



Human Rights in Kenya's Extractive Sector

Exploring the Terrain



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Institute for Human Rights and Business
34b York Way
London, N1 9AB, UK
Phone: (+44) 203-411-433
Email: info@ihrb.org
Web: www.ihrb.org

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List of Terms and Abbreviations

ASM	Artisanal and Small Scale Mining	NAP	National Action Plan on Business and Human Rights
CSO	Civil society organisation	NCAC	National Coal Advisory Committee
CBO	Community-based organisation	NEMA	National Environment Management Agency
CSR	Corporate Social Responsibility	NAFFAC	National Fossil Fuels Advisory Committee
DFI	Development Finance Institution	NEMC	National Environment Council
EMCA	Environmental Management and Coordination Act	NHRI	National Human Rights Institution
EIA	Environmental Impact Assessments	NLC	National Land Commission
ESIA	Environmental and Social Impact Assessment	NOCK	National Oil Corporation of Kenya
EMP	Environmental Management Plans	NGO	Non-governmental organization
EMCA	Environmental Management and Coordination Act 2015	OHS	Occupational health and safety
EITI	Extractive Industries Transparency Initiative	O&G	Oil & Gas
FBO	Faith based organization	OGP	Open Government Partnership
FPIC	Free prior informed consent	OECD	Organisation for Economic and Co-operation and Development
IAM	Independent Accountability Mechanisms	PPE	Personal Protective Equipment
ICMM	International Council on Mining & Metals	PSC	Productions Sharing Contract
IFC	International Finance Corporation	RAP	Resettlement Action Plan
ILO	International Labour Organisation	SOGA	Skills for Oil and Gas Africa
KCM		SESA	Strategic Environmental and Social Assessment

KNBS	Kenya National Bureau of Statistics	WHO	World Health Organization
KNCHR	Kenya National Commission of Human Rights	DFID	United Kingdom Department for International Development
KOGA	Kenya Oil and Gas Association	UNESCO	United Nations Educational, Scientific and Cultural Organization
KEPTAP	Kenya Petroleum Technical Assistance Program	UNEP	United Nations Environment Programme
MOU	Memoranda of Understanding	UNGPs	United Nations Guiding Principles on Business and Human Rights
MOEP	Ministry of Energy and Petroleum		

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Executive Summary

In the last ten years, Kenya has experienced an increase in investments in the oil, gas and mining sectors. In particular, the discovery of oil in Turkana County in 2012 has boosted Kenya's potential to become an oil and gas (O&G) producer. By current projections, Kenya will be an oil producer by 2020.¹ Explorations are underway both onshore and offshore. After the discovery of valuable mineral sands in Kwale County and large deposits of coal in Kitui County, the Kenyan mining sector is experiencing similar growth. This will augment existing mining of industrial minerals and artisanal and small-scale mining (ASM) - the latter of which is common in the coastal and western Kenya belts for gemstones and gold respectively.

Inspired by investor confidence and the recognition that a competitive extractive sector can be a driver of development, the Government of Kenya incorporated extractive industries into its Vision 2030, the country's economic blue print.² The Ministry of Energy and Petroleum's Strategic Plan 2013-2017 is focused on facilitating the *"provision of clean, sustainable, affordable, competitive, reliable and secure energy services at least cost while protecting the environment."*³

However, in parallel with the optimism and aspirations for the economic potential of a developing extractive sector, there are also concerns related to the risks of adverse economic, social and environmental impacts of the sector. In order to avoid the 'resource curse' that has afflicted many other African natural resources-rich countries, Kenya needs to develop a sustainable and equitable extractive sector, which is well governed and addresses transparency and accountability challenges alongside human rights concerns. Handled well, extractive resources can have a unifying potential by contributing to economic growth and prosperity and supporting the social contract, which binds societies together.⁴ Handled poorly, resource extraction can increase inequality, entrench divisions between different groups which potentially fuel conflict and widen the gap between government and people and drive inequality.

Mitigating these challenges will require action by all stakeholders: government, extractive sector companies, civil society organisations and independent oversight institutions. The Kenyan Government's task is to put in place laws and regulations that promote a productive sector while at the same time incorporating important principles of sustainable development and responsible business conduct to ensure the protection of affected people and the environment. Responsible business conduct by extractive sector companies must become the norm, rather than an add-on for foreign or large operators only. Sustained, independent oversight of both private and public sectors as well as safe avenues to address grievances will improve the transparency and accountability of the sector.

These are challenges facing any nation that is emerging as a new extractive sector producer.⁵ Contextualising these challenges in Kenya, there are clear strengths to play to in building a sustainable resource sector but also clear challenges.⁶ For a country with endemic poverty, high rates of youth unemployment, high illiteracy levels, inadequate infrastructure and unequal provision of health and education, the years it will take to bring major production on line may seem like a long time to a large population eager for

development. However, the wait also gives the country time to strengthen what is a clear advantage in its economic development policy – a diversified economy that does not rely predominantly or even significantly on the extractive sector for its growth.⁷

It also provides the opportunity to strengthen the policy and regulatory framework as part of the on-going revision of extractive sector policies and laws.⁸ Promisingly, the World Bank is supporting a \$50 million technical assistance programme - the Kenya Petroleum Sector Technical Assistance Program (KEPTAP)⁹ - that will include a Strategic Environmental and Social Assessment (SESA) to identify and improve management, socio-economic and environmental impacts of the oil and gas sector in Kenya. The assessment is geared towards influencing development of policies, plans and programs to facilitate policymaking that is environmentally and socially sustainable. Despite the SESA coming at a time when amendment of the petroleum sector policy and legal framework is well underway, the assessment process creates an opportunity to ensure improvement in the governance of the oil and gas sector in Kenya by helping realign existing and proposed petroleum policies, plans and programmes in a manner that comprehensively facilitates integrated, fair and consultative petroleum decisions making. Similarly, the National Environmental Management Authority (NEMA) is planning a SESA for the mining sector.¹⁰

There is nonetheless a deep concern that the immediate incentives of politics, commercial cycles and current economic circumstances in Kenya might play forcefully against the significant time, resources and effort needed to address the structural challenges of creating a supportive enabling environment for responsible business in the extractives sector. KEPTAP will help mitigate these forces and if policies and laws are successfully aligned with the country's strong new Constitution, Kenya can be expected to do a better job than many of its neighbours by putting in place frameworks that both provide certainty for investors but also protection of rights for both investors and Kenyan citizens. This will require support by a range of institutions as well as effective policy tools to balance out and address the many conflicts that will accompany development of the sector.

The profound devolution of administrative authorities to the 47 newly created counties creates both risks and opportunities for good governance of the Kenyan extractive sector. While administrative authority has now moved closer to citizens and is in theory better informed about local concerns and nimbler, the regulation and general oversight of the sector remains with the national government. Hence there is a need to ensure effective intergovernmental coordination both horizontally and vertically. Moreover, some key functions, notably the implementation of policies on natural resources and environmental conservation¹¹ that can be highly technical, have been devolved to county governments. This highlights the significant capacity building that will be needed in the counties hosting extractive operations to understand the sector and its environmental and social impacts and to discharge their administrative functions effectively. This capacity gap may be one of the biggest risks facing both communities and the sector.

Kenya ranks 139 of 168 on Transparency International's Corruption Transparency Index – a score it has held for years, indicating little change.¹² It is ranked only "partially free" according to the Freedom House Freedom in the World Index.¹³ The Government of Kenya has begun to adopt legislation that will bring some measure of transparency to the sector and more generally to administration. The Government has joined the Open Government Partnership¹⁴ (OGP) but has not yet fully committed to the Extractive Industries Transparency Initiative (EITI), as its neighbour Tanzania has. The Ministry of Mining

website notes that “*participating in the Extractive Industry Transparency Initiative*” is one of its flagship projects in the period 2014-2017, so the Government still seems to be considering membership.¹⁵ The EITI is a multistakeholder initiative involving governments, business and civil society that has developed a global standard to promote open and accountable management of natural resources through disclosure of information on tax payments, licences, contracts, production and other key elements around resource extraction. Given the well-publicised concerns about corruption in the country, the external discipline and internal scrutiny that EITI requires, including from the multistakeholder groups that must be set up to accompany the EITI process, would be welcome. Transparency is an important step on the path to accountability for the sector and the Government. The protection of civil society organisations (CSOs) working on extractive transparency that goes with EITI membership¹⁶ would also provide some welcome restraints on more recent Government trends to curb CSOs.¹⁷ The OGP has a “response policy” that also allows organisations to respond to concerns about closing civil society space or restrictions on freedom of expression, association and assembly.¹⁸

As this Report, and the wide range of reports on the sector cited here and elsewhere attest, while there are positive indicators for the general future direction of the extractives sector, challenges remain for both the Kenya Government and companies in ensuring that the sector does not result in harm to human rights but instead provides benefits for workers, for neighbouring communities and the wider country.

Purpose of the Report

The Institute for Human Rights and Business (IHRB)'s Nairobi Process has focused on building and sharing knowledge on responsible business conduct in the extractive sector in several of East African newly emerging producer countries, drawing on lessons learned from around the globe and the Institute's broader extractives work. The work has focused on research such as this report (the Report) and its twin report for Tanzania¹⁹ that draw together an evidence base to provide for more informed interaction among participants in the sector – the Government and Parliamentarians, the National Human Rights Institution (NHRI), extractive sector companies and their business partners, civil society organisations, trade unions and communities.

This Report was carried out by the IHRB's Nairobi Process, in collaboration with the Kenya National Commission on Human Rights (KNCHR) – Kenya's National Human Rights Institution (NHRI) -- through both desk-based and field research in eight counties²⁰ in Kenya that are host to oil and gas (O&G) and mining activities. The purpose of the Report is to provide a more in-depth analysis of the many human rights issues and broader sustainable development challenges associated with the rapidly evolving extractives sector. While many of the issues are common to other countries with O&G and mining operations and vulnerable land-dependent rural populations and governance challenges, the Report seeks to contextualise these issues within the Kenyan historical, political and economic context. The Report is particularly focused on supporting the NHRI in understanding key emerging concerns about and from the extractive sector in Tanzania and the actors involved so it can better target its actions to improving human rights in the sector.

The Report is framed by the concept of “responsible business conduct,” and the standards that help define that conduct. The Report does not address technical operating standards for the extractives sector. Instead, it is grounded in international standards relevant to responsible business conduct, particularly those concerning impacts of business activities on human rights. This is because there is an increasingly global expectation that businesses, big and small, take responsibility for their adverse impacts on society – human rights, social, environmental, ethical, and consumer concerns – whether or not those impacts have been specifically addressed in national law. The UN Guiding Principles on Business and Human Rights (“the UN Guiding Principles” or “UNGPs”)²¹ are an authoritative global standard that set out international expectations across a three-pillar ‘Protect, Respect and Remedy’ policy framework. The UNGPs were endorsed by the UN Human Rights Council in 2011 and have been widely endorsed and applied by governments, business and CSOs in the five years since adoption.²² The framework recognises the complementary but distinct obligations that States and businesses have in protecting and respecting human rights, as well as in providing effective remedy mechanisms when those obligations are inadequately met. The UNGPs provide the first globally agreed upon standard that sets out these roles.

The UN Guiding Principles on Business & Human Rights

Pillar I: States’ duty to protect human rights against abuse by third parties, including business, through a mix of policies, regulation and adjudication.

Pillar II: Companies’ responsibility to respect human rights by avoiding infringing on the rights of others and address any harm to rights with which they are involved.

Pillar III: Access to effective remedy where people’s human rights are harmed to be provided through state, company and multistakeholder initiatives.

In June 2014, the UN Working Group on Business and Human Right called on all Member States to develop a National Action Plan on Business and Human Rights (NAP) to promote the implementation of the UNGPs within their respective national contexts.²³ As a Member of the UN Human Rights Council, Kenya accepted the call to action, and on 9 February 2016, the Government of Kenya announced its intention to develop a NAP on Business and Human Rights to respond to accelerating foreign direct investment and the growth of the domestic private sector.²⁴ Kenya’s NAP is expected to include a focus on the extractive sector.

Structure of the Report

The Report looks at the three pillars of the UNGPs to understand the state of human rights in the extractive sector in Kenya as follows:

Pillar I – The State Duty to Protect Human Rights: An in-depth analysis of existing and proposed policy and legal frameworks that are applicable to the extractives sector. This human rights analysis is based on relevant international human rights standards, the Constitution's Bill of Rights and international standards of responsible business conduct (in particular the UNGPs). (Chapter 2)

Pillar II – The Corporate Responsibility to Respect Human Rights: Acknowledging that O&G and mining have distinct impacts, the research analyses the impacts of each sector separately. The Report draws on information about operations in each sector in order to identify common trends at the operational level. (Chapter 3)

Pillar III – Access to Remedy: Examining avenues for and experiences of individuals and communities in addressing concerns and complaints, the Report pays particular attention to enhancing the KNCHR's capacity to understand, promote and protect human rights within the extractives sector, drawing from its constitutional and statutory mandate to address human rights. (Chapter 4)

Audiences

Government and Parliamentarians

This Report aims to help Government agencies and Parliamentarians working on the extractive sector to better understand the current challenges facing the sector and those affected by it. With more detailed and relevant information, policies, laws and contracts can be better structured to help prevent and mitigate potential harms from the sector and to reinforce the potential for positive outcomes, in line with the country's commitment to the United Nations Sustainable Development Goals.²⁵ Adequate attention to longer-term impacts of the sector on society and human rights will support more equitable growth and poverty reduction for the broader Kenyan population.

Kenya National Commission on Human Rights

In its current Strategic Plan, 2013-2018, the KNCHR commits to working with the extractives sector as a key area of focus within its work on business and human rights.²⁶ KNCHR is active at the national level and contributes to extractive sector legal reforms but this can be strengthened further. In the past, KNCHR carried out an inquiry on salt mining in Malindi and made recommendations to the Government and industry some of which are still being implemented to date. The Commission, through its partnership with IHRB on the Nairobi Process, has consistently engaged both the State and companies urging use of human rights principles and standards in the sector as well as strengthening community voices in demanding accountability. Most recently, KNCHR has embarked on a pilot project

working in two counties of Taita Taveta and Kitui whose goal is to promote transparency and accountability and to build capacity of communities in advancing human rights within their localities. This Report seeks to build on those experiences, highlighting the human rights challenges in Kenya's extractive sector and identifying how KNCHR can increase internal knowledge and explore new strategies in this area. The aim is to improve the KNCHR's knowledge and capacity to monitor, investigate, and resolve negative impacts by proposing remedial actions and to report cases of adverse human rights impacts involving the extractive sector.

Extractive Sector Companies

As companies gear up their exploration and operations, they will be required to conduct project-level Environmental Impact Assessments (EIA) or other due diligence to help them understand the overall potential impact of their sector and their project(s) on the country. The Report provides a strategic review of the broader policy and legal frameworks relevant to the sector. It also crystallises the acute issues that are central to operating in Kenya which require proactive management by extractive companies and thus provides a "bigger picture" for companies coming into the country.

Local Communities and the Civil Society Organisations (CSOs) that Support Them

The Report can be used to support local communities, who are generally the rights-holders most directly impacted by extractive projects, to engage with companies and local authorities, and call on international standards to support their case.

National Civil Society Groups and the Media

The Report can also provide support to key societal voices so that they can participate in policy development and project planning for the extractive sector, leveraging international standards and approaches in their interventions.

Research Methodology

The Report is based on both desk-based research that is reflected in the text and sources throughout the Report, complemented by field research carried out from September to October 2015. The qualitative research involved 253 respondents from across eight counties in Kenya: Kajiado, Baringo, Kitui, Migori, Kwale, Turkana, Lamu and Taita Taveta. These eight counties were selected for their prevalence of extractive sector activities, which are either at the stage of exploration or active exploitation, and because they have some of the most well-known mining and/or oil and gas activities. In each county the survey focused on the specific area around the extractive operations by collecting data from the local populations, civil society organisations, community based organisations, government at the national and local level, and national and international businesses. See Annex 1 for a detailed overview of the types of research methods used and groups of stakeholders interviewed.