many of the employment roles involved in the mining industry, to date, are quite physically demanding.

## Minorities and Marginalised Groups

Those interviewed who rely on traditional livelihoods expressed concerns about the negative impacts of prospecting and mining activities on the land and water sources traditionally relied upon. They noted that compensation, whether consented to or

compulsory, would not be a sufficient replacement for the livelihood provided by these natural resources. They also complained of a lack of sufficient information about how to pursue replacement livelihood opportunities when traditional mechanisms have been diminished and/or how to seek redress when their livelihood has been harmed by mining activities.

### Older Members of Society

The mining industry, to date, has favoured men over women, and young men over older men. Consequently, the older members of society often feel excluded. During a meeting with community members on the mining industry, one elderly man stood to ask, *"What's in it for us."* Dialogue is needed as part of efforts to integrate the older members of society into the extractive sector transformation as well as the dissemination of information so these individuals understand their potential role and relevance.

### 3.2.2 Community Engagement

The presence of mining, particularly large-scale mining, changes a community in numerous ways, such as with respect to access to land and other natural resources, livelihoods, voluntary and/or compulsory relocation of groups of people, labour and employment prospects, and community dynamics. New mining activity in a community, even in the initial stages of exploration, can lead to the community believing a high value mineral has been discovered, and accordingly, that they will promptly reap the benefits of this discovery. Instead, the mining process from exploration to exploitation often spans years. In practice this means the community will often see the negative impacts of exploration activities long before any benefits may flow, while the mining companies and central government are perceived to reap all of the benefits, which leads to unmet expectations, frustrations, and potential security issues involving community unrest.<sup>267</sup> As an initial matter, therefore early community engagement explaining the lifecycle of mining and the time frame for the types of benefits that may flow – early construction jobs, potential longer term employment, social investment programmes and eventually payments disbursed by the national government to the county government and communities through the yet-to-be finalised benefit sharing scheme for the mining sector. It is important that the community understands what these changes are and how they will be impacted. Further, the mining company can learn from engaging with the community. In order to address these issues in a proactive way, ongoing and dynamic engagement between the mining company and the community stakeholders is important.

Some of the communities interviewed during the field research have formed 'community liaison committees' and in other cases, companies have prompted the formation of such bodies. In Kitui, for instance, community liaison committees successfully represented community perspectives during negotiations with extractive companies. In Kwale, individuals interviewed indicated that community consultations had been conducted prior to the commencement of the titanium mining project but these stalled due to a disagreement over compensation packages. A new mining company taking over the license has learned from the previous license holder who had on-going conflicts with the local community due to its failure to propose compensation terms that assured the community. The new license holder improved its community relations measures and managed to gain

community approval to commence mining in the area. The company continues to regularly review the terms of land access through monthly meetings with selected liaison committees and six community based committees to discuss impacts related to mine operations.

Information reported during the interviews emphasised a widespread practice: currently, women are often left out of community decision-making processes, giving them little or no say in how the benefits from mining activities, such as land compensation and wages, are spent. One woman respondent in Kwale summed up the way the community treats its women:

*"In our village the elders sit under a tree and make decisions on behalf of the community. They also speak on behalf of the village. We as women have nothing against that arrangement as long as the decisions do not adversely affect us."*

This sentiment was shared by other women interviewed in Salawa, Baringo where women's resignation in accepting the status quo reflects the challenges in changing social norms and exercising their rights.

*"We cannot inherit land, we don't make the final decisions on use of lands and we don't control the household finances. We believe that is how things were meant to be. Women who challenge the authority of men have a problem."*

### 3.2.3 Labour Rights

The mining industry is a physically demanding and often dangerous sector. Typical concerns include explosions, rock falls, cave-ins, rock bursts, and other accidents that have resulted in a high number of deaths and serious injuries to employees on a global, sector-wide basis. The ILO asserts:

*"Despite considerable efforts in many countries, the rates of death, injury and disease among the world's mineworkers remain high, and mining remains the most hazardous occupation when the number of people exposed to risk is taken into account."<sup>268</sup>*

During the field research for this Report, numerous respondents from across the counties provided accounts of the lack of health and safety practices in the mining industry and in particular the ASM sub-sector. There was a divergence of opinion between operators concerning safety standards and respondents claimed little prominence is given to the level of compliance with occupational health and safety (OHS) standards and the implementation of safety practices during mining operations. In one mine located in Taita Taveta, it was observed that personal safety rules were sometimes seen as a hindrance by mine workers. As several respondents reported, the mine workers would only use personal protective equipment (PPE) if the company was expecting visitors that day. Even when companies provide all of the necessary PPE to their workers, there can be a failure or delay in adequately educating workers on the importance of utilising the PPE at all times or in consistently and vigorously enforcing these standards.

Multinational companies are generally known to have better adherence to legal and industry standards than smaller mining enterprises. For example, at the Kwale minerals sands mining project, it was observed that the mining company followed strict OHS policies. Further, the company noted that it regularly reviews and updates such policies and employs officers specifically tasked with enforcing compliance. The company also has an on-site clinic that conducts regular health and safety training for its workers. As a result, no cases of serious occupational injuries or deaths had been reported at the time of the research for this Report. Through peer learning, sharing in industry associations and contracting, such standards and practices can begin to be shared more widely in Kenya.

The artisanal mining sub-sector is widely known to have poor observance of OHS standards due to a basic focus on immediate livelihoods, insufficient resources to equip sites with adequate safety procedures and equipment, a lack of training, and the at times transitory nature of the mining.<sup>269</sup> In the gold mining sites of Migori, it was observed that few miners had any form of PPE, except for a glove or two. When one artisanal gold miner was asked why he did not have proper shoes and clothing for digging the mine tunnels, he answered:

*"I know that it is dangerous to work in this condition but I don't have much money to spare to buy such protective wear. In any case our fathers and forefathers have been mining this gold in the same fashion as we are doing now and they never had major problems."*

In another instance, in Taita Taveta, mine workers were found digging out ore at an open cast green garnet mine with only their bare hands. An observation of the surrounding workers confirmed that most of these miners had become inured to the danger that comes with working in mines. There have been numerous incidents of miners being killed as a result of collapsing high mine walls, large stone falls, loose debris slips, falling into pits, and suffocation. Many of the artisanal miners told stories of someone who was seriously injured or killed in the course of this work. However, in some cases surprising explanations are given to account for the miner's cause of death, as one miner explained:

*"Some of our miners have been killed in the mines but that is the work of curses and bewitching. When someone does not like you, especially when your mine business is doing well, he will look for ways to bring you down including going to the witches."*

There continues to be a widespread lack of acknowledgement of the simple risks posed by mine activities, in some cases informed by ignorance or misinformation, which unfortunately helps perpetuate poor OHS standards.

There have been many cases where rock blasting by ASMs has caused accidental injuries to people and neighboring homes. Several respondents reported the use of explosives by miners in Migori and Taita Taveta, including cases where there were no warning signs posted when the rock blasting occurred and the passers-by found themselves dangerously close to the explosions.

Discussions with the Ministry of Labour and with ASM workers revealed a number of concerns. The low engagement of workers with the local labour offices, at least in part, is



attributed to the fact that most aggrieved workers fear that lodging complaints will result in the loss of their jobs. This points to a lack of confidence that the Ministry of Labour will be able to resolve the labour problem or protect the worker from employer retaliation. As a result, workers are largely left at the mercy of their employers and will continue to face labour injustices.

Second, in most of the counties covered by the research, the Ministry of Labour lacks the necessary resources and mechanisms to address most labour issues related to mining. When interviewed, labour officers noted they only handle salary related complaints, which is only a small segment of the responsibilities assigned under the legislation the Ministry oversees. Further, there is often a lack of inter-departmental collaboration and communication among government ministries. For example, it is unclear why the local county labour offices did not have information about the obvious child labour at mine sites found within the county. Solutions to child labour often lie in coordinated programmes that require the participation of the Ministries of Mining, Education, Social Affairs and Labour, each using its respective strengths and areas of expertise.

It is possible for workers in both the mining and oil and gas industry to join unions. For mining it is more applicable to medium and large companies and not small scale.

### *3.2.4 Land Ownership*

#### **Determining Land Ownership and Those Who Have a Voice in Land Matters**

Land ownership in Kenya is a complex and multi-layered challenge and the regulatory frameworks in place to date have not adequately provided solutions to the myriad concerns that arise from the development of land interests by the mining industry. Community concerns about land were observed in many locations under this study and they cut across all specific sub-locations assessed. Land is classified under three categories – public, private, and community. Community land is the predominant land ownership regime in most of the mining locales in Kenya. However, under current legal provisions no land is registered as community land – instead it is communally owned and is held in trust by the county governments or formerly by the local authorities. It is the county government, after community consultations, which grants the right to the extractive companies to use the land. The proposed Community Land Bill seeks to recognise, protect and register community land rights and provide for the management and administration of community land. The Bill seeks to spell out the procedure for the adjudication and acquisition of community land while also providing for community structures for the administration and management of community land.

In a few counties, such as Migori, Kwale and TaitaTaveta, much of the land belongs to individuals as private land. However, even many private land owners in Kitui and Taita Taveta do not have ownership titles. Before titles for private land can be issued, there needs to be an adjudication process to ascertain the rights, interests and the owners of the land as currently, many land holdings are demarcated only in a rudimentary manner, which leads to numerous disputes between community members. While the government

seems keen on issuing the titles, the due process involved is quite protracted and it could be a long time to complete the adjudication process and issue ownership titles.

Moreover, the land question is more complex and different locations have unique challenges. Take the case of gemstone and iron ore rich Taita Taveta County. Land rights in Taita Taveta have been the source of longstanding debate. A significant portion of the total land in the county is under individually owned ranches and plantations -- a situation that has caused disquiet among local communities particularly because ranch owners are not from the local community but politically connected persons. In addition, the challenge is exacerbated by the presence of persons labelled as squatters (these are mainly from upcountry and not native to the area) who after living there for many years also lay claim to the land. An illustration of how this ongoing problem impacts mining has been raised by communities located around the ranches where an iron ore mining company is operating. The local communities have raised concerns over attempts by the company to claim tenure over their lands without their consent. According to the Taita Taveta County Government,<sup>270</sup> feuds between two groups of a cooperative society that administers the land have exacerbated the situation. Some communities – including squatters – feel that allocation of land for mining purposes aggravates the land problem in the area. Community members reported concerns about the discretionary powers of the county administration in providing select individuals and companies the rights to public lands for mining, claiming that only politically connected individuals are allocated land for mining purposes.

In coal-rich Kitui County, a group of elders in Mutito Ndoa surmised that the proposed coal project has attracted external and internal land prospectors who acquire the land in the hope of selling it to enterprises associated with the coal mining project at a future date. If not well guided on this issue, individuals and the whole community risk creating conflicts.

Another challenge to landownership is that contrary to both the Constitution and international human rights standards which expect women to be accorded equitable land rights in the community, many cultural practices in Kenya do not recognise the legitimacy of women's participation in land matters.<sup>271</sup> This societal discrimination against women's ownership of land is most acute in rural areas.<sup>272</sup> In many communities, women are considered 'outsiders' because they are only brought in through marriage and, consequently, cannot hold charge over customary land. As a result, men are the sole authority in most of these communities as well as the head of the household and sole decision-makers of the family. In these circumstances, women noted that they are rarely involved in major community deliberations such as land ownership and access. With land being a major livelihood asset in these communities, women who have the crucial role of tilling the land to feed the family face decision-making challenges about the use of land that is not within their control.

The research undertaken for this Report found that in some communities, women have been allowed to own land, but only if they purchase it using their own personal money. In some instances, however, such as Kajiado, Turkana and Baringo, it was noted that even if a woman was allowed to purchase land with her personal money, the land automatically belonged to her husband. Further, because customary land is strictly passed down to sons, even if a woman is the sole child of her parents she will not inherit her parents' land. Instead, upon her father's death, the land will be allocated to the closest male relatives.

Despite the inequitable land ownership system, women account for six percent of the land titles in Kenya, the majority of which are joint titles.<sup>273</sup>

When community members were asked about the implications of the Constitutional provision giving women the right to inherit customary land, both men and women respondents replied that it will take a long time for the customs to attune to this expectation. This creates a paradox between the significance of land to women and the state of their land rights. Land is incredibly valuable and important to women and for many rural women it is their only source of livelihood. The challenges presented by unissued titles to land and the difficulties in ascertaining ownership over community land as well as women's underrepresentation in landownership matters have serious consequences during land acquisition that greatly impact the wellbeing of family unit and the community as a whole.

### **Acquisition of Land and Adequate Compensation**

There are many challenges around land acquisition under the current legal framework that can have severe human rights impacts, a number of which are highlighted here.

When mining a company is issued a concession, it acquires rights over the use of land. Land rights in Kenya, are either acquired or leased – through a simple owner-buyer sale arrangement or compulsory government acquisition. Where the land is inhabited or used by a community, compensation to the community is required and this should be through a process of wide consultations with the affected community prior to acquisition in order to gain their consent. The research showed that for many of the communities interviewed, this step has largely been unmet for a number of reasons.

Because of the frequent lack of landownership documentation, land ownership cannot be readily determined. This impacts the ability of mining companies to obtain informed consent for acquisition. As discussed above, ascertaining the rightful owner of the property can be quite challenging. This is further complicated by the inter-community buying and selling of land, which as observed in Baringo and Turkana. It is not supported by the issuance of any title deeds but instead is based on rudimentary demarcations of boundaries and verbal agreements. This means challenges for mining companies in determining who to engage and potentially exacerbating conflicts within the community.

The Constitution (Article 40) and the Land Act, 2012 (Section 111) provides clear protections for individual property rights, including the requirement of prompt, just and full compensation for land owners subjected to the voluntary sale or compulsory acquisition of land. Communities engaged during the research highlighted this as a core concern. One reason for this is the lack of clear regulations or even benchmarks for the valuation of land assets. The NLC indicated that valuation of assets is completed based on prevailing market value. This raises the issue of whether there is a market value that can be readily determined in some areas of the country at all and what process is used.

In addition, many communities seemed unaware of the valuation systems used to compensate for crops and other assets. Although these communities may often have excessive expectations about valuations, there seems to be an information gap caused by the failure to educate affected people on the process of determining compensation,

including the design of the compensation framework. During the study, communities expressed an expectation that the Government not only provide a fair compensation package, but also provide information to the community about the package prior to the issuance of compensation.

It was observed that some of the affected communities criticised the compensation packages offered for the use of their lands. There are numerous factors that impact whether the compensation provided for land is adequate that may be overlooked by mining companies. First, as discussed above, when it comes to compensation men typically receive any kind of compensation on behalf of the community and/or the family. There were mixed feelings about this among the women surveyed. For example, in Baringo, women interviewed were unanimously in agreement that men were in a better position to receive compensation and they had confidence that the men would be responsible enough to put the money to good use. However, in counties like Migori and Taita Taveta, the women felt they needed a bigger role in decision-making around compensation. Despite the mixed feelings among the women interviewed, the implications of women not having a voice in land compensation matters are far reaching.

Second, even when individuals receive compensation for their interest in the community land, the compensation often fails to account for the communal resources on the land, which belong to no one individually. For instance, in Lokichar (Turkana), respondents reported that while the land held and used by individual families in communal tenure systems was compensated, the common resources within the land such as forests, pastures and footpaths were not recognised and, thus, entirely excluded from the compensation equation.

Third, given that the market value of land is the prevailing approach, it is not surprising that mining companies rely on it, and have often failed to adequately value the worth of land as the main, and often only, livelihood asset of an individual or community as well as the importance land plays in the social fabric of a community – beyond a market valuation. Any disruption on the land significantly affects subsistence. There are often many challenges around resettlement and displacement of persons that compensation alone does not remedy. Many researchers have pointed to the displacement of populations as one of the greatest sources of impoverishment associated with large development projects such as extractives around the world, in part because the populations subjected to resettlement tend to already be poor and marginalised. Displacement often threatens the very existence of indigenous or other traditional, rural communities because they find themselves separated from their traditional territories, which causes a loss of cultural identity. Poverty-inducing consequences of resettlement commonly include homelessness, landlessness, food insecurity, increased morbidity and mortality, loss of employment, marginalisation, loss of access to common resources, loss of access to public services, and loss of social cohesion.

For example, during the research for this Report, it was observed that many rural communities are unaccustomed to cash-based economies. Accordingly, when individuals are monetarily compensated in exchange for the use of their land, there are numerous practical challenges that add to the insufficiency of this compensation. The recipient of the money is likely unskilled in knowing how to keep the money (physically) safe from theft, and resources such as a bank, safe deposit box or locked doors are not available. Equally

important, recipients may be unfamiliar with the concepts necessary to utilise money in a way that sufficiently replaces the loss of land, which provided shelter, livelihood, and a place of belonging. As a result, experience has shown that the money is often rapidly dissipated. Finally, often no “new” land is available for purchase to replace the land that was leased or sold. Because the concept of land ownership by title is new, and much of the land in rural communities is community owned land, the concept of an available plot of land for purchase in another community simply does not exist. Also, new communities are sceptical of outsiders who enter their community and offer to pay money in exchange for land. Consequently, these community members, who once had a home and means of subsisting, are often left displaced and worse-off than if they had kept their land and received no compensation at all.

Mining induced displacement and resettlement has become increasingly recognised as a key challenge within the global mining community.<sup>274</sup> Resettlement should first be avoided if at all possible, and if not, then requires careful attention and planning to provide alternatives that are appropriate to the communities being resettled, with clear programmes to provide for replacing if not bettering their livelihood options. Cash compensation is often not able to restore communities. Many of the larger mining companies follow IFC Performance Standard 5<sup>275</sup> for voluntary and involuntary resettlements and have developed policies and experience<sup>276</sup> to address what has been typically a poor record in this area. Awareness of international experiences can help spread better practices in Kenya. An example to be learned from can be seen in the experience of a mining company in Kwale which held wide consultations with the whole community and especially with the people who were going to be displaced.

Finally, additional challenges arise around land dynamics in ASM areas. The proliferation of small scale and artisanal gold mines, which are unregulated, present challenges beyond government's control. An official at a local NEMA office explained that forced land use by gold miners and forced displacement of the land's inhabitants through the use of threats are a problem. For example, in Migori there have been reported cases where gold prospectors found gold deposits next to someone's land, requested access to the land, but when denied threatened the owner in order to gain access. This phenomenon was also corroborated by a CBO leader who also added that when access has been denied, the gold prospectors dug tunnels below the person's land, thereby compromising the integrity of the land and the owner's livelihood:

*“You can wake up one day to find your land collapsing under several mine tunnels dug by these people. They don't want to do anything else like grow sugarcane. They only want to mine gold and since there are no regulations by government to control how this is done, these miners have their own ways of doing things and if you cross their path they can harm or kill you. People do not talk about it but it is true that some people are threatened into selling their 'rich' lands to gold miners.”*

In these instances, the trespassers do not duly compensate the landowners for the use of the land and they use intimidation tactics to gain access, yet land owners find it difficult to report this to the authorities. In some areas landowners whose land sits on assumed gold deposits were able to sell their land to the gold prospectors. However, because the vast majority of ASMs – especially artisanal miners – are unregulated under the current legal



framework it is difficult for the Government to monitor their engagements with the community or impacts on the environment. In some counties, such as Migori and Taita Taveta, the county governments have identified this problem and have taken steps to carry out a basic registration of the ASMs, which is an ongoing process.

### *3.2.5 Livelihoods*

Issues concerning land and land assets were raised across sampled counties as highlighted above. However, according to many respondents, the biggest concern is the disruption and/or destruction of the immediate environment on which they depend for their livelihoods. In rural and developing communities, land is often the most valuable, if not the only, livelihood asset of its owners. Land not only provides a home for its owners and acts as the glue for the social fabric of its community, but it also provides the means by which a family and/or community is able to subsist. When this livelihood is removed, land owners must find a new way to access and utilise uncontaminated land and water resources to build a home, grow food for personal use, secure potable drinking water, and sustain agricultural practices.

Labour is a prominent topic in many communities where extraction is taking place because when land is acquired by the mining company these communities are forced to find a replacement livelihood. Naturally, these impacted communities often look to the mining industry as a means of meeting this need, expecting that the mining operation will employ a good number of local community members, especially young people. The mismatch between community expectations and realistic opportunities for employment create tensions in Kenya as they do in similar circumstances in other countries. First, mining companies often need workers with a highly technical skill set. Subsistence farmers do not have such skills, resulting in very few livelihood opportunities for community members, and particularly youth. Further, the 'unskilled' jobs available are often low paying and temporary, often during the construction phase. Consequently, the low levels of personnel uptake have resulted in communities protesting and demanding more jobs from extractive industry players.

Second, in addition to creating a limited number of jobs for community members, there are significant gender disparities in the employment opportunities available for men and women; the majority of jobs are sought by and given to men. In fact, across Kenya in a given mining operation the number of men employed is about ten times higher than the number of women.<sup>277</sup> Women are offered menial jobs that according to one small scale miner in Migori are 'suited for women.' An added dynamic is that women themselves are often resigned to look for employment opportunities that align with their gender roles. For these reasons, most operations have employed very few women – save for the artisanal mining sector. Moreover, women who do manage to find employment in the mining industry earn less money than men. The fact that women have been prevented from taking up lucrative opportunities in the industry has significant impacts on investments in health, nutrition, and education at the household level because men and women typically prioritise and spend income quite differently.

Mining companies interviewed highlighted that efforts are being made to increase the number of women employed in the sector, but the reality, as observed, indicates that very few women directly benefit from employment opportunities. However, one mining

company in Kwale has employed a number of women across the company's operational value chain – such as plant managers, clerks, store keeping, and environmental officers. This practice has not yet been replicated in many companies and when surveyed, the women in these communities feel they deserve more opportunities to participate in the sector.

According to the extractive companies surveyed, the employment expectations held by communities are unrealistic because the mining sector is a relatively small employer in Kenya and most of the benefits gained should accrue from fees and royalties paid to governments as well as various social investments rather than employment. This sentiment was corroborated by the Minister of Mining at a conference in Nairobi in 2015:

*"It is important for our communities to look beyond employment in the mining industry as there are only few jobs available for the many youth. There are so many other opportunities to gain from mining and its time we showed Kenyans these other ways..."*

While the Ministry of Mining has championed the employment of locals in the mining sector, it also asserts that the realisation of benefits goes beyond employment. Regulations for the new Mining Law are under development and these will speak to issues such as hiring of Kenyan nationals and procuring local goods and services. These 'local content' requirements,<sup>278</sup> are aimed at supporting local enterprise by linking it to the mining sector value chain. In this way, new enterprises are expected to be set up within the area to start supplying goods and services to mining operations.

These new enterprises, which include small food shops and sellers of wares for the mines, can employ a significant number of people from the mining communities. As part of the research for this Report, many of these small businesses were observed lining the settlement centres around mining operations in Taita Taveta, Migori, and Turkana. However, this study found that while these fringe enterprises do increase the number of employment opportunities available, the compensation is usually far less than that offered for work in the mining company. Additionally, in some cases these small enterprises do not observe the human rights of their workers or the community. Where more formal arrangements exist between larger mining companies and local enterprises, this provides an opportunity to build in some requirements, supported by appropriate guidance, to smaller business in meeting responsible business conduct standards.

### *3.2.6 Environment, Health & Safety*

Mining industries, almost by definition, have major environmental impacts on the communities in which they are located because mining requires the conversion of land to new uses – either for extraction itself or to support infrastructure (roads, ports, housing, clinics, and offices). This can mean the loss of subsistence agriculture and farmlands as well as the cutting off of access to fresh water, vegetable gardens, gathering firewood, accessing food, and ceremonial uses. As the Social Development Officer in Migori explained:

*"As much we are looking at all these other impacts of the extractive industry we should not forget the impacts that any environmental damage can bring to*

*the whole community. Life is about our environment, everything we do depends on the environment and our food comes from the environment. We are even buried in this environment. Let us put the care of the environment at the forefront of our discussions."*

It is undisputed that mining practices can cause serious deleterious impacts to the physical environment – water, land, and air – as well as on human health. For example, when family members ingest contaminated water and become ill, it is mothers who must devote time to seeking and providing family health care, which thereby detracts from potential income generation, farming, or other tasks that could benefit the family or community. When mining practices change or pollute the local environment, women often have a more difficult time gathering water and finding food. Further, when these tasks take more time and effort, women and girls have less time for other activities – such as schooling or other work.<sup>279</sup>

The lack of regulation of small and artisanal mining sectors adds additional concerns regarding the risk of causing harm to the environment as well as human health. Water and soil contamination are real concerns in places like Migori and Turkana where artisanal gold miners use mercury to extract gold. Mercury is a highly toxic substance that does not break down naturally in the environment, and consequently, can travel long distances from the original source as it is cycled between the atmosphere, land, and water. It can also build up in humans and animals and become highly concentrated in the food chain, which is a problem because it means even low levels of mercury exposure can build up over time until concentrations are high enough to be harmful.<sup>280</sup>

Despite these harmful impacts, miners still use mercury to purify gold from ore, as was observed in Migori, in a process called amalgamation. Through this process mercury was used in water pools, thereby contaminating the water, which could find its way into the water sources of the villagers and expose them to the harmful effects of the substance. It also results in miners and their families inhaling toxic mercury vapours as well as polluting surrounding air, soil and waterways. Accordingly, across the globe, efforts are being made to reduce the use and release of mercury into the environment. Global initiatives such as the UN-led Global Mercury Project are trying to help miners in developing countries adopt best practices and reduce mining pollution caused by the use of mercury. Members of the International Council on Mining & Metals (ICMM) have committed to promote the responsible use of mercury and partner with governments to transfer low – or no – mercury processing technologies to the ASM sector.<sup>281</sup>

The use of cyanide can also result in significant harm to the environment and toxic exposure to human health, including death. Despite its high level of toxicity, cyanide<sup>282</sup> can be used without harming miners or the environment if handled properly. However, interviews confirmed that this is often not the case. For instance, one respondent indicated that some mid-sized gold miners had experimented with cyanide to separate the gold from the ore, but only rudimentary methods and equipment were used during this process thereby exposing the miners and environment to severe adverse impacts.

As noted above, prior to the commencement of any formal extractive sector project, the company must conduct an ESIA to analyse the potential human and environmental impacts that may result from the extractive project and develop comprehensive recommendations

to prevent and mitigate these impacts at the outset. Accordingly, this assessment forms the basis for the company's social and environmental management plan (EMP, which spells out how the company will mitigate any impacts that could affect the wellbeing of the communities and the environment surrounding the mining project. Even with an ESIA and EMP in place, there are still many issues to address. These include the quality of the ESIA and the management plan, the quality of NEMA's review and its capacity to follow up, a company's commitment to meeting the EMP, and the trust a company is able to build with local communities around the impacts it is or is not having. Environmental impacts can be quite technical and may have significant economic and livelihood impacts on communities. Without some kind of trusted intermediary, it is often difficult for communities and their representatives to verify company evidence on environmental impacts. While in theory a government should fulfill this role, the low capacity of NEMA and its extensive mandate and the often even weaker to currently non-existent capacity of county governments to address these issues means communities have no definitive answer about mining impacts on the local environment. Some impacts will be visible and harder to dispute but others are less visible and subject to speculation or even competing scientific evidence. Communities often look to third parties such as specialised CSOs to help them understand and articulate their position, some of which may be fundamentally opposed to mining. This highlights the importance of strengthening the relevant ministries and county governments to play that intermediary role if the sector is to develop in a manner that prevents and mitigates negative environmental effects for their work force and local communities.

### *3.2.7 Community and Public Security*

Globally, the mining sector and extractive sector more generally has been associated with conflict with local communities that has escalated into protests, delays, violence that has resulted in numerous tangible costs to mining operations and significant amounts of employee time lost managing local conflicts instead of performing their intended job duties. In fact, a recent study found that in Africa approximately 10-15% of a senior manager's time is spent on managing community conflict issues.<sup>283</sup> Time and again, experience has shown that where community complaints go unaddressed, this can escalate in an effort to thwart the mining company's operations with consequently deleterious impact on the community.<sup>284</sup>

It is reasonable that mining companies legitimately invest in measures to ensure the safety of their personnel and assets, as mining companies have major infrastructural installations that need constant security.<sup>285</sup> However, security is often narrowly focused on the private good, which entails protecting the mining company's property and personnel from the threat of intruders. Accordingly, "illegal mining" and theft are among the most serious security challenges, and the potential perpetrators are seen as organised groups, local community members, and even the mining company's own workers. Also, artisanal miners are sometimes seen by companies as a major security risk because they have infiltrated large mining concessions.<sup>286</sup> The case of excessive force in northern Tanzania (North Mara) brought into the spotlight the risks to artisanal miners operating adjacent to a large commercial mine. Local community members were injured and killed when security guards and public police used excessive force against the alleged intruders.<sup>287</sup> While the mining company has moved to compensate the families of the victims, no one has been brought to justice for the killings.

While the numbers are low, there have been reported cases of security-related incidents involving host communities. For example, in the Kishushe area of Taita Taveta, a mining company engaged the services of the local police to secure their property and logistical routes from locals who were protesting against the company's land use and acquisition practices. Community respondents expressed frustration, as one noted:

*"We are nobodies here. Whenever we try to fight for our rights the police use force to stop us. Who will defend us if our leaders cannot take up that role? How can we live harmoniously with the mining company if they can easily unleash the security forces on us just because we are poor?"*

Extractive companies sometimes request the services of national police because private security guards are not permitted to carry firearms. Kenya enacted for the first time a law regulating the private security sector, the Private Security Regulation Act 2016 that includes a number of welcomed references to human rights, such as ensuring that the exercise of the powers of arrest does not infringe on rights and provisions on the human rights of those employed in the industry.<sup>288</sup> The use of firearms by private security providers is prohibited under Section 53 of the Act. It is envisaged that the Cabinet Secretary for Internal Security will develop additional regulations necessary for the implementation of this law while the Private Security Authority established under the Act is to formulate and enforce a code of conduct for the sector. One area that needs clarity is the framework of cooperation between private and public security. The Act provides that the Cabinet Secretary or Inspector General of police may request the involvement of a private security provider in maintenance of law and order or other requests. Regulations on this will soon be formulated, but in so doing it is important to consider if state liability for acts committed in furtherance of an instrument of cooperation with private actors will be addressed. Providing clarity around issues involving public security providers protecting extractives operations will be important.

Communities are also exposed to security threats – just as companies are - but often have far fewer avenues to mediate protection. In many situations, security services are offered only to companies who pay and are designed to protect specific facilities and people and not necessarily to address threats affecting the neighboring community. Localised security threats to the safety of community members or their property or their businesses are typically not within the scope of responsibility of private security service providers hired to protect extractive operations. And although public security services clearly have responsibilities in this respect, they may not see it as their role to provide protection to local communities if they consider their mission as protecting critical assets.

As a result, responses to security threats are too often based on a differentiated service which depends on the ability to pay, and not based on the concept of ensuring public security as a right. This creates a real sense of exclusion which can then become its own driver of new conflict associated with the company, rather than on the original source of the conflict. The MOUs that some extractive sector companies are considering signing with Kenyan public security forces are at the same time a source of concern for companies. In the absence of effective public security services in communities, these MOUs may reinforce the perception of security as a privilege only for those who can pay, rather than a constitutional right for everyone to enjoy. Security becomes a zero sum game. Communities feel excluded and if the most fundamental enabler of rights – security – is



not guaranteed for them but only to ensure protection for companies. Conflicts can therefore become directed at a company rather than dealing with root causes of conflict.

The employment of local police by mining companies in Kenya increases the potential risk of community harm. First, while police are assumed to offer more deterrence because they carry guns, this also brings a greater risk of excessive force against the community resulting in injuries and/or death. Second, while local police are available for private hire, practice has shown that when police are hired away from their state/county duties their absence is not filled by a replacement hire. Instead, there remains one less security force protecting the interests of the public.

Concerns of excessive use of force by security forces is not unique to large scale mining operations. In fact, small scale miners present an additional challenge because with fewer resources to hire trained security personnel, their guards often lack sufficient skills to deal with trespassers and thieves in the mines. For example, even in the small scale gold mining centres of Osiri and Masara, located in Migori County, there are reported anecdotes of human rights abuses by untrained security guards as well as occasional skirmishes with gold prospectors. Because gold is a precious metal, the small-scale miners treat their facilities with the utmost care and protection, which has resulted in the use of force against any errant community member who attempts to intrude, sometimes resulting in serious injuries.

Finally, clashes between communities and mining companies caused by the use of excessive force by security agents often leads to more protests which can end in halting mining operations. Therefore, companies have a lot to lose if their security agents are not trained in the appropriate use of force. Several of the international extractive sector companies operating in Kenya are members of the Voluntary Principles on Security and Human Rights – a multistakeholder initiative involving governments, businesses and civil society from around the world.<sup>289</sup> The initiative is founded on a set of principles designed to guide extractive companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights when engaging private security and working with public sector security forces. As noted above, the Government of Kenya is not a member of the Voluntary Principles; currently Ghana is the only African member. Joining the initiative would provide valuable insights and lessons learned to the Government at an early moment in the development of the mining sector. The International Code of Conduct for Private Security Providers is a multi-stakeholder initiative that aims to set principles and standards for the private security industry operating in complex environments based on international human rights and humanitarian law, as well as to improve oversight and accountability for these companies.<sup>290</sup> Currently, there is only one Kenyan company that is a member of ICoCA, but as the number of members continues to expand, more Kenyan private security providers may join.<sup>291</sup> Extractive companies operating in the country may also engage private security providers from outside the country that are members of ICoCA.

## 3.3 Human Rights Impacts of the Oil & Gas Sector – a Field Perspective

### *3.3.1 Groups at Risk in the Oil & Gas Sector*

While oil explorations in Kenya have been underway for approximately sixty years, until recently, activity remained quite minimal. Accordingly, the country is still three to four years away from entering the exploitation phase. Similar to the mining sector, it is the at-risk-groups that stand to lose the most and gain the least during the continued development of this sector. These groups are faced with the immediate implications of development – i.e. loss of land and livelihoods, displacement, changes to the socio-economic makeup of their communities, and loss of access to potable water sources – while the regulations governing adequate compensation packages, resettlement plans, and replacement livelihood opportunities remain inadequately defined. Further, the potential for replacement livelihood opportunities are few and far between for communities in general, due to the highly technical skill set required for these jobs or benefiting from local content initiatives, but such opportunities are even scarcer for at-risk-groups, including women.

#### **Women**

Women impacted by the oil and gas sector face challenges similar to those encountered in the mining sector – i.e. loss of land, environmental contamination, impacts on health and food security, and loss of livelihood options. (See section on women in the mining sector above for a more in- depth analysis). The study found that women are underrepresented in the labour and service opportunities available in and around the development of the oil and gas sector. While the development of this sector is still underway, making it possible to remedy these issues, there are numerous challenges, including entrenched beliefs and traditions that threaten the equitable integration of women into the development of this sector.

For example, it is well understood that the vast majority of job opportunities that will increasingly become available in the oil and gas sector will require significant technical training. Yet, women in Kenya have higher illiteracy rates and girls are less likely to be educated than boys. This reality increases the difficulty of ensuring that women are able to take advantage of any educational, vocational or training programmes put in place by the industry, which means women will not be in a position to benefit from potential livelihood replacement opportunities that oil and gas companies may present. However, it is hoped that women's skills gap can be addressed in part through initiatives in training including scholarship programmes by companies and partnerships between the Government and donors such as Skills for Oil and Gas Africa (SOGA).<sup>292</sup>

#### **Children**

The research undertaken for this Report found little information on how children are currently being impacted by oil and gas activities. And due to the highly technical and skilled nature of the jobs in the sector, it is highly unlikely that children will be directly

employed in such activities. While there is less direct involvement of children in exploitative situations as there are in the ASM sector, children may still be involved in exploitative work around facilities – such as running errands for workers, in support services, or involved in prostitution.

There are numerous other impacts that children are exposed to in this sector. (See section on children in the mining sector above for a more in- depth analysis). First, the labour practices in the sector often require employees to cycle through long periods of work on the job, with long periods of time away from the family with impacts on the structure, integrity and security of the family unit, particularly if women are required to work this type of schedule as well. Second, children are more sensitive to environmental contamination due to their maturing physiology so may be at higher risk of adverse environmental impacts from the sector. Third, as is the case under the mining sector, displacement caused by land acquisition can detrimentally impact the social fabric of the community, which in turn negatively impacts the security and cultural identity of children raised in displaced communities.<sup>293</sup>

## Youth

Due to the highly technical and skilled nature of the job opportunities available in the oil and gas sector, Kenyan youth are currently under skilled and under qualified to take on these roles, thereby leaving few, if any, job opportunities currently available. However, the proposed Upstream Petroleum and Energy Bill requires that license holders provide training and education requirements aimed at ensuring youth are able to obtain the skills and training necessary to avoid being left behind. If implemented, these programmes could create important opportunities for a small segment of the youth population to gain important skills in the sector. As noted above, Kenya's donor community, notably the UK and Germany, have a programme underway to address skills gaps in the oil and gas industry (SOGA) and associated sectors and to assist the Government in preparing their workforces for upcoming opportunities. The study found as well that youth in local communities lack capital as well as options to acquire capital necessary to take up local content opportunities around the oil and gas sector – such as to start up a small business to provide supplies or services. This is a constraint that should be taken into consideration in designing local content programmes and in twinning requirements for CSR programmes and in developing opportunities for such programmes to support youth entrepreneurship.

## Persons with Disabilities

Similar to the mining industry, research found that persons with disabilities were absent in the oil and gas sector. (See section on persons with disabilities in the mining sector above for a more in- depth analysis). Addressing this challenge will require intentional planning to ensure persons with disabilities are not forgotten in the continued growth and development of this sector.

## Minorities and Marginalised Groups

Minorities and marginalised groups tend to be heavily reliant on the land to support all aspects of their livelihood and culture. The sector's demand for land will continue to increase not least because substantial development of the supporting infrastructure is

required, (i.e. roads, ports, pipelines, processing facilities, etc.) as well as operational facilities (i.e. housing, clinics, offices, plumbing, sanitation, etc.). Those interviewed worried that the increased demand and acquisition of land will change the land's accessibility to these groups. For example, companies will erect fences and barriers around their operations in an effort to protect their operations and employees, which will block the ability for members of these groups to traverse the land as freely as they are accustomed. More significantly, displacement threatens their traditional ties to the land (i.e. separating them from cultural lands and burial grounds or impacting their cultural practices) as well as livelihood options. Finally, a serious lack of information is available to impacted communities on the development of the sector as well as potential for new livelihood options.

### **Older Members of Society**

The research for this Report found that little is known about the impacts the development of the oil and gas sector is having on the older members of society. Accordingly, there is a serious need in the coming years to assess how the invisibility of this group may be affected and the impacts development of the sector is having on them.

### **Community Engagement**

Ongoing community engagement will be a key dimension of developing a successful oil and gas sector, similar to the mining sector. (See section on community engagement in the mining sector above for a more in-depth analysis). Field research concluded that in communities where oil is found there is often an immediate expectation that the community will reap benefits from the discovery. In reality, however, there is often a seven to ten year delay from the point of discovery until the point of revenue generation. This means that although local communities may immediately experience negative impacts (or at least perceive such impact) including with respect to issues of land ownership and use, environmental impacts, inflow of labour and skilled personnel from outside, unequal distribution of scarce resources and services, and displacement,<sup>294</sup> the more wide-spread positive trade-offs in the form of revenue sharing are often not realised for many years.

Several communities interviewed expressed frustration with community engagement efforts by oil companies to date. For example, in areas like Turkana and Baringo there is a prevailing feeling of dissatisfaction due to what are perceived to be inadequate steps taken by the companies and the Government to safeguard livelihoods. Communities reported that with the growth of the oil sector, they are increasingly apprehensive about the fate of their lands, which is a main livelihood asset, and for some the only livelihood asset.

In another example, a group of men at a Kerio Valley community centre expressed dissatisfaction with the terms of the initial engagement negotiated between an oil company and their community. They stated that given their recent experiences and increased awareness of potential adverse impacts, they wished the oil company would 're-enter' the community afresh so they could renegotiate the terms to which they found themselves currently bound. While local politicians educated the community about how to get a fair deal for the use of their land by the oil company, this did not occur until after the land access had taken place. As a result, community members stated that they lacked

awareness at the time of the negotiations of company procedures. Now, because of the terms reached with the oil company, community members fear for the future of their land and the potential for resettlement if the oil company decides it needs to access the land for oil activities. This emphasises the importance of early capacity building with communities by governments and CSOs and on-going community engagement between communities and companies. It also highlights the challenge for companies and communities addressing and documenting changing expectations.

An added complication to community engagement is that women are often left out of important discussions on land ownership and compensation packages, which often has detrimental effects on the wellbeing of the community. Paradoxically, in Baringo women are at the forefront in the push for acquisition of ownership titles for the lands that belong to their men as they await the development of the oil industry. These women desire a more open society where they have a greater voice and more important roles in their communities.

With respect to field research interviews with companies, one company representative compared this process to a basic interaction he experienced when he stopped to make a purchase at a fruit stand at the side of the road. Although the company representative wanted to have a quick monetary exchange (money for fruit) it became quite clear that the seller would not willingly sell the fruit unless there was proper engagement, which in this case included a connection and conversation about who the buyer was, where he came from, etc. The company representative explained that the fruit seller did not see himself as being at the mercy of the buyer, but instead saw his role as important to the community. After a 10-15 minute personal interaction, the representative was able to buy the fruit, but it was a time investment he had not anticipated.

This anecdote highlights a particular approach to community engagement based on a transactional approach. This is typical in the industry and reflects a view in which communities are engaged for the purpose of a particular transaction, whether a compulsory consultation as part of an ESIA process, or to negotiate access to land or participate in an annual meeting. There is a growing recognition among companies of the need for a broader and deeper approach to community engagement that is about building longer-term relationships with local communities. Unfortunately, such an approach is often not sufficiently planned for nor resourced as community engagement is widely seen as a cost rather than a resource contributing to operations.<sup>295</sup> Effective community engagement requires skilled community liaison officers and time – both of which require resources. The costs must be balanced against the benefits of good on-going community relations and the cost of poor results from less successful efforts. In the DFID study on the oil and gas sector in Kenya, failed community engagement, which can result in the shutdown of a drilling rig, is estimated to cost approximately \$1 million per day.<sup>296</sup> Accordingly, the business case for effective community engagement should be obvious. However, in a time of sharply decreased oil prices, funding fully staffed community engagement is often a hard sell.

Industry leaders at the second Kenya Extractive Sector Forum noted numerous challenges to effective community engagement strategies. These include identifying bona fide community leaders as well as understanding the leadership hierarchy and decision making procedures. In addition, participants noted that companies must balance considerations of



cost and time with its likelihood of successful exploration leading to final exploitation.<sup>297</sup> But experience shows that as exploration teams are the early “face” of what may eventually become the operator, poor interactions from the outset by junior exploration companies can set important precedents that can haunt later longer-term relationships.<sup>298</sup> Whether companies buying out junior exploration companies take into consideration the cost of inheriting poor community relations as part of acquisition negotiations is unclear. Making the state of community relations an explicit part of the acquisition price would begin to send an important signal on the significance of good community relations to overall operations.

### *3.3.2 Access to Information and Transparency*

Effective community engagement is contingent upon transparent, accessible and meaningful information. This may also require educational outreach to the community. To date, access to information about oil company activities taking place in Kenya at a national level has been difficult to find. Generally, PSCs are not available publicly but a number have been made public as a requirement of capital market regulations from which the holders raise funds for exploration. With regard to EIA reports, NEMA maintains a database of EIAs. However, the database is difficult to use as the reports are not categorised or titled in any useful manner and not all reports are provided online. However, NEMA maintains that a copy of each of the EIAs is available at their county offices. Some companies have also started posting EIA summaries on their websites.

Communities interviewed expressed mixed reactions about the flow of information. Many were uncertain about who had received information, who represented the community in discussions and made decisions on their behalf. This raises questions about the sharing of information within communities. Is this principally where the flow of information stops or are companies sharing only limited information or doing so only on a very infrequent basis? Is information shared through a once a year meeting with a formal committee or on a more on-going basis using a variety of methods? It would be useful to explore further what role local county governments are playing in ensuring that useful and credible information is getting to communities in advance of their discussions with companies coming into their area to operate.

For example, in Turkana, where oil exploration is ongoing in several sites, community members said they were not involved when the oil company first made entry into the community and consequently lacked information about its activities. As one woman in Lokichar put it:

One Lamu fisherman said:

*“The vessels in the deep seas (Offshore oil exploration) just appeared and we only got to hear about it in our informal village chats, none of us fishermen can claim to have attended a meeting for briefing on impending oil exploration.”*

In 2016, Kenya passed an Access to Information Act that gives effect to Article 35 of the Constitution. Moreover, the Mining Act, Section 119 provides for the publication of

mineral agreements. It will be important to see how these legal frameworks will contribute towards transparency in the sector.

### *3.3.3 Labour Rights*

There are a number of labour issues that overlap with the mining industry. (See section on labour in the mining sector above for a more in- depth analysis).

While it is possible to join a trade union in the oil & gas sector, there are a number of barriers. First, with respect to offshore operations in particular, workers are in hard to reach places thus even the unions have no ready access to them. Second, the workers themselves are not aware of their rights to join a union and the Ministry of Labour that could 'educate' workers on their rights does not have the capacity to do so. Third, the large number of temporary labour contracts may not necessarily qualify for unionisation. That said, employers can play an important role in educating workers about their rights, including the right to form and join trade unions. Internal grievance mechanisms should not be used to replace unions but where trade unions do not exist, such mechanisms should provide the hearing and resolution of work-related issues.

Africa Oil's Lundin Foundation estimates that over the next ten years, human resource demand will be at its highest during the construction phase (such as pipeline construction to the coast). At that time, the oil and gas sector will create between 6,000 to 15,000 new jobs in Kenya, but the majority will require technical or vocational training.<sup>299</sup> If Kenyans are not adequately skilled to fill these roles they will be given to workers from outside the country. Shorter term construction work can involve contracting temporary workers, who because of their short-term contracts can fall outside the scope of labour law protection.<sup>300</sup>

### *3.3.4 Land Ownership*

The challenges associated with land ownership are layered and complex and require a dynamic approach to understand the challenges presented and develop sustainable solutions. Many of the same concerns were expressed by communities and CSOs with respect to land use in the oil & gas sector as in the mining sector. One civil society respondent reported that while the process of seeking consent for land use has been respected, insufficient information has been provided for communities to make an informed decision. As a result, an increasing number of communities are demonstrating that the most effective way to control their social and environmental risk exposure is to oppose the oil operations altogether. This was clearly illustrated in Kerio Valley where communities protested operations because of poor communication between the oil company and community members. The same scenario was observed in Magadi oil exploration sites where the local leadership bitterly protested the manner in which the oil company had entered the community. In one meeting between community leaders and the oil company, the Kajiado Deputy Governor asked:

*"How can NOCK come here with all that machinery, dig up grazing fields as they use heavy vibrators in total disregard of the effects they inflict on livestock?"<sup>301</sup>*

### *3.3.5 Livelihoods*

The impact on livelihoods associated with O&G activities are similar to those felt in the mining sector – (See section on livelihoods in the mining sector above for a more in-depth analysis).

The loss of land as a traditional livelihood resource is further complicated by the fact that there are few replacement livelihood opportunities created by the sector, particularly for women and youth, and especially at these early stages of the development of the sector. Despite information provided by the sector, by local government and companies, the expectation of employment and other immediate livelihood options remains – whether out of ignorance by the communities or design by companies or local governments in discussions with local communities about the benefits of the sector. Inflated expectations result in disappointment at best and in some cases, active conflict with the sector. In one instance, an oil exploration activity was suspended for a period of time due to protests by local communities who felt short-changed on employment opportunities and wanted more of their local youth to be employed by the company. In Baringo County, community women lamented that there is a low intake of women – especially for those above 25 years – into the oil industry work camps. While an oil company representative attested that there has been an improvement in the number of women employed in the sector, women are still largely under represented.

Communities surveyed consistently lamented the low level of compensation provided for damage caused to their land. This sentiment is, at least in part, attributed to the lack of community knowledge regarding the valuation methods used by the companies. This points to the need for clear guidelines and educational campaigns complemented by appropriate grievance mechanisms and access to remedy where local grievance mechanisms are needed. For example, respondents near oil exploration sites in Turkana and Baringo complained that they had been inadequately compensated when oil exploration activities caused destruction to their crops, trees, fences and other assets. Community members claimed their fences had been destroyed by oil company activities, which caused crops to be destroyed by grazing animals. Inadequate compensation was provided because the oil company did not directly cause the damage. In response, the oil company reported that it did provide compensation for destroyed crops based on the valuation method provided by the Ministry of Agriculture and that the company paid 20% above the valuation rate. These kinds of disputes point to the need for on-going community engagement complemented by robust operational level grievance mechanisms to at least narrow the range of disputes, recognising that some will be resolved using an evidenced-based approach while others disputes involve more serious differences of perceptions and opinions that will require other approaches to mediation.

The government is drafting a Land Valuation Bill with a view to provide a framework for land valuation targetting large developments (including infrastructure). However, whether the proposed law will take an ecosystems services approach or a strictly surface approach remains to be seen.

### 3.3.6 Environment, Health & Safety

Similar to the mining sector, oil and gas activities almost by definition, have major environmental impacts on the communities in which they are located. (See section on environment in the mining sector above for a more in- depth analysis).

Because O&G activity is still in the exploration phase and has not yet reached the phase of production, there is limited information on the impacts this industry may have on human rights and the environment throughout the lifecycle of oil production for Kenyan stakeholders. The Strategic Environmental and Social Impact Assessment (SESA) of the oil & gas sector being carried out by NEMA under the World Bank-funded KEPTAP programme will present recommendations for policies, plans, and programs that will guide environmental and socio-economic planning and decision making in the country for the sector. It is intended to support Kenyan authorities in *"systematically addressing environmental and socio-economic management issues pertaining to oil and gas activities in the context of sustainable development."*<sup>302</sup> The SESA will look at a wide range of environmental and social issues for the sector with a view to improving the management of these issues in the sector. While human rights was not originally a subject of the SESA terms of reference, NEMA and the consulting team have included human rights considerations and these will be canvassed in consultations with civil society organisations and community groups.<sup>303</sup> A Technical Advisory Committee for the SESA that includes human rights experts has been put in place to provide independent oversight and support to the process. The outcomes of the SESA will provide relevant analysis not only for Government authorities but also for companies who can use the findings to improve their own analysis and understanding of the wider environmental and social operating context of the sector.

Communities and community-based organisations interviewed for this Report expressed apprehension about the potential impacts of oil explorations on the environment.<sup>304</sup> One of the reasons for this fear is because many have never seen an EIA report, and those who have claim they are not reassuring. Respondents reported a number of potentially negative environmental impacts they already associated with extractive operations. For example, community members in Kerio Valley noted several cases where cattle unexpectedly aborted pregnancies. Because of the oil exploration activities in the area and the fact that this occurrence was previously unprecedented, the community immediately associated the incident with the exploration activities. This illustrates the importance of effective community engagement based on reliable information to begin to move discussions of such incidents to a firmer evidence-based footing. Communities will need support to begin to understand more technical scientific evidence but may often need access to independent, reliable sources that they feel they can rely on. Joint monitoring involving the community and companies of environmental impacts that simultaneously builds community capacity to understand and take ownership of environmental impacts can be effective.

### *3.3.7 Community and Public Security*

Like mining companies, oil & gas companies have a legitimate interest in protecting the security of their workers and assets but will be expected to do so within the limits of constitutional protections of the right to security of persons. The same constitutional restrictions apply to Kenyan public security forces when protecting oil & gas assets onshore and offshore.

Many of the challenges of developing the sector in a manner that balances the security of operations with the security of the surrounding local community is captured in the field research from Turkana. The discovery of oil in the traditionally marginalised Turkana County has created unrealistic expectations of wealth and betterment, both locally and nationally. The risk is as these expectations continue to go unmet, frustrations and misunderstandings may continue to grow, which if not proactively addressed have potentially significant implications for the future of the business and for the political stability of the region.<sup>305</sup> These frustrations could be exacerbated if security forces without proper training are brought in to address community protests and demonstrations, which often, and almost inevitably provoke further grievances.

In Turkana, water scarcity is a major concern and has long been a source of conflict in the region among indigenous populations even before the discovery of oil. As exploration, construction and production require significant water resources, this has the potential to destabilise the imperfect balance that currently exists between water users in the region, thereby triggering conflict not only with, but also between, the indigenous populations who rely on this scarce resource for survival.<sup>306</sup> Detailed assessments involving the community to gain a proper understanding of the existing water needs and careful planning and agreement with communities to ensure continued access to water resources will be needed in Turkana and other water stressed regions of the country. With so much riding on a community's access to water it is not surprising that communities are willing to protest to protect their survival.