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Pillar III

Access to Remedy for
Extractive Sector Impacts



4. Pillar III: Access to Remedy for Extractive Sector Impacts

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

The third pillar of the three-pillar UNGP framework is about access to remedy for victims or potential victims of human rights abuses – whether by the state or companies or their business relationships. The idea behind this pillar is to counteract or make good any human rights harms that have occurred or to prevent further recurrence of harms or foreseeable harms. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

Remedies can be provided through state-based judicial mechanisms – such as through several types of courts that are part the Kenyan legal system set out below. Non-judicial grievance mechanisms, such as the Kenya National Human Rights Commission, labour inspectorates, and environmental authorities can all play a role in trying to resolve disputes between parties and in providing remedies, including around emerging extractive operations. These state-based mechanisms should form the foundation of a wider system of remedy that includes company-led or collaborative based operational-level grievance mechanisms that can provide early stage recourse and resolution. These state-based and non-state based mechanisms, in turn, can be supplemented or enhanced by international and regional human rights mechanisms and other international mechanisms.

4.2 Constitutional Analysis of Access to Remedy

The 2010 Kenya Constitution makes clear that every person has the right to have a legal dispute fairly and impartially resolved by the courts or another independent body, as appropriate. Kenya's Bill of Rights explicitly provides that disputes resolved by the application of law must be decided in a "*fair and public hearing*" before a court or other independent and impartial tribunal or body.³⁰⁷ Further, every administrative action must be "*expeditious, efficient, lawful, reasonable and procedurally fair.*"³⁰⁸ The Constitution also imposes a duty on the State to ensure that access to justice for all persons is reasonable and not cost prohibitive.³⁰⁹

4.3 Remedy in Kenya and through International Mechanisms

4.3.1 Judicial Mechanisms in Kenya

According to the Constitution, there are a number of hierarchal courts in a two-tiered system. The first tier is the superior courts, consisting of the Supreme Court,³¹⁰ the Court of Appeal,³¹¹ the High Court,³¹² and those courts established by Parliament to hear and determine disputes relating to employment and labour relations; and environment and land under Article 162(2). The second tier comprises the subordinate courts, which include the Magistrates courts, the Kadhis' courts, the Courts Martial, and any other courts or tribunals established under Article 169.³¹³ The Supreme Court is the highest Court in the country and has exclusive original jurisdiction over presidential election petitions and crucial constitutional interpretations.³¹⁴ Next is the Court of Appeal that deals with all appeals from the High Court and any other court or tribunal as prescribed by law.³¹⁵ The High Court which has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine if there has been a violation of fundamental rights and freedoms under the Bill of Rights; and other matters listed in Articles 165(3)(c-e)-(4). Subordinate courts include the Magistrates courts, Kadhi's courts, Courts Martial and other tribunals established by Statute.³¹⁶

Examples of Communities Bringing Cases about Extractive Operations

Various communities have brought cases under the 2010 Constitution involving human rights impacts by extractive companies. In one such case – *Pasred Youth/Forum Petition No. 621 of 2014*³¹⁷ - filed in the High Court of Kenya at the Nairobi Constitutional and Human Rights Division, a group of residents of Fafi Sub-county raised important questions regarding the right to a clean and healthy environment under Article 42 of the Constitution. It was the Petitioners' contention that the respondents contravened that right by their oil exploration activities in the Fafi area of Garissa County. Other issues raised in the Petition include the right to participate in cultural life under Article 44 of the Constitution, the right to information held by the State under Article 35 of the Constitution and issues relating to rights of persons living in community land as defined in Article 63 of the Constitution. The petitioners raised a number of arguments about oil exploration activities, including that they were undertaken without the local community's participation and consent and without a proper EIA, and that the area served as a significant religious and cultural site. The Court held that the claims of environmental degradation were arguable as they had not been supported by sufficient evidence and since NEMA had given all the necessary licenses. While the Court was satisfied that the petition raised a number of issues that were not frivolous, principally, the right of communities to natural resources in their land, it found that many other issues required further evidence to substantiate the claim. Lastly, the Court stated that it had seen evidence of some public participation – therefore whether it was adequate or not was a matter of fact to be determined at a hearing.

Despite the success some communities have had with the judicial system, those interviewed for this Report presented mixed views regarding whether the judicial system

can be an effective and impartial agent for redress. For example, in the areas where extractive projects have not yet commenced, such as Kerio Valley, communities are urging the Government to issue ownership titles, which according to them is a better bargaining chip during the engagement with the extractive companies. Some residents have vowed to resist efforts by the Government and the oil company to allow oil exploration activities to proceed, stating that they intended to petition the court to seek a permanent injunction against the oil company unless the Government sped up the process of demarcation and issuance of title deeds.³¹⁸ This suggests that the community has confidence in the judicial system and believes that its rights can be protected through this approach.

4.3.2 Non-Judicial Mechanisms in Kenya

There are a number of non-judicial grievance mechanisms in Kenya. State-based non-judicial mechanisms include administrative, legislative and national human rights institutions. While there are numerous state-based non-judicial mechanisms such as the labour inspectorate which is charged with inspecting at least formal workplaces, the discussion below focuses on the Kenya National Commission on Human Rights (KNCHR).

Non-state-based mechanisms include operational-level grievance mechanisms administered by business alone or with stakeholders, regional and international human rights bodies, industry or other multi-stakeholder initiatives.

State-Based Non-Judicial Grievance Mechanisms: KNCHR

A "national human rights institution" (NHRI) is an institution with a constitutional and/or legislative mandate to protect and promote human rights. They are the "*cornerstones of national human rights promotion and protection systems*"³¹⁹ and serve as a link between international human rights norms and the national level. Supported by the United Nations General Assembly in 1993, standards for NHRIs are set out in the 'Paris Principles'.³²⁰ While these institutions vary from one country to another in terms of the scope of their work and quasi-judicial powers, NHRIs can play a positive role in resolving social conflict.³²¹

The KNCHR is Kenya's NHRI, which is tasked with the overall responsibility of promoting human rights. KNCHR's existence and mandate is provided for in the Kenya Constitution, which requires it to promote the protection and observance of human rights in public and private institutions.³²² It is tasked with the following mandate³²³ covering eight thematic areas, including promoting human rights in business:³²⁴

- Advising government agencies and/or legislative authorities on human rights issues;
- Promoting international human rights norms at the national level;
- Implementing the human rights treaties to which Kenya has agreed;
- Formulating and running human rights public education programs;
- Hearing, responding to, and/or resolving complaints about human rights abuses (which include non-judicial grievance mechanisms and alternative dispute resolution processes);
- Enforcing remedies to human rights abuses;
- Promoting public awareness regarding government and business human rights obligations.

The KNCHR can play a positive role in resolving social conflict involving extractive industries alongside other Government institutions with responsibilities in this area, including courts, executive agencies, minerals and energy commissions, environmental protection agencies, and legislative bodies.³²⁵ The KNCHR's Strategic Plan 2013-2018³²⁶ makes clear that it may on its own initiative or on the basis of complaints "*investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs.*"

However, if a NHRI is inadequately funded, its ability to receive and investigate complaints and otherwise fulfil its mandate is obstructed.³²⁷ Accordingly, a NHRI with a broad mandate – such as the KNCHR – may face a situation in which it cannot address all of the issues under its mandate.

Engagement with other Stakeholders

The KNCHR has an impressive practice of engaging and collaborating with other stakeholders especially with like-minded civil society organisations. In fact, it has undertaken joint activities such as research and awareness programs and it arguably is the most prolific human rights organisation in Kenya. While the research for this Report found that all Government, opinion leaders, religious leaders and civil society organisations were aware of the KNCHR's existence and most respondents understood it to be a defender of human rights, most respondents could not identify the thematic focuses of the organisation and had limited contact with it, indicating a continued need to expand contacts.

On the other hand, communities reported having very little knowledge of the KNCHR. This may be because the Commission has largely been involved in giving its input on the formulation and review of the extractive regulatory framework at the national level rather than focusing at the local level. As a result, community members requested that the KNCHR set up a satellite office to ease the relay of complaints for faster remediation. For instance, in Lokichar, one respondent stated:

"Why don't they (KNCHR) come and put a small office here to record our problems. Now we don't know where to take our human rights concerns because we think their offices are in Nairobi and that is too far."

The same sentiments were heard from a fisherman in Lamu who had land disputes with the Government:

"How possible is it for KNCHR to have an office in Lamu or alternatively how can I channel my grievances to you? Many people here get stranded not knowing who to turn to and as you may know the county government is a hard nut to crack."

The Commission has established regional offices in the North Rift region, Coast region, Northern Kenya region, and the Western region but clearly there is an interest from stakeholders in further outreach into ever more local community settings.

Gaps and Growth Opportunities for KNCHR

The questions that were repeatedly heard during the study – “Where is KNCHR?”, “How can we get in touch with KNCHR?”, “Can KNCHR set up an office here to address our concerns?” – suggest an operational gap around extractive sector grievance redress. However, this also means that the KNCHR has an opportunity for growth because the need is there and the Commission has the mandate to respond to human rights grievances. It could focus on the following:

- First, the Commission could fill the technical knowledge gap by ensuring that its staff are well versed in the complexities of the extractive industry.
- Second, it could leverage the goodwill it has, by virtue of being a government institution, to further engage in pin order to ensure that the policy and regulatory framework for the sector incorporates human rights protections.
- Finally, the KNCHR could partner with grassroots organisations to create a more comprehensive reporting structure to channel human rights concerns from communities. Existing collaborations at the national and county levels could also be strengthened to cover the extractive sector.

Non-State-based Non-Judicial Grievance Mechanisms

Traditional Community Grievance Handling

Most traditional communities have established governance structures, decision-making processes, and customary laws critical for handling community affairs, which often include non-judicial mechanisms for resolving grievances. Such mechanisms range from community hearings to dialogue-based processes that are sometimes facilitated by a trusted individual and a range of other mechanisms that combine these approaches. Often these have developed from tradition and have evolved over time as societies change, but overall, they are recognised and accepted by those that defer to them. The limitations of traditional mechanisms are that they may not be suited to handle technical matters not to mention that companies are often unfamiliar with them. However, they are useful in learning about the community-justice actors, effective channels by which communities voice their complaints and even what constitutes justice from communities’ perspectives.

In establishing their own grievance structures, companies should pay close attention to community mechanisms and find ways of incorporating elements into their procedures for them to be acceptable and relevant to communities. For companies this will likely mean adapting procedures used in other operations, requiring more time to set up a grievance mechanism. In the long run, however, involving the community in the design of a company grievance mechanism and building on community traditions has longer term benefits of demonstrating respect for the community and promoting ownership and usage of the co-designed mechanism.

CSO Involvement in Handling Complaints³²⁸

Often communities will have or seek to have the support of civil society organisations local or international in managing their grievances. Because CSOs are closest to the people, they remain well-positioned to act as a useful resource in the promotion and protection of

human rights at the community level. There is often significant information asymmetry between communities and companies which impacts negotiating power and eventual outcomes. Moreover, in addition to acting as a 'trusted friend' civil society organisations can ensure that grievance mechanisms adopt a human-rights based approach and adhere to human rights standards in the grievance resolution process.

In Focus:

Example of CSO-mediated Company - Community Engagement to Address Grievances

Kenya's coastal salt belt region has been mired in on-going conflict between companies and communities. This conflict is captured in a 2006 report of a public inquiry conducted by the KNCHR with recommendations to government and companies for the redress of allegations of human rights abuses. Various attempts to implement interventions to ameliorate the situation have been undertaken over the years with one of the latest being spearheaded by the industry association, the Kenya Association of Manufacturers (KAM). Under this intervention, KAM engaged a neutral party - Ufadhili Trust - to help build trust between the companies and the communities as a first step to deepening their engagement to address various challenges identified. Ufadhili's role in the project as a neutral mediator revolved around assisting the parties to establish a common platform for dialogue, build the capacity of the community to negotiate as informed partners with the companies, build awareness and capacity of companies to engage in strategic community engagement practices and guide the parties to develop and implement an action plan to address various conflicts touching on environmental impacts, labour practices, land ownership, community engagement among others.

KAM and its donor were keen on building the capacity of both the community and companies to work together to address various grievances to ensure the process was sustainable. Therefore, following improved relations between the parties, Ufadhili's role in the process was reduced. The companies are now working directly with the communities through their CSR committees which has led to increased trust and resolution of a number of challenges.

Interview with Ufadhili Trust and The Global Compact Network Kenya, 14 June 2016.

However, some CSOs interviewed reported a general lack of trust between civil society on one hand and companies and governments on the other. In particular, they complained of difficulties in securing meetings with companies and in getting relevant government bodies to take notice of the complaints being raised on behalf of communities. While CSOs are often ready and willing to support communities' access to grievance mechanisms, they often are limited by availability of funds.

Company Operational Level Grievance Mechanisms

In Focus:

Effectiveness Criteria for Non-Judicial Grievance Mechanisms from the UN Guiding Principles on Business and Human Rights

The UNGPs set out the following set of criteria for non-judicial grievance mechanisms, both State-based and non-State based, in order to ensure their effectiveness:

Legitimate: enabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of the grievance process;

Accessible: being known to all stakeholders groups for whose use they are intended, providing adequate assistance for those who may face particular barriers to access;

Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means monitoring of implementation;

Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

Rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights;

A source of continuous learning: drawing from relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms; Operational-level mechanisms should also be:

Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances

The UNGPs call on companies to set up operational level grievance mechanisms to make it possible for grievances from workers, individuals and communities to be addressed early and remediated directly.³²⁹ These mechanisms are typically administered by companies,

alone or in collaboration with others, including relevant stakeholders. They support the identification of adverse human rights impacts as a part company's ongoing human rights due diligence by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. These mechanisms make it possible for grievances to be addressed and for adverse impacts to be remediated early and directly by the business, thereby potentially preventing harms from compounding and grievances from escalating. Such mechanisms should reflect certain criteria to ensure their effectiveness in practice (see Box x below).³³⁰ These criteria can be met through many different forms of grievance mechanism according to the demands of scale, resources, sector, culture and other parameters.³³¹

Every extractive company surveyed for this Report stated that it had a grievance mechanism in place for both their workers and the communities affected by company extractive activities. The large and well-established extractive companies – most of which are multinational companies – had well documented grievance mechanisms.³³² One company had over a short period of time cultivated relatively good relations with the surrounding communities and had established a social performance department with social workers who proactively traversed the community to document any grievances.

KOGA has noted that its members have established grievance mechanisms to address complaints relating to their operations. These grievance mechanisms typically involve receiving specific complaints, followed by steps to validate/acknowledge, assess and resolve them. This is followed by community feedback and entering grievances in a log/registry.³³³

In most cases, however, it was not clear how many cases any of these companies had successfully addressed. Therefore, it is difficult to conclude whether these grievance mechanisms have been effective in their protection and redress of human rights. A number of stakeholders noted that they were concerned about a lack of independence in such mechanisms given that the company alleged to have committed the abuse is also determining the outcome of the complaint. This can create a lack of confidence and credibility in the system by stakeholders.

Some companies are moving to co-created company-community grievance mechanisms that are designed and operated jointly.³³⁴ However, this can only work where there is already a degree of trust between the community and the company, often built through a history of meaningful community engagement. A company-community grievance mechanism can be built into the community engagement process as long as all are clear that engagement is about active, on-going engagement whereas a grievance mechanism should provide a specific, structured process to address and resolve grievances.

4.3.3 International and Regional Grievance Mechanisms

The first “port of call” for communities or workers or individuals who feel they have been negatively impacted by an extractive operation may be the company itself. If companies are not accessible or open to addressing concerns or fail to address grievances to the satisfaction of the complainant, the local, Kenya-based mechanisms to address and resolve

grievances involving the extractive sector through judicial and non-judicial mechanisms provide a next line of remedy. There are also a number of international avenues that may be available to Kenyan claimants. Some depend on the home state of the company or companies involved and the source of finance for extractive sector operations. The following overview provides a short summary of additional options for accessing remedy at the international level.

The African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights³³⁵ and the African Court on Human and Peoples' Rights³³⁶ can hear complaints from individuals and CSOs, but only concerning violations by a State party to the African Charter on Human and Peoples' Rights of one or more of the rights covered by the Charter, rather than against companies. Kenya is a state party.³³⁷ The Endorois case³³⁸ is an example of a case brought to the Commission with relevance to the extractive sector. The Endorois community had tried to petition national courts and tribunals against eviction from their traditional lands along the shores of Lake Bogoria. Their complaint was that in the 1970s the Government of Kenya had evicted them from their land to pave way for a national reserve and tourism facilities. In 2003, the community with the help of two non-governmental organisations, Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International brought the case before the African Commission on Human and Peoples Rights. In May 2009, the African Commission ruled that the Kenyan Government in evicting the community had breached their rights to property, health, culture, religion and natural resources. It went on to give an order that the Government restore them to their traditional lands and provide compensation. In 2006, the African Commission ruled against the Government for licensing the mining of rubies in another part of Endorois land. The company withdrew after this ruling.³³⁹ In February 2010, the African Union adopted the decision of the Commission making it legally binding on Kenya. However, to date, the Government is yet to implement the decision. In 2013, the Attorney General called for a team of experts to advise on the implementation of the decision. The tenure of the task force lapsed without any progress being made.

The East African Court of Justice

The East African Community (EAC) is a regional intergovernmental organisation of 6 Partner States: the Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda, with its headquarters in Arusha, Tanzania. The regional co-operation and integration is wide ranging, involving co-operation in political, economic, social and cultural fields, research, technology and skills development, defence, security and legal affairs for mutual and equitable development in the region. The intention is to establish a Customs Union as the entry point of the Community, a Common Market, subsequently a Monetary Union and ultimately a Political Federation of the East African States.

The Treaty for the Establishment of the East African Community includes as an objective *"the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States."*³⁴⁰ Respect for human rights is one of the underlying principles of the

EAC.³⁴¹ The Court has jurisdiction over cases between the member states of the EAC, not against companies in the EAC.³⁴² However, the Court may hear cases brought against a state that involve the management of natural resources that could involve extractive companies. The Court has already ruled on this objective of the Treaty in a 2014 case brought by an NGO challenging the Government of Tanzania's plans to build a highway across the Serengeti national park. The Court held that this is unlawful and an infringement of Articles 5(3)(c),³⁴³ that provides for the promotion of sustainable utilisation of the natural resources.

OECD National Contact Points (NCPs)

Companies involved in extractive sector operations in one of the 46 countries³⁴⁴ adhering to the OECD Guidelines on Multinational Enterprises³⁴⁵ face another potential grievance mechanism. A 'specific instance' (complaint) can be filed with the OECD National Contact Point in the home country of the company. This is done when the complainant (typically a civil society organisation or a trade union) considers that a company has not observed the OECD Guidelines for Multinational Enterprises in their operations or through their business relations.³⁴⁶ The Guidelines comprise a set of recommended standards for conduct across a range of topics, including human rights and labour rights. The NCPs are charged with contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines. NCPs are supposed to offer investigation and mediation, either themselves or through independent mediators, to work with the parties and agree on steps to resolve complaints. Many of the specific instances to date have involved the extractive sector.³⁴⁷

International Accountability Mechanisms of Multilateral and Bilateral Development Banks

If the extractive sector operator or the Government of Kenya received financing for operations from a multilateral or bilateral development bank, it may be possible to file a complaint with the international accountability mechanism (IAMs) of the development finance institutions (DFIs). The accountability mechanisms provide access to remedy for individuals and communities that are adversely affected by DFI-financed activities and to hold them and their clients accountable to the DFI's own policies. To date, there are a more than a dozen such mechanisms and together they formed the Network of Independent Accountability Mechanisms.³⁴⁸ Some of the well-known IAMs include, the Inspection Panel of the World Bank, the Compliance Advisor Ombudsman of the International Finance Corporation, the Project Complaint Mechanism of the European Bank for Reconstruction and Development, the Accountability Mechanism of the Asian Development Bank, the Independent Review Mechanism of the Africa Development Bank and the newly established Independent Complaints Mechanism that is shared between the Dutch and German development banks, FMO and DEG, respectively.³⁴⁹ While these offer an additional avenue for redress, as with other international mechanisms, complainants must meet certain criteria before the IAMs will address the complaint. As a result of the application of the criteria, they have been shown to reject a large proportion of the complaints received.³⁵⁰ In the case of Kenya, the World Bank Inspection Panel investigated a project involving natural resource management and the resettlement of indigenous peoples.³⁵¹

Voluntary Multi-Stakeholder Initiatives

There are a number of multi-stakeholder initiatives seeking to address grievances as part of participation in the initiative.

The Voluntary Principles on Security and Human Rights (VPSHR)

The VPSHR as noted above is a multi-stakeholder initiative involving governments, extractive companies and CSOs, established in 2000 to guide the extractive sector in designing and maintaining security for their operations in a manner that respects human rights.³⁵² The Principles are non-binding and do not have an independent grievance mechanism but have an internal process of discussion among members. Kenya is not a member of the VPs but several of the companies operating in Kenya are members and would be expected to apply the Principles.

The International Code of Conduct for Private Security Providers

The International Code of Conduct for Private Security Providers³⁵³ both calls upon signatory companies to establish grievance procedures³⁵⁴ and is in the process of establishing a complaints procedure to receive complaints from individuals or their representatives on alleged violations of the Code and / or the non-compliance of Member Companies' grievance mechanisms with the Code. The ICoCA will establish a process to support and oversee companies' responsibility to provide fair and accessible grievance procedures that offer effective remedies to address claims alleging violations of the Code.³⁵⁵ 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.³⁵⁶