



# The State of Human Rights in the Kenyan Extractive Sector

Executive Summary

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# Executive Summary

## Setting the Scene

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.<sup>1</sup> 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 industrial minerals mining 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.<sup>2</sup> 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."<sup>3</sup>

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.<sup>4</sup> 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.

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<sup>1</sup> IMF "[Kenya: Fifth Review Under the Three-Year Arrangement Under the Extended Credit Facility and Request for a Waiver and Modification of Performance Criteria](#)" (April 2013)

<sup>2</sup> Government of Kenya, "[Kenya Vision 2030](#)." Extractive industries are included in the Vision's second medium-term plan (2013-2017) as the seventh sector of the economic pillar.

<sup>3</sup> Ministry of Energy and Petroleum, [Strategic Plan 2013 - 2017](#), Preface.

<sup>4</sup> The Ministry of Energy and Petroleum recognizes the need for "consensus-building and mutual understanding among stakeholders are crucial to energy development to interlock technical, environment, social, political, economic, and financial goodwill and buy-in by stakeholders." Ministry of Energy and Petroleum, [Strategic Plan 2013 - 2017](#), p. 20.

These are challenges facing any nation that is emerging as a new extractive sector producer.<sup>5</sup> Contextualizing these challenges in Kenya, there are clear strengths to play to in building a sustainable resource sector but also clear challenges.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> Promisingly, the World Bank is supporting a \$50 million technical assistance programme - the Kenya Petroleum Sector Technical Assistance Program (KEPTAP)<sup>9</sup> - 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.<sup>10</sup> 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. No such strategic assessment is planned for the mining sector however.

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 more nimble, the regulation and general oversight of the sector remains with the national government and hence the need to

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<sup>5</sup> See for example: Chatham House, "[Guidelines for Good Governance in Emerging Oil and Gas Producers](#)" (June 2015).

<sup>6</sup> Ministry of Energy and Petroleum, [Strategic Plan 2013 - 2017](#), Critical Challenges, p. 5.

<sup>7</sup> Mining currently contributes less than 1% of Kenya's GDP but its estimated potential is 4% to 10%. Government of Kenya/ Ministry of Mining, "[Kenya Mining Investment Handbook](#)" (2015), p. 16.

<sup>8</sup> Ministry of Energy and Petroleum, [Strategic Plan 2013 - 2017](#), Foreword. The plan recognises that "legal and institutional capacity building is key to ensuring that Kenya maximises benefits from exploration, development and production of oil and gas resources and establishing organized oil and gas sector."

<sup>9</sup> See: World Bank, "[Petroleum Technical Assistance Project](#)."

<sup>10</sup> World Bank, "[Petroleum Technical Assistance Project](#)."

ensure effective intergovernmental coordination. Moreover, some key functions, notably the implementation of policies on natural resources and environmental conservation that can be highly technical, have been devolved to country governments. This highlights the significant capacity building that will be needed in the counties hosting extractive operations to understand the sector and its environmental 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.<sup>11</sup> Helpfully, 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 Partnership<sup>12</sup> but has not yet committed to the Extractive Industries Transparency Initiative (EITI), as its neighbour Tanzania has. 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.

## Overview of the State of Human Rights Report

IHRB's Nairobi Process, in collaboration with the Kenya National Commission on Human Rights (KNCHR), has conducted a study on the state of human rights in Kenya's extractive sector and captured its findings in a detailed forthcoming "State of Human Rights in the Kenyan Extractive Sector" Report (the Report – forthcoming).

The forthcoming Report is based on both desk-based and field research in eight counties<sup>13</sup> in Kenya that are host to O&G or mining activities. It provides insight into the historical, political and economic context of the country as a whole and the areas visited. Many of the human rights issues included in the Report are common to other countries with O&G and mining operations, vulnerable land-dependent rural populations and governance challenges.

This Executive Summary presents the most recurrent issues that emerged from the study specific to Kenya in 2015. The fuller forthcoming Report will provide an in depth analyses of each issue and how it manifests in each sub-sector. The Report will also identify negative human rights impacts while making recommendations on how the various stakeholders, within their own mandates, can prevent and mitigate the risks of the impacts identified.

### Framework

The forthcoming Report is framed by the concept of "responsible business conduct," and the standards that help define that conduct. The Report will not address technical

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<sup>11</sup> Transparency International, "[Corruption by Country/Kenya](#)" (2015).

<sup>12</sup> Open Government Partnership, "[Kenya](#)."

<sup>13</sup> The counties visited are: Kajiado, Baringo, Kutui, Migori, Kwale, Turkana, Lamu and Taita Taveta.

operating standards for the extractives sector. Instead, it is grounded in the international standards relevant to responsible business conduct, particularly those concerning impacts of business on human rights.

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”) are an authoritative global standard that sets out international expectations across a three-pillar ‘Protect, Respect and Remedy’ Framework. The Framework recognises the interactive roles of governments, businesses and affected people and affirms that both government and businesses must take steps to prevent abuses involving corporate actors and provide remedy to people when there is harm:

- **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, that is, to avoid infringing on the rights of others and address any harm to rights with which they are involved.
- **Pillar III:** The need for **access to effective remedy** where people’s human rights are harmed.

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

- **Pillar I:** 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 United Nations Guiding Principles on Business and Human Rights).
- **Pillar II:** Acknowledging that O&G and mining have distinct impacts, the research analyses the impacts of each sector separately. The Report draws on information about particular projects in order to identify common trends at the operational level, but also assesses the potential impacts of the O&G and mining sector on society as a whole – looking at the sectoral level for the extractives sector.
- **Pillar III:** 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.

## Audiences

- **KNCHR:** 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.<sup>14</sup> 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

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<sup>14</sup> Kenya National Commission on Human Rights, “[Strategic Plan 2013-2018](#).”

out an inquiry on salt mining in Malindi and made recommendations to government and industry<sup>15</sup> some of which are still being implemented to date.<sup>16</sup> The Commission, through its partnership with IHRB on the Nairobi Process,<sup>17</sup> 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.

- **Government and Parliamentarians:** The forthcoming 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.<sup>18</sup> 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.
- **Extractive Sector companies:** As companies gear up their exploration and operations, they will be required to conduct project-level Environmental Impact Assessments (EIA)<sup>19</sup> 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 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.

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<sup>15</sup> Kenya National Commission on Human Rights, "[The Malindi Inquiry Report](#)" (2006).

<sup>16</sup> This was confirmed by the UN Global Compact Kenya Office who are working together with the Kenya Association of Manufacturers and salt companies in the implementation process.

<sup>17</sup> IHRB, "[The Nairobi Process: A Pact for Responsible Business.](#)"

<sup>18</sup> Government of Kenya, "Vision 2030 Second Medium Term Plan (2013-2017)," p. 2.

<sup>19</sup> Section 58-67 of the Environmental Management and Coordination Act (1999).

# Cross-cutting Themes from the State of Human Rights Report

A number of cross-cutting themes run through many of the forthcoming Report's findings, including:

## Gaps in the Legal Structure

The current gaps in the legal structure pose challenges for both companies, communities and individuals.

Operating in countries with limited legal structures is nothing new for larger extractive companies. The extractive industry may be exceptional in terms of its size, its impact and its revenue generating potential but its real uniqueness lies in its willingness to invest almost regardless of the operating environment. Kenya has a well-developed legal structure and a robust Constitution, but is in the middle of updating the policy and legal framework for the extractives sector and related topics, in particular concerning land.

Amending policies and laws is a multiyear process, which could benefit from comprehensive public participation. The promise of constitutional guarantees on protection of the right to property, public participation, a clean and healthy environment and access to information among others is in place but not yet reflected in sector laws and practice. This creates frustration for stakeholders who do not yet have the legal or procedural means to resist change or claim benefits and uncertainty for companies about what procedures to follow or standards to meet. In addition, the ASM sector currently is not covered by the regulatory framework, as is the case in many countries, with no standards and no monitoring of the at times significant localised impacts from ASM operations.

## Land

Land is and will remain a complex issue for the extractive sector and other sectors with a land footprint.

Land is also one of the most emotive subjects in Kenya, having been the cause of many conflicts over the years. This is also not a new issue for the extractive sector but is nonetheless complicated in Kenya by a number of factors.

In 2012 the country revised the legal framework for the land sector to bring it in line with the Constitution.<sup>20</sup> These changes included the creation of the National Lands Commission.<sup>21</sup> However, the gaps in the land laws have necessitated amendments and currently a Land Laws (Amendment) Bill<sup>22</sup> is before Parliament. The greatest risk that remains is the delay in enacting a law to provide communities as a collective with rights

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<sup>20</sup> The new land law regime resulted in the repealing of 7 statutes and the enactment of the Land Act (2012), Land Registration Act (2012) and the National Land Commission Act (2012).

<sup>21</sup> Created under Article 67 of the Constitution, the NLC is mandated amongst other duties to manage public land on behalf of the national and county governments and to advise the national government on a comprehensive programme for the registration and titling of land throughout the country.

<sup>22</sup> The [bill](#) aims to give effect to articles 67(2)(e) and 68(c)(i) of the Constitution and to provide procedures for evictions.



over their collective land as recognized under Article 63<sup>23</sup> of the Constitution. In this regard, a Community Land Bill<sup>24</sup> is also before Parliament.

In the interim, county governments are trustees for community land, with the attendant risks for corruption and confusion. The Endorois case,<sup>25</sup> involving an indigenous community evicted from their traditional lands in the 1970s for tourism development, continues to influence the discourse around large development projects on community land as well as upcoming legislation on community land because without a statutory framework for the operationalisation of community land rights, those rights will continue to be largely ignored.

## Capacity

Capacity of county level administrations and communities must be increased to understand the at times profound changes that will take place when operations and production takes place in their area.

The ability of county level environmental authorities to effectively assess the quality of lengthy, technical EIA reports, negotiate effective action plans to respond to EIAs, monitor and enforce them (or other environmental laws) is questionable in many cases for potentially years to come. Even at the national level, it has been recognized that the National Environmental Management Agency (NEMA) needs to enhance its technical expertise and capacity in anticipating and managing environmental issues.<sup>26</sup> For many marginalized communities, with no experience of the sector, awareness raising about their rights, as well as risk and opportunities, and moderating expectations will be important. Through County Environment Committees<sup>27</sup>, there is room for greater direct CSOs participation in influencing quality assurance of the ESIA reports and incorporation of community concerns.

## Key Issues in the Extractive Sector in Kenya – Overview of Field Research

The field research for the Report was carried out across eight counties<sup>28</sup> and involved interviews with communities, community based organisations, civil society organisations, businesses and local and national level government officials. This section highlights issues that emerged quite consistently during the field research across stakeholder groups and throughout the study areas.

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<sup>23</sup> Article 61(2) classifies land in Kenya as either public, community or private; Article 63 then discusses community land and provides in (1) that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest

<sup>24</sup> [The Community Land Bill](#) (2015).

<sup>25</sup> African Commission on Human and People's Rights, "[276/03: Centre for Minority Rights Development \(Kenya\) and Minority Rights Group \(on behalf of Endorois Welfare Council\) / Kenya](#)" (2009).

<sup>26</sup> The World Bank, through the [Kenya Petroleum Technical Assistance Project](#) (KEPTAP), is supporting country efforts to better manage oil and gas developments and wealth for sustainable development impacts. The project has four components the first of which is petroleum sector reforms and capacity building. NEMA is one of the 18 government ministries, departments and agencies targeted by this project.

<sup>27</sup> Environmental Management and Coordination Act (2015), Section 29, creates the County Environmental Committee whose members include CSOs.

<sup>28</sup> The counties visited were Kajiado, Baringo, Kutui, Migori, Kwale, Turkana, Lamu and Taita Taveta.

## Community Engagement

The relationship between extractive companies and communities remains challenging despite some positive impacts that have resulted from the presence of companies such as jobs, local contracts and social investment or corporate social responsibility (CSR) projects. In some cases, companies were faulted for failure to consult communities at all in some circumstances, thus leaving wide scope for improvement that can start to address some of the challenges identified throughout the Report. Civil society organisations and communities stated that there is room for improvements in how companies: (i) start their relationship with communities from the very first moment they enter into communities to discuss exploration; (ii) engage with communities in explaining how projects are implemented and in gathering ideas for prevention and mitigation of expected impacts; and (iii) share information on forthcoming operations and available opportunities that can benefit the community. The importance of timely sharing of accurate information by all parties - government, companies, civil society and communities - was seen as necessary to ensure sustainability, inclusiveness and smooth operations in the sector. The persisting challenges of information asymmetry, with communities being the most disadvantaged in terms of access to relevant and understandable information, builds mistrust and suspicion towards companies and government.

For their part, companies cited the challenge of operating in an environment with multiple layers of stakeholders, all with varying interests, and the difficulty in identifying honest and neutral brokers. For instance, companies use local government administrators, such as chiefs to gain access to communities but this approach in most instances has led to mistrust by those who feel companies compromise chiefs. Companies felt they cannot bypass existing administrative structures especially at the community level in spite of the existing mistrust. Of concern therefore is how companies win the confidence of the community while still working with the administrative structures and not being perceived as having been compromised. A related challenge is identifying the right stakeholders to engage to avoid elite capture and other vested interests. These – yet unmitigated - challenges have led to mistrust, misunderstanding, conflict, unrealistic expectations, and even unresolved grievances in numerous circumstances and risk colouring longer term relationships where production is expected.<sup>29</sup>

Engagement strategies need to be tailored to the needs of different regions in which companies operate, with strategies addressing the exact needs of the communities in which they operate, rather than merely replicating those they might have used from other operations. Social investment programmes to support communities living near larger scale operations have become an expectation but also a source of tension, with at times unrealistic expectations of immediate and wide-scale benefits for local communities, and unfulfilled commitments by companies on the other.

Transparency around such social investment programmes is just one source of discord: civil society organisations would like to see disclosure of documents detailing companies' specific commitments to communities in order to facilitate tracking and follow-up on those commitments while companies highlight that such programmes are agreements between companies and communities and therefore only available to the parties. Transparency of such investment programmes has the potential to invite

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<sup>29</sup> See for example the discussions in the latest Extractive Sector Forum on this point, IHRB and ILEG, [“Extractive Sector Forum – First Workshop Report: Understanding the Kenyan Extractive Sector: The Players and their Roles”](#) (February 2016).

comparison and competition among those seeking resources. Under the Petroleum (exploration, development and production Bill 2015<sup>30</sup>, companies would be required to disclose their social investment programmes.

## Impacts on Land Rights

Land and access to land are the most important factors in ensuring the livelihoods of most rural families in Kenya as about 75%<sup>31</sup> of the population is dependent on agriculture. Along with access to land, there are also related issues such as restricted access to water, pasture, and other resources from these community lands.

Given the extractive sector footprint, land is the issue that brings the sector most immediately into contact with local communities. Procedurally, both mining and onshore O&G exploration companies are granted licences by the national government over a specified area and then it is up to the companies to negotiate for access from land owners, users or occupiers. This includes assessing compensation for the land, developments thereof, and even crops. With regard to crops, the Ministry of Agriculture has a guide<sup>32</sup> on the value of each crop/tree that companies can use but there is no further guidance for valuing other assets such as housing or land. The field research identified that several of the key challenges the sector faces with respect to access to and use of land resources are inextricably linked with the incomplete and unclear legal framework regarding use of land, leaving both landholders and companies in an uncertain situation. It means that these situations must be negotiated on an ad-hoc, individualised basis. This leaves rural communities and individuals with a lack of legal protection and companies exposed to criticism.

Stakeholders identified several key issues with respect to land:

- The current lack of legislation protecting land held collectively (community land) - some extractive operations are taking place on community land for which there is no governing law on acquisition or compensation. Currently companies have to negotiate access with the county government and then with the community directly impacted. However, no monetary compensation is payable to community members for the land because there is no law to guide how this can be done. Instead, companies will normally undertake projects identified by community members in addition to some ceremonies such as slaughtering of an animal to signify consent to the transaction has been undertaken in some cases.<sup>33</sup>
- Incomplete land adjudication - in some locations land was found to be individually owned but the government has yet to complete the adjudication process and issue title documents. Thus there is little protection of ownership which leaves people vulnerable to exploitation.
- The absence of processes for valuation of private land for purposes of compensation - this has resulted in widespread community complaints about inadequate compensation for land and resources.

The field research also highlighted persistent complaints around inadequate consultations concerning land acquisitions. There is therefore a role for both county

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<sup>30</sup> Clause 121(2)(d),

<sup>31</sup> Feed the Future, "[Kenya](#)" (2013).

<sup>32</sup> 'Crop compensation rates' guides are established at county level and are reviewed from time to time. Samples from three counties are annexed to the report.

<sup>33</sup> Information obtained on 18 February 2016 from a former community engagement officer with an oil and gas operator currently undertaking exploration in Kenya.

governments and companies to play in informing and involving communities in the process of developing natural resource development plans that will impact on their land and resource use for their areas and in subsequent specific exploration and production plans that involve negotiations directly about community land.

## Impacts on Livelihoods as a Result of Environmental Pollution

With the exception of one large scale mining operation at the coast that is already at the production stage, most Kenyan large-scale O&G and mining operations are at the exploration stage. Most discussions on environmental pollution were therefore about concerns of potential future harm. Sections of communities and in particular civil society organisations are aware of the many serious environmental risks related to resource extraction and expressed concerns that these risks could materialize in Kenya. They are familiar with the environmental pollution that has occurred in other countries, in particular countries without robust legislative or regulatory frameworks or insufficient application of existing frameworks.

Currently companies are required by Kenyan law to carry out project-level environmental impact assessments (EIAs) for any projects that significantly alter land use.<sup>34</sup> However, communities have criticized the EIA processes for the superficial involvement of affected communities despite the requirements written into the law that these processes should be participatory.

Access to the notices for the published reports for comments still remains a challenge. The regulations provide that the community must be informed of the availability of the final EIA report via notices to publication in the Kenya Gazette and in a newspaper circulating in the area around the proposed project as well as radio announcements<sup>35</sup> after which they have 90 days to forward comments.<sup>36</sup> This locks out those populations in remote regions in Kenya with limited access to newspapers. This is further complicated by the difficulty in accessing the EIA reports online and in a language that is understandable to communities and CSOs.<sup>37</sup> The EIA reports are long and technical in nature and often there is no assistance to communities to help them understand and to thus be able to give valuable feedback. There is no community assistance requirement for companies and NEMA currently lacks the capacity to provide such support. Consequently, in light of NEMA's limited capacity to monitor environmental management plans (EMPs) that detail prevention and mitigation measures to be undertaken to respond to the EIAs, effective efforts are unlikely, given limited capacity of communities and CSOs.

In areas with significant ASM, negative environmental impacts caused by such operations continue unchecked. The current regulatory framework does not address such

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<sup>34</sup> See: Schedule 2 of the Environmental Management and Coordination Act (1999).

<sup>35</sup> Upon receipt of environmental impact assessment study report the Authority must publish notice for two successive weeks in the Gazette and in a newspaper circulating in the area of the proposed project. An announcement must be made via radio in official and local languages at least once a week for two successive weeks pursuant to section 59 (1) of the Environmental Management and Coordination Act and section 21(2) of the Environmental Impact Assessments Regulations (2003).

<sup>36</sup> Sec. 59(1) (d) Environmental Management and Coordination Act (1999).

<sup>37</sup> The researchers were able to access 5 Environmental Impact Assessment reports, relating to 6 out of the 46 licensed oil blocks on the [NEMA website](#). All were published in English as there is no requirement to publish the same in a language that can be understood by local communities. There is however the option to request a hardcopy of the reports, subject to the laws relating to access to information and the payment of the requisite fee; section 4 [Environmental Management and Coordination Act](#) (2015).

small scale mining and even if it did, few of even the medium sized enterprises would have the capacity or commitment to comply with environmental, health or safety rules.

## Impacts on Labour Rights

A number of labour-related issues emerged during the field research. First, artisanal and small-scale miners generally do not adhere to occupational health and safety measures and are also lax on taking even the most basic of precautionary measures. The widespread use of mercury in small-scale gold mining is particularly harmful to miners and the environment. Child labour is also widespread among small-scale gold miners. These issues are exacerbated by a lack of oversight from relevant government officials, in particular from the Mining and Labour Ministries. Serious accidents and fatalities are common.

With regard to large-scale mining and O&G operations, challenges identified related to short-term contracts and their impact on the right to unionisation. The potential to create tensions and conflict is high: most operations are currently at the exploration stage where the nature of work during exploration is transient but where communities nonetheless have high expectations with regard to employment opportunities. The question of who is a 'local' for the purposes of recruitment has arisen, with communities expressing displeasure at the recruitment of workers from areas other than the immediate vicinity. The absence of skilled workers among local communities further adds to discontent when community members are mainly hired as unskilled or semi-skilled workers.

Some O&G and mining companies are addressing the skills gap by using their social investment programmes to build local capacity. The government, together with development partners has also started programmes that address skills gaps through the provision of training to increase job opportunities for locals in the extractive sector.<sup>38</sup> Companies are setting up technical and vocational training centres that help individuals from local communities build the requisite skills, as well as taking part in enterprise development to assist small and medium enterprises (SMEs) and entrepreneurs to create new or expand existing businesses.

## Impacts on Women's Rights

The field research found that women were particularly impacted by loss of land and environmental damage. Owing to their gender roles in society, women in many parts of rural Kenya are charged with ensuring food production and preparation for the family in addition to other domestic duties such as collection of water and firewood. The field research found the voice of the women was almost inaudible during consultation and thus a lack of involvement in decision making - an effect of widespread patriarchal societies. The Constitution includes guarantees of equal opportunities/non-discrimination for women<sup>39</sup>, and newer laws such as the draft Community Land Bill include specific guarantees on equal treatment and non-discrimination for women<sup>40</sup>, but these provisions have not yet prompted widespread changes in society.

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<sup>38</sup> A good example is the DfID/GIZ supported, [Skills for Oil and Gas Africa](#) (SOGA) program in East Africa of which Kenya is a beneficiary.

<sup>39</sup> Article 27, Constitution of Kenya (2010).

<sup>40</sup> Clause 14(4)(b), Community Land Bill (2015).

Furthermore, the sector was found to involve significantly fewer women at project-site level signifying limited economic opportunities for them.<sup>41</sup> This reflects typical patterns of gender-segregated roles across the extractive sector on a more global scale.<sup>42</sup> There may be other opportunities, beyond the project-site level, in the extractives value chain where there might be more and diverse opportunities for female entrepreneurs and workers<sup>43</sup>. It will take a focused effort by companies and government to build capacity and support for further female participation in the sector.

The exception is in artisanal and small-scale gold mining. There is a particularly high number of women and their children involved in processing gold, exposing them to toxins with an increased risk of serious illnesses and even death.

## Security

While Kenya has experienced severe security threats recently with several incidents of attacks by Al-Shabab from neighbouring Somalia and earlier inter-communal violence around the 2007-2008 elections, none of these have targeted extractive sector operations and thus security was generally not considered a major concern. Where there have been conflicts around extractive facilities, these have generally been due to poor community engagement rather than as a result of broader conflicts.

Many stakeholders argue that government at national and county levels should play a stronger role – both in ensuring and supporting community engagement based on meaningful dialogue, and in promoting the overall conditions required for the potential benefits of extractive activities for communities to be recognised and realised. Companies reported that they are working with county governments, communities and contractors to put in place more transparent processes for awarding local contracts and hiring local staff. This could ease tensions and create a more sustainable basis for tackling security concerns.

This also points to the need for extractive companies to continue to carry out ongoing risk assessments from the earliest stages of exploration, involving meaningful stakeholder engagement, dialogue and participation. Risk assessments failing to get to grips with contextual issues lead to misguided responses when security and human rights problems occur. The Government of Kenya is not a participant in the Voluntary Principles on Security and Human Rights, an international multistakeholder initiative designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights.<sup>44</sup> The initiative and the principles can provide valuable guidance to both public and private security forces. Some companies operating in Kenya are members, but not all, meaning there may be quite disparate responses to security incidents should they arise that pose risks for the communities as well as the sector. A draft law aimed at regulating the activities of private security providers is currently before the Parliament.

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<sup>41</sup> Anecdotally, information from a large-scale mining company indicated the following as the employment figures. Total: 921, of which 540 permanent, 64 fixed term; 58 trainees; and 259 service provider contractors. Of the direct 662 (non-contractor) employees the gender split is men/women: 84/16%. Information based on direct communication with a mining company (3 March 2016).

<sup>42</sup> See for example the [World Bank Gender in Extractive Industries Programme](#).

<sup>43</sup> NEMA will soon conduct a gender assessment for the oil and gas sector whose findings will feed into the SESA design and recommendations

<sup>44</sup> See website of the [Voluntary Principles](#). Ghana is the first African country to join the Voluntary Principles initiative.

## Transparency and Access to Information

Access to relevant information was a repeated concern throughout the field research, in particular at the community level as highlighted above. Even at a national level, information is difficult to obtain. The Ministry of Mining provides access to updated mining cadastre on its website, but it is available only to existing mineral rights holders or applicants.<sup>45</sup> However, the Ministry has made available a useful mining cadastre map that shows the areas covered by licenses granted; by clicking on each license area, basic information on the company holding the license, the dates of the license, minerals covered and area appear but apparently no consolidated list is available from the website.<sup>46</sup> Updated information on O&G concessions and the companies awarded are not available from the Ministry of Energy and Petroleum website.<sup>47</sup> Neither Ministry includes weblinks that would connect information on concessions or licenses to any available draft or adopted EIA or subsequent management plans about the projects on the NEMA site or company websites. As noted above, it is difficult to find these reports even on the NEMA site, as they are not clearly signposted.

Currently, unlike some other African countries that are beginning to disclose extractive sector contracts,<sup>48</sup> Kenya does not yet disclose its contracts, but under the draft Mining Bill (2014), the Government has indicated it will submit mineral agreements to Parliament<sup>49</sup> and make them publicly available.<sup>50</sup> The draft Upstream Petroleum Bill (2014) also needs to follow this approach. Currently it provides for the tabling of field development plans upon declaration of commerciality<sup>51</sup> but efforts are underway to advocate for the tabling all production sharing contracts.

Kenya does not yet have an access to information law to implement the Constitutional guarantee to access to information (Article 35). The Access to Information Bill, 2015, is currently before Parliament.<sup>52</sup> Kenya's 2012 Open Government National Action Plan committed it to drafting a freedom of information law, noting that "the draft if passed in its current form—will place Kenya 10<sup>th</sup> globally for most progressive ATI [access to information] law."<sup>53</sup>

With respect to transparency of revenue intake from the sector, there is no clear route for citizens to understand what extractive sector companies report as payments to the Government and what revenue the Government reports receiving. The Mining Bill (2014) would require an "accountable and transparent mechanisms of reporting mining and mineral related activities, including for - revenues paid to the government by mineral right holders and production volumes.<sup>54</sup> There is need to ensure that draft Upstream Petroleum Bill (2014) also adopts a similar approach to transparency. Participation in the EITI would begin to address the issue as countries that are members must prepare yearly reports on such disclosures. As much of the

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<sup>45</sup> Ministry of Mining, "[Mining Cadastre](#)."

<sup>46</sup> Ministry of Mining, "[Mining Cadastre Map](#)."

<sup>47</sup> [Ministry of Energy and Petroleum website](#).

<sup>48</sup> See for example, Open Contracting Partnership, "[Contract Disclosure in Extractive Industries](#)."

<sup>49</sup> [Section 117\(5\) of the Mining Bill \(2014\)](#).

<sup>50</sup> [Section 119\(1\) of the Mining Bill \(2014\)](#).

<sup>51</sup> Clause 58 of the Petroleum (exploration, development and production) Bill (2014).

<sup>52</sup> [The Access to Information Bill \(2015\)](#).

<sup>53</sup> Government of Kenya, "[Open Government Partnership National Action Plan](#)" (2012).

<sup>54</sup> [Section 119\(3\) of Mining Bill \(2014\)](#).

sector in Kenya is still in the exploration phase, expected revenues are still in many cases, years off. Nonetheless, the issue of revenue transparency is squarely in the spotlight for governments, companies and communities in the sector and the Government's approach to the issue will be under increasing scrutiny.

## Access to Remedy

The option of seeking judicial redress for negative impacts on human rights does exist as a general matter in Kenya and has been used in certain instances.<sup>55</sup> The judiciary has embarked on a process of recruiting additional judges for the Environment and Land Courts,<sup>56</sup> which should also improve access by the citizenry and the capacity of these courts to resolve land complaints more expeditiously.

However, not every grievance warrants a judicial remedy and thus the development of effective, independent alternative, non-judicial mechanisms to mediate and resolve complaints involving the sector, is important. Here the national human rights institution, KNCHR, has played and will continue to play an important role in strengthening community understanding of and capacity to claim their rights, while also mediating disputes that cannot be addressed through company level grievance mechanisms but where judicial avenues are not required.

Companies are encouraged to continue to improve operational level grievance mechanisms where grievances can be addressed early and to do so in line with the important guidance set out in the UN Guiding Principles on Business and Human Rights.<sup>57</sup> Information provided by the Kenya Oil and Gas Association (KOGA)<sup>58</sup> indicates that all their members have established grievance mechanisms to address complaints relating to their operations. These grievance mechanisms typically involve 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.<sup>59</sup> Although such operational-level grievance mechanisms do exist among some the O&G and large-scale mining operations, according to the field research they do not appear to have yet gained the trust of communities in many cases as avenues through which they can obtain solutions, indicating areas for continued improvement.

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<sup>55</sup> In 2014 residents of Badada Lagbogol in Wajir County had moved to court to stop exploration activities in Block 2B, on the basis that the national government had signed agreements without undertaking any public participation and that the exploration activities would negatively impact their nomadic way of life. The suit resulted into temporary stoppage of exploration.

<sup>56</sup> The Land and Environmental Courts are a division of the High Court of which there are 20 stations countrywide. The Judiciary of the Republic of Kenya, "[About Courts.](#)"

<sup>57</sup> See in particular principles 22, 30 and 31.

<sup>58</sup> The Kenya Oil and Gas Association is an industry association whose members are oil and gas companies that have existing Production Sharing Contracts with the Government of Kenya.

<sup>59</sup> IHRB/ILEG, "[Extractive Sector Forum – First Workshop Report: Understanding the Kenyan Extractive Sector: The Players and their Roles](#)" (February 2016).



# Recommendations

The following is a summary of recommendations to the main actors in Kenya's extractive sector. The recommendations are explained in detail in the main report.

## To the Government of Kenya and Parliamentarians

### 1. Strengthen the attention to human rights in policy and law making.

- Include appropriate human rights, social and environmental safeguards in proposed policies and legislation for the extractives sector while ensuring appropriate cross references with related legal and policy frameworks. These are the Mining Bill, the Petroleum (Exploration, Development and Production) Bill, the Energy Bill and their attendant policies and regulations that are currently in draft form.
- Enact the Community Land Bill, which already includes important protections for communities.
- Include adequate safeguards against forced evictions and improve the resettlement provisions in the Land Law (Amendment) Bill.
- Enact the Access to Information Bill.
- Strengthen the Environmental Impact Assessment process by including requirements to cover social and human rights impacts as part of the assessment requirements.
- Ensure that the results of the SESEA process for the O&G sector are incorporated into policies, plans, and programs that will guide environmental and socio-economic planning and decision making in the country.

### 2. Strengthen policy coherence across government.

- Strengthen collaboration across government departments, ministries and agencies relevant to the extractives sector when formulating policy and when addressing challenges facing the sector. Key among these are the ministries of labour, health, education and devolution.

### 3. Improve enforcement and monitoring capacity.

- Strengthen the capacity of NEMA through allocation of funds and human resources to ensure it is able to carry out its oversight mandate.
- Support NEMA in developing a programme to build the capacity of the environmental functions at county level.

### 4. Improve access to information by communities on extractive industry projects.

- Ministries of Mining and Energy and Petroleum should make available briefings, with information of a non-commercial nature, about the projects that are currently underway and should include links to any draft or completed EIAs for the project.
- Provide access to an up to date mining cadastral through the Ministry of Mines website.
- Provide access to O&G and other energy projects, with up to date information of the companies involved and their blocks.

- Improve access to EIA reports on the NEMA website and through the county governments in accessible formats.

#### 5. Fill the gap on the ASM sector.

- Undertake research on the ASM sector with a view to understand its scope, revenue potential, socio-economic impact on mining communities, impacts on communities and the environment.
- Using that analysis, develop policy on ASM.

#### 6. Improve transparency in and about the sector.

- Consider joining the Extractive Industries Transparency Initiative.
- Strengthen attention to the extractive sector within the Government's programme to implement the Open Government Partnership.
- Amend current licensing and contracting models to permit disclosure, subject to appropriate provisions to protect commercial confidentiality.

## To the Kenya National Commission on Human Rights

### 1. Improve its knowledge sharing and capacity building.

- Collaborate with civil society organisations in building their capacity and that of communities to advocate for their rights and to engage with extractive sector companies and Government.
- Encourage on-going engagement between different stakeholders including affected communities, local and national CSOs, county and national government and companies to ensure inclusion of concerns and opinions of affected communities and CSOs in extractive sector project development processes.

### 2. Improve complaints handling to ensure accessibility by communities affected by extractives have access to an alternative, independent and robust grievance-resolution mechanism.

### 3. Play a role in policy and law making.

- When contributing to government policy and regulatory development, promote the inclusion of requirements for responsible business practices based on international human rights laws and good practices.
- Advocate for transparency and accountability of the sector including the enactment of the Access Information Bill.

### 4. Collaborate with other government institutions to strengthen human rights protection in the sector.

- Collaborate with the National Gender and Equality Commission to promote gender-inclusive policies for the extractives sector by the government and private sector.
- Collaborate with the National Land Commission to address land related concerns linked to extractive activities and in particular secure the rights of affected persons and communities.

## 5. Improve its own capacity and knowledge with respect to the sector.

- Continuously gather data on human rights risks and impacts of the extractives sector and integrate findings into the institution's work - this can be through training of community based organisations, documentation and reporting, and on partnership and network building.

## To Companies in the Extractive Sector

### 1. Establish and publish a policy commitment to respect human rights and responsible business conduct.

- This commitment should build on the UN Guiding Principles on Business and Human Rights, with a commitment to applying international standards of responsible business conduct.<sup>60</sup>

### 2. Conduct human rights due diligence across the company's proposed operations and its business relationships.

- Analyse human rights risks and impacts and integrate and act upon the findings. This due diligence should cover at least the key human rights risks identified in the Report, but should also be adapted to the particular operating environment for exploration and production.

### 3. Engage in open, active and on-going engagement with stakeholders.

- Inform stakeholders about forthcoming operations, engage them on prevention and mitigation efforts and develop strategies for positive social, economic and institutional development beyond mitigating adverse effects.

### 4. Adopt human rights compliant grievance mechanisms.

- Communicate to affected communities and other stakeholders about the grievance mechanism and ensure that it is accessible and effective.

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<sup>60</sup> See for example, the European Commission, "[Oil & Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights](#)" (2013).

# State of Human Rights in the Kenyan Extractive Sector

## Executive Summary

March 2016

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. 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 industrial minerals mining 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.

IHRB's Nairobi Process, in collaboration with the Kenya National Commission on Human Rights (KNCHR), has conducted a study on the state of human rights in Kenya's extractive sector and captured its findings in a detailed forthcoming "State of Human Rights in the Kenyan Extractive Sector" Report (the Report – forthcoming).

The forthcoming Report is based on both desk-based and field research in eight counties in Kenya that are host to O&G or mining activities. It provides insight into the historical, political and economic context of the country as a whole and the areas visited. Many of the human rights issues included in the Report are common to other countries with O&G and mining operations, vulnerable land-dependent rural populations and governance challenges.

This Executive Summary presents the most recurrent issues that emerged from the study specific to Kenya in 2015.