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Conclusion & Recommendations



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5.1 Conclusion

The Government of Kenya, and the many county and local governments that are now charged with governing the extractives sector are still putting important parts of the governance, legislative and regulatory framework in place. The Government is undertaking a strategic assessment of the oil and gas and mining sectors that can provide the basis for making informed choices. The Government and the local communities affected by extractive operations will need better information to make more informed choices about when to say yes and no and under what conditions to the projected rapid development of the sector in the country.

Kenya has drawn on lessons learned and embedded sustainable development and to a lesser extent responsible business conduct, at the heart of its extractive sector framework. It is building a reasonably strong foundation to hold extractive companies and the Government itself to account. Once that is done, as highlighted in this Report, it faces the titanic task of strengthening governance capacity across not just national agencies responsible for dealing with the sector but also across the devolved county governments.

The country is attracting international companies across the mining and oil & gas sector. Extractive sector companies are expected to live up to a growing number of international norms that seek to define what "responsible business conduct" means in the extractive sector -- respecting human rights, protecting the environment, and promoting the interests of local communities. In response, companies, industry associations, and multi-stakeholder initiatives mentioned through this Report have developed policies and practices that are meant to prevent or at least minimise impacts on human rights. As "above ground risks," which includes scrutiny on human rights, can be at least as significant as "below ground risks" figuring out how to avoid such risks makes good business sense. These companies can bring and spread good practices that can be shared with local business relationships and within their supply chains.

Industry players have made real progress in accepting the relevance of these topics to operations as well as developing policies and refining global management systems. However, implementation still remains a big challenge on the ground in some circumstances, especially in the far corners of the country involving real life consequences for local communities. Communities and the CSOs that work with them must continue to be given a voice and support in holding companies – large and small – to account for their human rights performance.

Smaller extractive sector companies have an even steeper learning curve. The recent move to bring ASM into a more formalised relationship only begins the long road of building the capacity of that sub-sector to deal with the impacts they create and those to which they contribute. To date, an unregulated ASM sub-sector, has been allowed to operate with very

little, if any, regard for human rights and the environment and as a result, most negative impacts have gone unreported and unresolved.

Several lessons are clear from this study: First, human rights remain a key concern in Kenya's extractive sector. Second, monitoring and enforcement efforts must continue to be improved and strengthened. And finally, more CSOs need support in pressing for better human rights and environmental protections for impacted communities and workers. Throughout the research for this study, numerous human rights impacts were observed – in varying degrees – across a range the range of counties. The impacts are typical of the sector across the world. The challenge is in contextualising them within the Kenyan situation in order to build an effective response that prevents negative impacts and maximises positive ones.

Accordingly, many communities have expressed an interest in the Government having a more hands-on approach in dealing with human rights challenges. The KNCHR has a good opportunity to answer this demand and to address some of these challenges through the implementation of programs that will supplement the efforts of other stakeholders already promoting human rights in the extractives sector. The ultimate test of KNCHR's effectiveness will be whether or not it can prevent human rights abuses, or at a minimum reduce the severity with which they occur, and provide a just resolution mechanism for victims when abuses do occur.

Finally, much effort will need to be made over the coming months and years by businesses and the Government to educate the public on realistic expectations for communities from extractive sector activities and to shape sustainable and inclusive community benefits that can have real impact on poverty reduction. The majority of the communities interviewed as part of this Report expressed high expectations for benefits from extractive operations. The communities are right that these natural resources exist in their communities, and most often on their lands; therefore, if they stand to lose the most in extractive activities, they should also stand to benefit. On the other hand, community expectations must be managed to ensure they are not unrealistic. This can be achieved by raising widespread awareness about extractive sector lifecycles, as well as through education and ongoing community engagement and appropriate community investment programmes.

5.2 Recommendations

Kenya's extractive sector has great potential to contribute to the country's development, and an increasingly significant role in underpinning the Government's vision of reaching middle income country status by 2030. To meet this potential, there is a need to strengthen actions by all actors. The sections below set out a series of specific recommendations to address gaps and weaknesses based on the analysis presented in the Report above.

5.2.3 Government of Kenya and Parliamentarians

- The Government has made the right high-level commitments to strengthening the links between the sector, its contributions to poverty reduction and the need to address negative impacts on the environment, on society and on human rights. There remain some weaknesses in the policies and laws that should be taken into consideration in future updates to fill gaps in the legal framework identified in this Report. Existing policies and laws now need to be followed through by incorporating these commitments into on-going policy making, laws, regulations and Model PSC and mining concessions. The commitments need to be cascaded through each level so they become increasingly specific and therefore enforceable.
- Unequivocally subjecting itself to the external discipline of the EITI would be an important next step. The Government has already joined the OGP; joining EITI would be a logical next step in extending that commitment to transparency and accountability in the sector, while drawing on the important expertise and peer support that comes with being an EITI member.
- Understanding that access to land and land compensation are major concerns around extractive projects, the process of surveying and titling land should be speeded up so that local communities have better protection. In addition, given the absence of comprehensive resettlement laws or regulations, the Government should develop a clear legal framework on resettlement that incorporates human rights protections based on the right to housing³⁵⁷ and other relevant human rights and drawing on international standards, such as IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement.³⁵⁸ If the Community Land Bill can be adopted and the structures proposed implemented, this will go a good way towards addressing many community concerns.
- The Government is planning a SESA for the oil & gas sector and for the mining sector as well. Local communities and CSOs should be a core part of that consultation process to ensure that the assessments develop a well-grounded and accurate understanding of the potential environmental and social impacts of the sector from the community perspective. Combined with expert, technical assessments of the environmental, social and human rights impacts of the sector, these SESAs should help provide a clear basis for incorporating considerations of externalities when designing regulation specifically for the sector, rather than treating them as a secondary consideration.
- The profound devolution the country is experiencing means that numerous county governments will have important tasks in managing extractive sector operations. There is a clear need to further strengthen and follow up on ESIA's and their implementation is necessary as is attention to OHS in terms of legislation and enforcement. The capacity to manage these issues will need to be built at the county level as well.
- The Government has made a significant step in recognising the need to regulate and support the ASM sub-sector, rather than ignoring or criminalising it. Given the negative impacts of the sub-sector on workers, children and the environment, it is

important that the Government follows through on its plans to reduce child labour and improve environmental and labour practices.

- Given the expected expansion of the extractive sector, it is important for local communities to be able to trust public security forces as part of broader trust building that needs to go on in the sector. Joining the Voluntary Principles on Security and Human Rights, like its neighbour Ghana, would provide a relevant framework and lessons learned for public security forces and private security forces.
- Government actors at all levels should engage effectively with local communities and civil society organisations in advance of companies entering the community to commence extractive sector activities and during operations. Local communities need to see that the Government is committed to hearing their concerns and grievances and to supporting their informed participation in decision-making on land, employment, local contracts, and environmental protection. In addition, given the long-term perspective of the sector in the country, the Government should be actively promoting positive engagement with and by the sector. Keeping civil society space open and protected to continue to engage on extractive sector legislation and operations will be an important component of building acceptance of the sector.
- Establishing the KNCHR in the Constitution is a testament to the importance the Government attached to an independent institution charged with addressing human rights and good governance. That prominence has not been matched in deeds. The Government should provide further financial resources to the KNCHR so it can pay an important role in helping mediate between companies and communities.
- The Government should be providing clear and accurate information to local governments and local communities about the expected revenue flows to help manage expectations. It will need to complete the suite of revenue management legislation, ensure the package is coherent, and support local governments in managing these resources effectively with local communities.
- The Government should use the opportunity of the forthcoming National Action Plan on Human Rights and Business, to involve a wide range of stakeholders from civil society, to business, to trade unions, in a discussion on improving implementation of the UNGPs across all three pillars in the country. Doing so would provide an opportunity for the Government to set out clear expectations for companies large and small operating in the extractive sector.

5.2.4 Kenya National Commission on Human Rights

- To support further work on the extractive sector, the Commission could start with collecting reliable and current data on human rights abuses in the extractive sector so as to better understand the scope of interventions and remediation needed. This will entail conducting an independent and broad investigation of the impacts caused by extractive sector activities, particularly related to the dispossession of livelihood assets and productive resources, as well as the complex social impacts caused by the

displacement of communities in order to ensure proper redress and compensation for losses.

- Collaboration with CSOs and CBOs working on the extractive sector would allow the Commission to leverage the geographical coverage that these organisations provide to deliver its objectives.
- KNCHR should continue to participate in and support the multistakeholder Extractive Sector Forum³⁵⁹ that brings together actors to promote effective collaboration and provides a good model for initiating further collaborations. It could also provide technical training through seminars on the human rights and business nexus, with a focus on the extractive industry's key stakeholders to inform them of company roles in the promotion and protection of human rights. Stakeholders include businesses, government officers from key ministries and departments, representatives of communities around extractive operations, academia, the media, and civil society organisations.
- The Commission should work with the Ministry of Land, Housing and Urban Development and the land survey process in the country to ensuring that land rights and territorial rights of communities are protected to the greatest extent possible in the extractive concessions processes, given the limited protections currently in place.
- KNCHR should engage with extractive sector companies to promote independent human, environmental, social, cultural, and economic impact assessments before projects are advanced and support companies in improving their community engagement and setting up their own operational level grievance mechanisms (see below).
- Collaboration between the Commission and NEMA could address complaints arising from communities concerning environmental impacts by extractive companies. This could include supporting communities in bringing claims to the appropriate administrative authorities, working with communities and companies to mediate and potentially develop new ways to collaboratively monitor environmental impacts, or building their own capacity to monitor and hold companies accountable, including by assisting NEMA to improve accessibility to communities and awareness of the human rights dimensions of such complaints.
- KNCHR should be aware of Kenya's OGP processes, the actions being taken to improve transparency and accountability through those mechanisms and consider how the mechanisms can be mutually reinforcing with this work.
- KNCHR should act as a focal point of information on avenues for access to remedy to handle complaints that emanate from workers at the extractive sector site and from aggrieved community members as a result of extractive sector operations. It could provide technical and financial assistance to train local communities to know their rights and their options to demand accountability in the extractive sector.

- KNCHR is a widely trusted entity in the country and therefore the Commission can leverage this to design a grievance mechanism that is widely accepted. This includes building community capacity to engage in human rights monitoring and accountability. To achieve this, the Commission will need to use innovative methods of outreach and communication such as collaboration with existing grassroots organisations. These satellite liaison offices could assist KNCHR's capacity to execute these objectives at the local level.
- KNCHR should lobby the Ministry of Labour to clearly outline regulations on labour and workers' rights – including safe working conditions, decent wages, and the right to join labour unions – and encourage and enforce respect for these rights. This is possible through the productive engagement with companies and through the education of workers.
- The Commission should support the implementation of women's empowerment and gender equality strategies in the communities affected by extractive operations and displacement. A good starting point would be to collaborate with the National Gender and Equality Commission (NGEC) in promoting human rights and equality principles in the extractive industry.

5.2.5 Companies in the Extractive Sector

- The first obligation of companies is to comply with national law. But as Kenya is still evolving its extractive sector framework, it is appropriate for companies in the sector to look to international norms for appropriate guidance. The UN Guiding Principles on Business and Human Rights apply to all companies, everywhere, of whatever size. Given the extractive sector history in Kenya and abroad, it is particularly important that extractive sector companies operating in the country meet the UNGPs in carrying out their operations. This includes developing appropriate policies and guidance, carrying out human rights due diligence, and supporting and enabling access to remedies, including through operational level grievance mechanisms.
- This Report has sought to assist companies in their human rights due diligence processes by identifying key challenges existing in the country on human rights – both in terms of the existing policy and legal frameworks and its gaps – and key issues from the perspective of communities and workers. As companies carry out their human rights due diligence processes to understand the human rights challenges already existing in the country, they should draw on this Report and other sources of information to shape their policies and practices to prevent negative human rights impacts to the greatest extent possible.
- Given the potential for negative impacts, meaningful community engagement from the very start of operations, even from the exploration stage is important to avoiding some of the potential adverse impacts of extractive operations as well as optimising potential positive contributions.³⁶⁰ Community engagement, even from the exploration stage, including by juniors in the sector, can play an important role in framing longer-term relationships positively and negatively.³⁶¹ Communicating early, often, and clearly with stakeholders helps manage expectations and avoid risks, potential conflict, and project

delays and indicates from the very start an openness to taking community concerns seriously.

- Given the weaknesses of judicial and administrative mechanisms in Kenya, this means that communities and workers may have few reliable means to address their concerns. Rather than relying on this state of affairs and assuming that a lack of voice is a positive outcome for the company, in line with the overall message from the Government about building an accountable sector, companies should put in place robust grievance mechanisms to handle complaints that emanate from workers as well as aggrieved community members as a result of actions or inactions by extraction operations. These grievance mechanisms should meet the “effectiveness criteria” of the UNGPs.³⁶² At the same time, for serious impacts, such as those of a criminal nature, companies should not impede access to judicial mechanisms that do exist.
- Companies should ensure ongoing human rights due diligence processes consistent with the UNGPs are undertaken in the extractives value chain. Where extractive companies have hired contractors to carry out operations or to provide services they must address the risks associated with these hires because often contractors have a larger and deeper footprint than the extractive company. One way to do this is to ensure that all contractors are aware of and trained on human rights and business standards.
- The Government has set clear expectations for companies that they engage in “CSR” programmes. There has been a good deal of learning among large extractive sector companies and institutions about how investments with and in local communities can contribute to the social, economic, and institutional development of local communities in a manner that goes beyond mitigating any adverse effects that businesses might have. CSR programmes of an ad hoc or philanthropic nature such as building an isolated school or health clinic are increasingly being replaced by more strategic approaches to community investments, including through specific community development agreements. The Government, communities and companies should be building on the latest learning in designing community support and the distribution of benefits. Government and communities should be careful to ensure that such community development programmes are not used to compensate for negative impacts elsewhere as these should be addressed separately.³⁶³

5.2.6 Investors in Kenya's Extractive Sector

- Investors should conduct enhanced due diligence on companies in their portfolios that are involved in the extractive sector in Kenya.
- They should engage with companies they invest in that involved in the extractive sector in Kenya to ensure these companies meet or exceed international standards on responsible business conduct relevant to their business in Kenya.
- Investors should urge companies doing business in the extractive sector in Kenya to report robustly on how they manage risks and impacts associated with investments and operations in the country.