



# Human Rights in Kenya's Extractive Sector

Exploring the Terrain



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December 2016

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## List of Terms and Abbreviations

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

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

These are challenges facing any nation that is emerging as a new extractive sector producer.<sup>5</sup> Contextualising 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. 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.<sup>10</sup>

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 conservation<sup>11</sup> 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.<sup>12</sup> It is ranked only "partially free" according to the Freedom House Freedom in the World Index.<sup>13</sup> 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 Partnership<sup>14</sup> (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.<sup>15</sup> 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 membership<sup>16</sup> would also provide some welcome restraints on more recent Government trends to curb CSOs.<sup>17</sup> 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.<sup>18</sup>

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 Tanzania<sup>19</sup> 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 counties<sup>20</sup> 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”)<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</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.

### *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.<sup>26</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 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.

# 1

## Setting the Scene

Overview of Kenya's Extractive Sector



# 1. Setting the Scene: Overview of Kenya's Extractive Sector

## 1.1 The Role of the Extractive Sector in Kenya's On-going Development

Until recently the extractive industry contributed only approximately 1% to Kenya's GDP, and less than 3% to total export revenues.<sup>27</sup> While mining operations have been conducted since the 1930s, albeit on a relatively small scale, prior to the 2012 discovery of oil in Turkana County, the extractive sector was not seen as important to Kenya's development. With the recent discovery of oil, however, this sector's contribution to GDP is expected to grow to as much as 10% by 2020, thereby repositioning the sector to play a prominent role in Kenya's development and poverty eradication.<sup>28</sup> World Bank projections suggest that if Kenya's average economic growth rate increases from its historical rate of 4% to 6%, then poverty is expected to fall 14% by 2030.<sup>29</sup>

Kenya boasts a population of approximately 44.35 million people that includes most ethno-racial and linguistic groups found in Africa.<sup>30</sup> Currently, petroleum exploration occurs almost exclusively in some of Kenya's poorest regions<sup>31</sup> mainly in the northern part of the country while mining operations<sup>32</sup> are more widespread in many regions.

The Kenya Vision 2030 is the country's development blueprint that covers the period from 2008 to 2030.<sup>33</sup> The Vision 2030 aims to transform Kenya into an industrialising, middle-income country that provides a high quality life to all its citizens by the year 2030 based on the following three pillars:

- **The Economic Pillar:** Aims to improve the prosperity of all Kenyans through an economic development programme, covering all regions in Kenya, and aiming to achieve an average GDP growth rate of 10% per annum beginning in 2012.
- **The Social Pillar:** Seeks to build a just and cohesive society where social equity exists in a clean and secure environment.
- **The Political Pillar:** Aims to realise a democratic political system founded on issue-based politics that respects the rule of law, and protects the rights and freedoms of every individual in Kenya.

Vision 2030 is to be implemented in successive five-year Medium-Term Plans. In 2007, the Vision 2030 mapped out six sectors whose growth and employment creation potential were seen as key in driving the country's economy, but the extractive sector was not one of them.<sup>34</sup> However, in late 2013, after the discovery of oil, the Vision 2030 earmarked oil and gas and a revamped mineral sector as the seventh sector that will enable the country to achieve middle-income status by the year 2030. The Plan notes that even though the

sector has traditionally accounted for minuscule levels of GDP and total export earnings, recent discoveries of oil, gas, and other mineral resources point to an increasing importance of the sector in contributing to increased export earnings, higher GDP growth, broader social development, and as a major spur for infrastructure development and job creation.<sup>35</sup>

Currently it is expected that the extractive sector, among the other six key sectors, will drive the economy to achieve a 10% annual growth rate by 2017 and a sustained growth rate in the double digits thereafter. Consequently, the Government has set strategies to enable the country to reap the economic benefits from the extractive industry. For example, infrastructure development is another key sector in Kenya's Vision 2030. Accordingly, the country is investing heavily in infrastructure projects that collectively will ensure mining operations costs are reduced over time. These include: (1) New Paved Roads Construction Project, (2) Mombasa Port Efficiency Project, (3) Standard Gauge Railway (transport goods to/from the port under 4 hours), (4) the National Optic Fiber Project (is set to position Kenya as the leading communications hub in Africa), (5) LAPSET Project (The Lamu Port and South Sudan Ethiopia Transport Corridor – transportation of cargo, oil pipelines (longest heated pipelines in the world - crude and refined) and refineries.<sup>36</sup>

## 1.2 Brief Overview of Kenya's Extractive Resources

Kenya has a wide range of mineral resources. The table below summarises the different classes of extractive industry products found in the country. Annex 2 and 3 provide further information on these resources and the locations they are found in the country.

*Table 1: Classification of Hydrocarbons and Minerals Found in Kenya*

Hydro-carbons	Industrial Minerals	Base Metals	Gem-stones	Dimension Stones	Precious Metals	Construction Aggregates
Oil	Limestone	Iron ore	Ruby	Soapstone	Gold	Sand
Gas	Diatomite	Copper	Sapphire	Granite		Gravel
Coal	Soda Ash	Manganese	Tsavorite	Limestone		Crushed stone
	Flourspar	Titanium	Amethyst	Marble		
	Barite	Tungsten	Rhodo-lite garnets	Travertine		Slag
	Gypsum		Tour-maline	Slate		
	Silica		Pyrite	Alabaster		
	Chromite			Tuff		
	Vermiculite					
	Granite					
	Wolla- stonite					

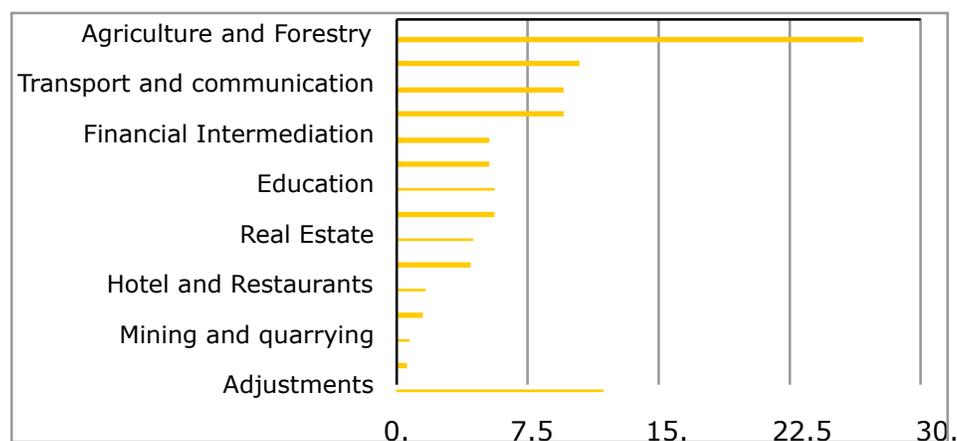
Source: Table made with information from the Ministry of Mining & Ministry of Energy and Petroleum Sourcebooks<sup>37</sup>

### 1.2.1 Brief History of the Mining Sector and Its Importance to Kenya's Development

While mining in Kenya is not a new phenomenon, the focus on the mining industry as an important contributor to Kenya's economy is a more recent development. Mining has been an active industry in Kenya for over 80 years. It is difficult to pinpoint just when mining activities commenced because until recently little attention has been paid to this sector. For example, in areas like western Kenya, gold mining has been ongoing since sometime in the early 1930s.<sup>38</sup> Similarly, soda ash and flourspar, in Kajiado and Kerio Valley respectively, have also been mined for many years.<sup>39</sup> In fact, among the minerals, together soda ash and flourspar have made the biggest contribution to the Kenyan economy.<sup>40</sup> Annex 3 shows the occurrence of the different minerals found in the country.

Prior to 2012, and the discovery of coal as well as rare earth minerals in the coastal region of the country, which are estimated to be worth USD 62.4 billion,<sup>41</sup> and iron ore, the mining sector contributed just under 1% to GDP and a mere 3% to total export earnings.<sup>42</sup> Moreover, prior to these recent discoveries, the mining industry was dominated by the production of non-metallic minerals. The delay in Kenya's discovery of metallic minerals is largely attributed to Kenya's lack of effort to enhance mineral explorations.<sup>43</sup> However, with these recent discoveries, the mining sector's contribution to GDP is expected to grow to between 4% and 10% in the coming years.<sup>44</sup> Kenya is also increasingly becoming a favoured destination for Foreign Direct Investment, now ranking sixth among favoured destinations in Africa.<sup>45</sup> Accordingly, with the promise of increased importance to the Kenyan economy, more attention is being aimed at the mining industry. Figure 1 provides a comparison of Kenya's different sectors and their respective contributions to the economy.

Figure 1: Extractive Sector Contribution to GDP (%)



Source: KNBS, Economic Survey 2012

Despite the mining industry's deep seeded history, not much about the industry – from the mining process and life cycle of exploration to exploitation, to the human rights impacts caused by mining activities – is widely known or understood by the general population. In large part, this is due to the fact that until recently much of the mining activities have been attributed to illegal and informal artisanal and small scale mining operations, which are often unregulated and difficult to monitor.<sup>46</sup>

The mining sector is generally grouped into two categories: artisanal and small scale mining (ASM) and large scale mining.<sup>47</sup> Although artisanal and small-scale mining are often times grouped together, this ignores the nuanced challenges and human rights impacts presented by each sub-group. Accordingly, where it is necessary to draw out the nuances between the two groups, this is done as follows: (a) 'artisanal' mining refers to the unorganised and currently illegal mining activity carried without the use of sophisticated machinery, and (b) 'small scale' mining refers to the organised miners that may or may not make use of sophisticated machinery but that have a higher revenue turnover.<sup>48</sup> Each player in the mining industry presents unique challenges for further development of the sector, from the creation of policies, laws, and methods of regulation and oversight, to the accessibility of remedy mechanisms, to the human rights impacts.

Because the mining industry has operated out of the spotlight for so many years, so too have the issues and challenges associated with it. However, with the establishment of a dedicated ministry (Ministry of Mining) in 2013, more information about the sector is coming into the public domain.

#### *1.2.2 Brief History of the Oil & Gas Sector and Its Importance to Kenya's Development*

Oil and gas explorations began in Kenya in the 1950s with the first well drilled in 1960.<sup>49</sup> Exploration continued at low levels for many years with only 33 wells drilled by 2012.<sup>50</sup> However, in March 2012,<sup>51</sup> substantive oil deposits were discovered by Tullow Oil, in partnership with Africa Oil and Marathon Oil, in Turkana County, located in the Northern part of Kenya.<sup>52</sup> In 2014, Tullow announced it had identified 600 million barrels of oil.<sup>53</sup> With additional reserves of oil expected to be found in Kenya, and if oil again reaches \$100 per barrel, at present Kenya's oil wealth is estimated to be \$260 billion.<sup>54</sup> The current depressed oil prices<sup>55</sup> in the global market have caused speculation as to whether oil finds will actually be exploited. However, the Government remains optimistic about advancing towards the exploitation of the oil. One of the operators has indicated that Kenya's oil could be exploited even if the global oil price is at \$25 per barrel<sup>56</sup> which gives the country a very high hope that the discovered oil will eventually be extracted and sold. Since the discovery of commercially viable oil deposits there have also been significant gas discoveries in the same region. Accordingly, oil and gas exploration remains ongoing with an estimated 23 exploration and production companies licensed to carry out exploration onshore and off-shore.

The announcement of the oil discovery created immediate, significant, and unrealistic expectations, both locally and nationally, which do not take account of the lifecycle of oil production as well as the time and investment necessary before any revenue can be realised.<sup>57</sup> On average, the lifecycle of oil production can take approximately eight to ten

years from exploration to exploitation. In fact, Kenya's oil deposits are not anticipated to reach the point of exploitation until 2020.

After the discovery of Kenya's oil deposits, the Government increased its focus on the oil sector and the former Ministry of Energy was renamed to incorporate oil and gas in its title – now, the Ministry of Energy and Petroleum. The Ministry was reorganised in November 2015 during which a State Department for Petroleum headed by a Principle Secretary for Petroleum was established.<sup>58</sup>

The country is also planning for infrastructure that will support the growing sector. Among the planned developments are an oil pipeline from Lokichar, Turkana to the coastal town of Lamu, and rehabilitation of the Kitale-Lodwar road. Another development that will boost the sector is the planned Lamu port that is being constructed under one of the most ambitious infrastructure projects the country has ever undertaken, the Lamu Port South Sudan Ethiopian corridor project (LAPSSET).<sup>59</sup>

## 1.3 Kenya's National and County Level Governance Structure in the Extractive Sector

### 1.3.1 Government Institutions Governing the Extractive Industry in Kenya

#### Oil & Gas Institutions

- **The Ministry of Energy and Petroleum (MOEP):** Oversees both upstream oil and gas, downstream petroleum, electricity (both renewable energy and geothermal), as well as the coal sector. It is in charge of policies to create an enabling environment for the efficient operation and growth of the sector. It provides a long term vision for all sector players.
- **The National Fossil Fuels Advisory Committee (NAFFAC):** Issues licenses for oil and gas in Kenya for the upstream sector. NAFFAC is led by the MOEP and includes the National Oil Corporation of Kenya, the Attorney General, NEMA, the Kenya Revenue Authority, the Ministry of Finance and the Petroleum Institute of East Africa as members.
- **State-owned national oil company – National Oil Corporation of Kenya (NOCK):** The NOCK is situated under the Ministry of Energy. Until the year 2010 NOCK had been focusing only on the downstream retail sector, but this has recently changed as the institution acquired an exploration license (Block 14T).

## Mining Institutions

- **The Ministry of Mining:** Set up in 2013 - the first ever in the country's history - to look into the mining activities in the country and undertake various activities with the aim of enhancing the mining sector. Ministry of Mining is responsible for issuing mineral licenses and providing oversight of the mining companies and their operations. The Ministry collects and analyses geological data for purposes of providing an understanding of the country's geological nature. The ministry has planned a collection of data that will map Kenya's mineral wealth, which is poised to be carried out using geological aerial survey technology.
- **Mineral Rights Board:** Established under Section 30(1) of the Mining Act, the Board is to give advice and recommendations to the Cabinet Secretary on matters relating to mineral rights agreements, areas to be designated for ASM or large scale, strategic minerals, fees and royalties payable under the Act and other matters. The Board members are drawn from various government ministries, the National Land Commission and industry professionals.
- **The National Environmental Management Authority (NEMA):** Sitting within the Ministry of Environment, Natural Resources and Regional Development Authorities, this is the institution charged with the regulation of environmental matters including those affecting the extractives sector. NEMA gives environmental licenses to extractive companies after an ESIA has been done. Its work is guided by the Environmental Management and Coordination Act (EMCA).
- **The Ministry of Land & Physical Planning:** This is the institution in charge of administration and management of land in Kenya. It is tasked with powers to reserve public land for any useful purpose such natural resources development.
- **The National Land Commission (NLC):** Established under Article 67 of the Constitution, the NLC among other functions, manages all public land on behalf of national and county government and makes recommendations on the national land policy.
- **The Kenya Revenue Authority:** Sitting within the Ministry of Finance, this is the body that collects all forms of taxes on behalf of the Government. It implements a number of laws including the Income Tax Act which relates to, among other things, the taxation of operations relating to oil, gas and mining activities.

## Other Branches of Government

- **Parliament:** Parliament (which includes the National Assembly and the Senate) is tasked with overseeing the management of natural resources as prescribed by the Constitution of Kenya, 2010 (Article 71). In essence Parliament is expected to ratify transactions involving the grant of a right or concession for the exploitation of any natural resource. A bill to operationalise this constitutional provision-The Natural Resources (Classes of Transactions Subject to Ratification) Bill 2015 is currently under consideration. The Bill has been passed by the Senate with amendments and forwarded

to the National Assembly for consideration. There is a constitutional deadline of 27 August 2016 by time which the law should be enacted. Furthermore, the Senate protects the interests of counties on matters such as sharing of revenues accrued from natural resources and is expected to exercise its oversight on this matter.

- **The Judiciary:** The Judiciary in Kenya handles any dispute that may arise from the extractive sector whether they relate to land rights, mineral rights, human rights or any other issues. Of particular importance is the Environment and Land Court established in 2010 by virtue of Article 162 (2) (b) of the Constitution of Kenya 2010 to settle matters concerning the environment and the use/ occupation of, and title to land. For instance a grievance or dispute on land with an extractive company would be determined in this court. This role is only limited where agreements expressly limit dispute resolution to arbitration as is common in many extractive agreements.
- **The Attorney General:** The Attorney General (AG) is the chief legal advisor to the government and plays a major role in the extractive sector. All the laws developed for the industry have to pass through the AG's office for legal scrutiny and processing. Extractive company-government agreements have to go through the AG's office before they are forwarded for ratification by the National Assembly.
- **County Governments:** Counties are devolved government structures with a range of administrative functions at the county level. County governments are the ones that give permission to companies to use the lands within the County. The County administrators also have a responsibility to protect the rights of the communities settled near the extractive industry operations. The County governments are also poised to manage the funds from extractive activities shared from the national government for both the community and themselves.

### 1.3.2 Devolution

One of the major changes resulting from the 2010 Constitution is the creation of a two-tiered structure of government: (1) the national Government, and (2) the county level government, which is comprised of 47 different counties.<sup>60</sup> Elections were held in March 2013 and the first county governors and county assemblies were elected to office.<sup>61</sup> While Kenya's devolution process has been among the *"most rapid and ambitious devolution processes going on in the world"*<sup>62</sup> it has only been underway for three years. Accordingly, the Government is still working out which institutions are responsible for what and how to divide roles amongst the players. In addition, at least some proposed county level bills evidence a failure to account for the laws already in place at the national level. A major effort must be made to ensure that the county level and national level laws and institutions work together harmoniously.

Equally as significant, the capacity of county level administrations and communities must be increased to understand the at times profound changes that will take place with extractive sector operations and production in their area. The ability of county level environmental authorities to effectively assess the quality of lengthy, technical environmental impact assessment (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 recognised 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 and monitoring of the EIA reports and incorporation of community concerns.

### *1.3.3 Actors in Kenya's Extractive Sector*

In addition to the Government institutions highlighted above, and the companies currently holding licenses in the sector (highlighted in Annex 2), there are a number of other initiatives and coalitions active in the sector: business membership organisations for the companies in the upstream oil and gas sector and for the mining sector respectively and civil society organisations have also taken a keen interest in the sector and with a number of initiatives and networks.

#### **Business Membership Organisations**

- **Kenya Oil and Gas Association (KOGA):** The association focuses on supporting private sector interests specifically in the upstream sector operating in Kenya. Companies become eligible to join the association upon signing a Production Sharing Contract (PSC) with the Government of Kenya. KOGA's main objective is to support its members to address the challenge of sustainability i.e. delivering value to shareholders, while providing economic and social benefits to impacted communities and minimising environmental footprint.
- **Kenya Chamber of Mines (KCM):**<sup>63</sup> This is the leading business membership organisation representing the mining industry in Kenya. It draws its membership from large and medium size mining companies but also has associate members that have an interest in the successful development of the sector.

#### **Civil Society Initiatives**

- **Kenya Extractive Sector Forum:**<sup>64</sup> Promoting sustainable management and use of Kenya's upstream oil, gas and minerals has been the subject of numerous exchanges over recent years among civil society organisations (CSOs), academic institutions working in the extractive sector, and mining and oil & gas companies in Kenya. Although the conversations have been useful, they have at times appeared unstructured, disjointed, and not inclusive. These experiences have highlighted the need for a common platform to promote open and continuous dialogue involving all concerned actors.

The Kenya Extractive Sector Forum (ESF), co-chaired by the IHRB Nairobi Process<sup>65</sup> and the Institute for Law and Environmental Governance<sup>66</sup> aims to facilitate regular dialogue among businesses from the extractive sector, KOGA, KCM and other stakeholders with an interest in the sector, including civil society organisations, community representatives and academics. The ESF encourages sharing of information concerning ongoing projects and the identification of issues of mutual interest and

plans to address them, all aimed at building trust, and providing opportunities for capacity building on aspects of the sector that are of value to all.

One of the Extractive Sector Forum's flagship initiatives is to convene quarterly workshops bringing together extractive sector companies, civil society, and academia to dialogue and share information on topical issues in the extractive sector.

- **Civil Society Platforms:** In Kenya there are three principle CSO networks operating at the national and county level on different aspects of the extractive sector (mining, oil and gas). The networks are the Kenya Oil and Gas Working Group (KOGWG),<sup>67</sup> Kenya Civil Society Platform on Oil and Gas (KCSPOG)<sup>68</sup> and Haki Madini Coalition.<sup>69</sup> Members of the KOGWG and KCSPOG work on human rights, transparency and accountability, land and other community issues emanating from both mining as well as upstream oil and gas, whereas Haki Madini focuses exclusively on the mining sector.<sup>70</sup> The three coalitions strive to work together for the common good of communities affected by extractives and the broader interests of the Kenyan population.
- **Information Centre for the Extractives Sector:** This is a multi-sector public platform that addresses concerns around the extractives industry by promoting knowledge, transparency and evidence-based stakeholder dialogue on the extractives sector in Kenya.<sup>71</sup>

# 2

## Pillar I

Kenya's Policy & Legal Framework Relevant to the Extractive Sector



## 2. Pillar I: Kenya's Policy and Legal Framework Relevant to the Extractive Sector

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

Pillar I of the UNGPs addresses the Government duty to protect against human rights abuses within their territory and/or jurisdiction by non-state actors, including business enterprises, through effective policies, legislation, regulations and adjudication.<sup>72</sup> This includes the obligation to set clear expectations for business and appropriate policy and legal frameworks to implement the corporate responsibility to respect human rights.

This section examines Kenya's policy and legal framework for the extractive sector. The examination will help the Government to consider whether its framework is fully aligned with its international human rights obligations or whether the current suite of policy and laws need further adjustments. For companies, it is important to understand whether the policy and legal framework reinforces their own responsibilities to respect human rights or leaves gaps or in the worst case scenario, contradicts international human rights standards. Where gaps in the policy and legal framework exist, they present a challenge to a level playing field among companies as they can be filled by good – and bad – practices. The UNGPs set out the clear expectations that where national standards conflict with international human rights standards, companies should seek ways to honour the principles of internationally recognised human rights.<sup>73</sup>

### 2.2 Constitutional Analysis

The Kenya Constitution provides for fundamental human, social, and environmental rights and protections as well as the responsibilities of business and Government, all of which underpin the on-going development of Kenya's extractive industry. The Constitution is one of the most progressive on the continent for the protection of human rights and socio-economic rights. It creates a number of important protections for groups at risk of harm from extractive sector activities as well as covering cross-cutting issues.

The 2010 Constitution lays a crucial but unusual foundation in establishing a constitutional obligation on businesses to respect human rights. Article 20 of the Constitution states that the Bill of Rights "*binds all State organs and all persons.*"<sup>74</sup> "Persons" are defined to include "*a company, association, or other body of persons whether incorporated or unincorporated (emphasis added).*"<sup>75</sup> This is a departure from the traditional perspective that only States have obligations to respect human rights.<sup>76</sup>

Notably, the Constitution recognises the separation of powers between the three branches of Government – executive, judicial, and legislative – and created two levels of government – national level and county level – thus ushering in the devolved government.<sup>77</sup> The Constitution also establishes a Supreme Court of Kenya.<sup>78</sup> Since the adoption of the Kenya Constitution in August 2010, the national and county level governments have been working to develop policies and laws, as well as amend existing laws, and create new governing bodies to uphold the Constitutional rights of the people and the environment. Accordingly, a contextual analysis of the Kenya Constitution is a key starting point in understanding the current state of play in Kenya's extractive industry.

### *2.2.1 Protection of Groups at Risk in the Extractive Sector*

The Kenyan Constitution prescribes that any decisions made or action taken by State agents must consider the protection of the marginalised.<sup>79</sup>

#### **Women**

The role of women as equal members of society is necessary for the sustainable development of Kenya as well as the extractive sector. The Constitution provides that “[e]very person is equal before the law and has the right to equal protection and equal benefit of the law.”<sup>80</sup> It further provides that gender equality includes the “right to equal opportunities in political, economic, cultural and social spheres”<sup>81</sup> as well as the right to be free from discrimination.<sup>82</sup> Constitutional protections underlying land policy in Kenya explicitly require elimination of gender discrimination around the customs and practices related to land.<sup>83</sup>

Implementation has not yet caught up with these constitutional protections. The prevention of discrimination against women with respect to land and property ownership, access, and inheritance rights still lack effective implementation.<sup>84</sup> For example, a woman's average monthly income is approximately two-thirds that of men, and women have difficulty moving into non-traditional fields, are promoted more slowly, are more likely to be dismissed, and more commonly face sexual harassment.<sup>85</sup> Accordingly, women still face much discrimination related to economic opportunities and are still disproportionately impacted by land matters related to the extractive sector, in which they have little, if any, say.<sup>86</sup> Some estimates indicate that only 1% of land in Kenya is held in the name of women, and 5-6% is jointly held by men and women.<sup>87</sup>

The courts have an important role to play in strengthening the rights of women and girls in Kenya. A number of cases decided since the adoption of the new Constitution have raised the effective bar of protection of women's rights.<sup>88</sup> In the “160 Girls Case<sup>89</sup>” the High Court of Kenya acknowledged the constitutional obligation of the Police Service to conduct proper investigations in the case of defilement of women or girls. It based its decision on the rights to freedom from violence, the right to dignity, non-discrimination and enjoyment of the equal protection of the law.<sup>90</sup> In a country where it is estimated that 45 percent of women between the ages of 15 and 49 have experienced physical or sexual violence<sup>91</sup>, ensuring reliable investigations is crucial for the relative safety of women.

In the context of on-going inequality to the right to land and inherent financial vulnerability of women, the High Court of Kitale contributed to an important evolution of jurisprudence. In *JOA v NA*, the High Court confirmed the equal rights of men and women during and after the dissolution of marriage based on constitutional and international rights to equality and non-discrimination.<sup>92</sup> This decision can play an important role for example when families are compensated for the loss of land for extractive operations.

At the same time, the first Supreme Court decision on gender parity in political representation held that the state had no obligation to take specific measures to advance gender equity.<sup>93</sup>

## Children

The Kenya Constitution provides several foundational protections for children. The Constitution explicitly states that “[a] child’s best interests are of paramount importance in every matter concerning the child.”<sup>94</sup> “Child” is defined as a person who is under the age of 18 years.<sup>95</sup> Notably, the Constitution provides that all children shall be “protected from...hazardous or exploitive labour.”<sup>96</sup> The Constitution further provides that children are entitled to free and compulsory basic education<sup>97</sup> as well as “basic nutrition, shelter and health care.”<sup>98</sup>

## Youth

Youth in Kenya, who are constitutionally defined as those individuals who are between the ages of 18-34 years,<sup>99</sup> comprise nearly 60% of the population, and accordingly their contribution to the economic production base of the country is seen as an essential component of sustainable development and growth of the extractive industry.<sup>100</sup> The importance of this group is evidenced by the Constitutional provision that requires measures to be taken to ensure that youth are sustainably incorporated into Kenya’s development, even if this requires the implementation of affirmative action programmes.<sup>101</sup> In fact, the Constitution explicitly provides that youth must have access to “relevant education and training,”<sup>102</sup> access to employment,<sup>103</sup> and protection from exploitation.<sup>104</sup> Accordingly, the extractive sector can play a role in contributing to the fulfilment of these Constitutional commitments through working with the Government to develop vocational education and training to provide relevant skills to qualify for employment in the sector.

## Persons with Disabilities

In a report to the UN Human Rights Council, KNCHR estimated there are seven million persons living with a disability in Kenya.<sup>105</sup> Persons with a disability have historically faced significant stigma and high levels of abuse and discrimination, which largely goes unreported for fear of reprisal,<sup>106</sup> as well as limited opportunities to obtain education and job training<sup>107</sup> and inaccessible government buildings that hinder those with a disability from meaningfully engaging in public life.<sup>108</sup>

Accordingly, the Constitution requires that any person with a disability – including any physical, sensory, mental, psychological, or other impairment or illness – <sup>109</sup> be treated with dignity and respect.<sup>110</sup> The Constitution further requires “access to educational

*institutions and facilities,"<sup>111</sup> "reasonable access to all places, public transport and information,"<sup>112</sup> and access to the necessary "materials and devices to overcome constraints arising from the person's disability."<sup>113</sup>*

While there has been increased focus on employment of women in the extractive sector from companies and different programmes, there has been little movement or guidance to date on incorporating disabled workers into the sector.

## Minorities and Marginalised Groups

Kenya is a country with over 40 different ethnic groups, none of which make up a majority of the population.<sup>114</sup> Accordingly, the Kenya Constitution provides that members of minority and marginalised groups must be provided "*special opportunities in educational and economic fields*,"<sup>115</sup> "*access to employment*,"<sup>116</sup> "*[ability to] develop their cultural values, languages and practices*,"<sup>117</sup> and "*access to water, health services and infrastructure*."<sup>118</sup> The Constitution in Article 260 goes on to recognise that the marginalised can be communities or groups. The Constitution defines "marginalised community" to include a community of relatively small population that has been unable to fully participate in the integrated social and economic life of Kenya, including traditional, indigenous, and pastoral communities.<sup>119</sup>

Marginalised groups are defined as "*a group of people who because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).*" Article 27 (4) lists the following grounds of discrimination: "*race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*"<sup>120</sup> Despite this encompassing definition, only time will tell which groups are actually protected under this Article. For example, the Constitution does not explicitly protect LGBT persons from discrimination on the basis of sexual orientation or gender identity and the penal code criminalises "*carnal knowledge against the order of nature,*" which is interpreted to prohibit consensual same-sex sexual activity and specifies a maximum penalty of 14 years' imprisonment.<sup>121</sup> The Constitution does not refer to "minority" groups or rights.

## Older Members of Society

Older members of society, defined as a person who has attained the age of 60 years<sup>122</sup>, is another group that is at risk of being excluded from developments in the extractive sector. The Constitution explicitly protects the rights of this group to "*fully participate in the affairs of society*,"<sup>123</sup> "*pursue their personal development*,"<sup>124</sup> and "*receive reasonable care and assistance from their family and the State*."<sup>125</sup> It will be particularly interesting to see how the 'right to receive care from family' will be impacted by the development of work conditions and the integration of other at risk groups into the extractive sector work force.

## 2.2.2 Thematic Issues Relevant to the Extractive Industry

### Community Participation / Engagement, Information & Transparency

Community participation in the management of land and the environment is not merely an aspirational goal, but a constitutional right in Kenya. Article 69 of the Constitution places the onus on the Government to *"encourage public participation in the management, protection and conservation of the environment."*<sup>126</sup> In fact, public participation, access to information and transparency are enshrined as national values and principles of governance in Article 10 of the Constitution and serve as guiding principles for any state action. However, the right to participation does not guarantee that each individual's views will have a controlling impact. In fact, the public duty does not exceed the obligation to consider all views offered in good faith as part of public participation.

However, the Constitution does not elaborate on the nature of public participation or the balancing act between right to access of information held by the state and the right to privacy of private actors. A growing body of jurisprudence is dealing with the nuances of public participation, access to information and transparency in the context of stakeholder engagement in extractive industries.<sup>127</sup> The Constitutional Court<sup>128</sup> has defined the minimum threshold for public participation in environmental governance through important elements that must be included: due consideration of the nature of the subject matter, mechanisms for quantitative and qualitative input from the public, access to and dissemination of relevant information, inclusivity and diversity. The Court made clear that no litmus test exists to assess the appropriateness of public participation since it needs to be tailored to the respective circumstances.

Persons and communities seeking to enforce their right to public participation through the courts have to substantiate how their rights have been infringed upon and what type of remedy they are seeking.<sup>129</sup> Educating communities about their rights and how to substantiate claims of violations of their rights will be an important prerequisite to meaningful realisation of these Constitutional rights.

Article 35 specifically provides that every citizen has the right of access to information held by the State<sup>130</sup> and any person that is required for the exercise or protection of any right or fundamental freedom.<sup>131</sup> The Constitution further places the burden on the State to publish and publicise any important information affecting the nation.<sup>132</sup> Further, the Constitution provides that land shall be managed in a way that provides *"transparent and cost effective administration of land."*<sup>133</sup>

The Environment and Land Court in Nairobi reasoned that *"[s]uch public participation can only be possible where the public has access to relevant information...."*<sup>134</sup> The Court determined that the right to access to information reaches as far as to include memoranda of understandings (MOU) with foreign governments. In a case that involved the import of electricity from Ethiopia, the applicants were granted the right to access the information contained in an MOU between the Government of Kenya and the Government of Ethiopia to ensure public participation and the assessment of environmental risks.<sup>135</sup>

## Labour Rights

Under the Constitution, every worker has a right to fair labour practices.<sup>136</sup> This requires at a minimum that every worker has the right to fair compensation,<sup>137</sup> reasonable working conditions,<sup>138</sup> and the right to form or join trade unions.<sup>139</sup> Any group of seven or more workers has the right to form a union of their choice, and if the registrar denies registration, then the union can appeal to the courts.<sup>140</sup> Further, as discussed under the "Groups at Risk" Section, the Constitution prohibits discrimination in employment based on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status, or HIV status.

In a landmark decision in 2013, the Labour Court held that an employee or prospective employee may not be considered medically unfit simply by virtue of being infected by HIV, and to do so was a "gross violation" of the employee's human dignity, thereby awarding the employee 6.97 million shillings.<sup>141</sup>

## Land Ownership

Land is and will remain a complex issue for the extractive sector and other sectors with a land footprint. It 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 legal framework for the land sector was revised to bring it in line with the Constitution.<sup>142</sup> These changes included the creation of the National Lands Commission.<sup>143</sup> However, gaps in the land laws have necessitated amendments-see the Land Laws (Amendment) Act, 2016.<sup>144</sup> Likewise is the enactment of the Community Land Act 2016 that aims to provide communities as a collective with rights over their collective land as recognised under Article 63 of the Constitution.<sup>145</sup>

The Constitution provides for three categories of land ownership in Kenya: (1) public land, (2) community land, and (3) private land.<sup>146</sup> Public land is any land lawfully used, held or occupied by the State at the time the Constitution entered into effect.<sup>147</sup> However, this also encompasses land transferred to the State "by way of sale, reversion, or surrender," land declared public by an Act of Parliament,<sup>148</sup> and land where no individual or community ownership can be established and no heir identified.<sup>149</sup> Further, all mineral<sup>150</sup> and natural resources, i.e. forests,<sup>151</sup> freshwater bodies,<sup>152</sup> and territorial sea, is public land.<sup>153</sup> The Constitution requires that public land is vested in the Government in trust for the people,<sup>154</sup> thereby imposing a duty on the Government to use the property in a way that, minimally, does not harm the interests of Kenyan citizens.

Community land is one of the most complex types of landownership under the Constitution. Community land may be held by communities that are identified on the basis of ethnicity, culture or similar community interest,<sup>155</sup> and which includes land "lawfully held, managed or used by specific communities as community forests, grazing areas or shrines,"<sup>156</sup> ancestral lands and lands traditionally occupied by hunter-gatherer communities,<sup>157</sup> and lands held in trust for the community by the county government.<sup>158</sup>

Finally, private land is that which is held by any person as a freehold tenure,<sup>159</sup> leasehold tenure,<sup>160</sup> or otherwise declared private land by an Act of Parliament.<sup>161</sup>

The Constitution provides that every person has the right to acquire and own land, either individually or in association with others.<sup>162</sup> The law further protects against the arbitrary deprivation of a person's interest in or right over any property,<sup>163</sup> or the limitation or restriction of the right to enjoy the land. However, there is still much work to be done in implementing these Constitutional protections because, as the Report highlights, in practice women are not uniformly afforded these protections.

## Livelihoods

Kenya's Constitution protects a number of important aspects that impact livelihoods. Under the Constitution, every person has a right to accessible and adequate housing, and reasonable standards of sanitation.<sup>164</sup> It further protects the right to be free from hunger and to have adequate food of acceptable quality,<sup>165</sup> adequate amounts of clean and safe water,<sup>166</sup> access to health care services,<sup>167</sup> and education.<sup>168</sup> While these create an important baseline for the protection of livelihoods, it has yet to be seen how the Government will be able to make progress in fulfilling these rights and protections. To date these constitutional rights are proving to be more aspirational than enforceable.

Moreover, the interpretation by the courts has been conflicting thus making it difficult to establish sound jurisprudence. For example, in 2011 a community in Moroto Mombasa challenged its forced eviction invoking its constitutional right to adequate housing. The High Court in Mombasa rejected the request and made clear that the right to housing, which is part of the right to livelihood, is an aspirational right, which can only be realised progressively.<sup>169</sup> However, the High Court of Kenya sitting in Nairobi, in another case involving the right to housing, decided on a more robust interpretation of the justiciability of the right: it stopped a forced eviction that was meant to vacate space needed for the development of modern housing. Despite the recognised private rights to the land held by the respondents, the judge acknowledged that the applicants' constitutional right to accessible and adequate housing overruled the private land titles.<sup>170</sup>

## Environment

The Constitution focuses on many aspects of sustainable development and protection of the environment. For starters, the Constitution clearly provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations.<sup>171</sup> The Constitution further requires that land be "*held, used and managed in a manner that is equitable, efficient, productive and sustainable,*"<sup>172</sup> including equitable access to land,<sup>173</sup> sustainable and productive management of land resources,<sup>174</sup> and sound conservation and protection of ecologically sensitive areas.<sup>175</sup>

Further, the State is required to ensure that the exploitation, utilisation, management and conservation of the environment and natural resources is done in a sustainable manner.<sup>176</sup> This includes establishing a system of environmental impact assessment, audit, and monitoring.<sup>177</sup> The Constitution additionally requires that all processes and activities that

endanger the environment be eliminated<sup>178</sup> and utilise the environment and natural resources for the benefit of the people of Kenya.<sup>179</sup>

## Community and Public Security

Along with the right to engage in public participation, the Constitution also protects the right to freedom of expression<sup>180</sup> and freedom to assemble, demonstrate, picket, and present petitions to the public so long as these activities are peaceful and unarmed.<sup>181</sup> The research for the Report found that when community engagement with companies in the extractive sector break down, communities turn to their rights of expression and assembly to protect their interests. Sometimes, the exercise of these constitutional rights have been met with force, and even excessive force by police and private security guards. Such a response contravenes Article 29, which protects the right of every person to be free from being "subjected to any form of violence from either public or private sources,"<sup>182</sup> as well as to be free from torture,<sup>183</sup> corporal punishment,<sup>184</sup> or cruel, inhuman and degrading treatment.<sup>185</sup> Further, the Constitution requires national security protection to be pursued in compliance with the law, and with respect for human rights and fundamental freedoms.<sup>186</sup> It also requires that the national police train staff to respect human rights and fundamental freedoms and dignity.<sup>187</sup>

## 2.3 Kenya's International Human Rights Obligations

Kenya has ratified a number of international human rights treaties and as a result of being a State Party, the Government has the obligation to respect, protect and fulfil the human rights covered by these treaty obligations.

*Table 2: Kenya's Ratification Status of International Human Rights Obligations<sup>188</sup>*

Treaty	Signature Date	Ratification Date: Accession date (a) Succession date (d)
CAT – Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment		21 Feb 1997 (a)
CAT – OP – Optional Protocol of the Convention against Torture		-
CCPR – International Covenant on Civil and Human Rights		01 May 1972 (a)
CCPR – OP2 – 2P Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		-
CED – Convention for the Protection of All Persons from Enforced Disappearance	06 Feb 2007	-

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women		09 March 1984 (a)
CEDR – International Convention on the Elimination of All Forms of Racial Discrimination		13 Sep 2011 (a)
CESCR – International Covenant on Economic, Social and Cultural Rights		01 May 1972 (a)
CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families		-
CRC – Convention on the Rights of the Child	26 Jan 1990	30 Jul 1990
CRC-OP-AC Optional Protocol to the Convention of the Rights of the Child on the involvement of children in Armed Conflict	08 Sep 2000	28 Jan 2002
CRC-OP6SC Optional Protocol to the Convention on the Sale of children child prostitution and child pornography	08 Sep 2000	-
CRPD – Convention on the Rights of Persons with Disabilities	30 March 2007	19 May 2008

Table 3: Kenya's Ratification Status of ILO Fundamental Conventions<sup>189</sup>

Convention	Date	Status
C029 - Forced Labour Convention, 1930 (No. 29)	13 Jan 1964	In Force
C100 - Equal Remuneration Convention, 1951 (No. 100)	13 Jan 1964	In Force
C100 - Equal Remuneration Convention, 1951 (No. 100)	07 May 2001	In Force
C105 - Abolition of Forced Labour Convention, 1957 (No. 105)	13 Jan 1964	In Force
C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	07 May 2001	In Force
C138 - Minimum Age Convention, 1973 (No. 138)	09 Apr 1979	In Force
C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)	07 May 2001	In Force

### 2.3.1 Indigenous People

As noted above, Kenya is a country with over 40 different ethnic groups, none of which make up a majority of the population.<sup>190</sup> The Kenyan Government takes the position that the term “indigenous peoples” is not applicable in Kenya, as all Kenyans of African descent are indigenous to Kenya, while recognising, the vulnerabilities of minorities/marginalised communities.<sup>191</sup>

Kenya is one of only 11 states that abstained from supporting the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>192</sup> UNDRIP is a comprehensive statement addressing the human rights of indigenous peoples. The Declaration emphasises the rights of indigenous peoples to “live in dignity, to maintain and strengthen their own institutions, cultures and traditions and to pursue their self-determined development, in keeping with their own needs and aspirations.”<sup>193</sup> The Declaration addresses both individual and collective rights, cultural rights and identity, as well as the principle of free, prior and informed consent (FPIC). It requires States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>194</sup>

The African Commission on Human and People's Rights (ACHPR) in 2003 adopted a report of the Working Group on Indigenous Populations/Communities<sup>195</sup>, ‘Indigenous peoples in Africa: the forgotten peoples?’<sup>196</sup> which is the Commission's official conceptualisation of, and framework for, the human rights of indigenous peoples in Africa.<sup>197</sup> The report states that the African Charter on Human and People's Rights:

*“expressly recognises and protects collective rights by employing the term ‘peoples’ in its provisions, including in the Preamble, and by its very name, the African Charter on Human and Peoples’ Rights. Such collective rights should be available to sections of populations within nation states, including indigenous peoples and communities. The provisions of the African Charter are thus highly applicable to the promotion and protection of the human rights of indigenous peoples, and the most relevant articles include articles 2, 3, 5, 17, 19, 20, 21, 22 and 60.”<sup>198</sup>*

The Commission did not give a definition of indigenous people because in their words, they did not think it was necessary or desirable. However, they enumerated the characteristics of groups that self-identified as such and these include:

- their cultures and ways of life differ considerably from the dominant society, and their cultures are under threat, in some cases to the point of extinction;
- for most of them, survival of their particular way of life depends on access and rights to their traditional lands and natural resources;
- they are less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalisation, both politically and socially;
- they are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities

of the national majority. This discrimination, domination and marginalisation violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in decisions regarding their own future and forms of development.<sup>199</sup>

The Kenyan Constitution sets out many constitutional protections for minorities and marginalised groups that overlap with the objectives of UNDRIP (see Chapter 2 above), but Kenya has explicitly rejected viewing these protections through the lens of the international human rights framework applicable to indigenous peoples. The key issue for the groups on the ground will be how these constitutional protections are applied through laws, regulations, contracting, jurisprudence and in particular in practical application in protecting their way of life and whether they meet the standards of international human rights law. Given the recent date of the Constitution (2010), much of the jurisprudence is still being developed. For example, from the constitutional protections in Article 56 covering minority and marginalised communities, there is an expectation that there be purposeful community engagement aimed at ensuring participation for extractives sector projects and indeed any other projects taking place in the areas occupied by communities that fall within the definition of marginalised and minorities. From a strict sense, the participation requirement falls short of all the elements comprising the international human rights standard of free, prior and informed consent (FPIC) for indigenous peoples (see below). How these protections will apply will also play out against the wider and very active discussions globally about the impact of the extractive sector on indigenous peoples' rights.

## In Focus:

# Indigenous Peoples and the Extractive Sector<sup>200</sup>

There has been a long and often contentious history of interaction between extractive companies, governments and indigenous people around extractive operations. The worldwide drive to extract natural resources, with much of the remaining resources on the lands of indigenous peoples, means there are increasing and ever more widespread effects on indigenous peoples' lives. It is not the case that all extractive resource development is incompatible with indigenous peoples development; the UN Special Rapporteur on Indigenous Peoples draws attention to alternative business models for the sector.<sup>201</sup>

The adoption of international instruments on indigenous peoples rights, increasing sensitivity of governments, private sector companies, extractive sector industry associations, IFIs and CSOs, combined with improved environmental and social management processes, has meant that at least in some operations, impacts of extractive operations have been prevented or minimised. As significant as these developments are in bringing improvements, there remains in many countries signifi-

cant challenges for indigenous peoples in exercising their rights to “*determine priorities and strategies for the development or use of their lands and territories*” and for protection of their wider set of rights.

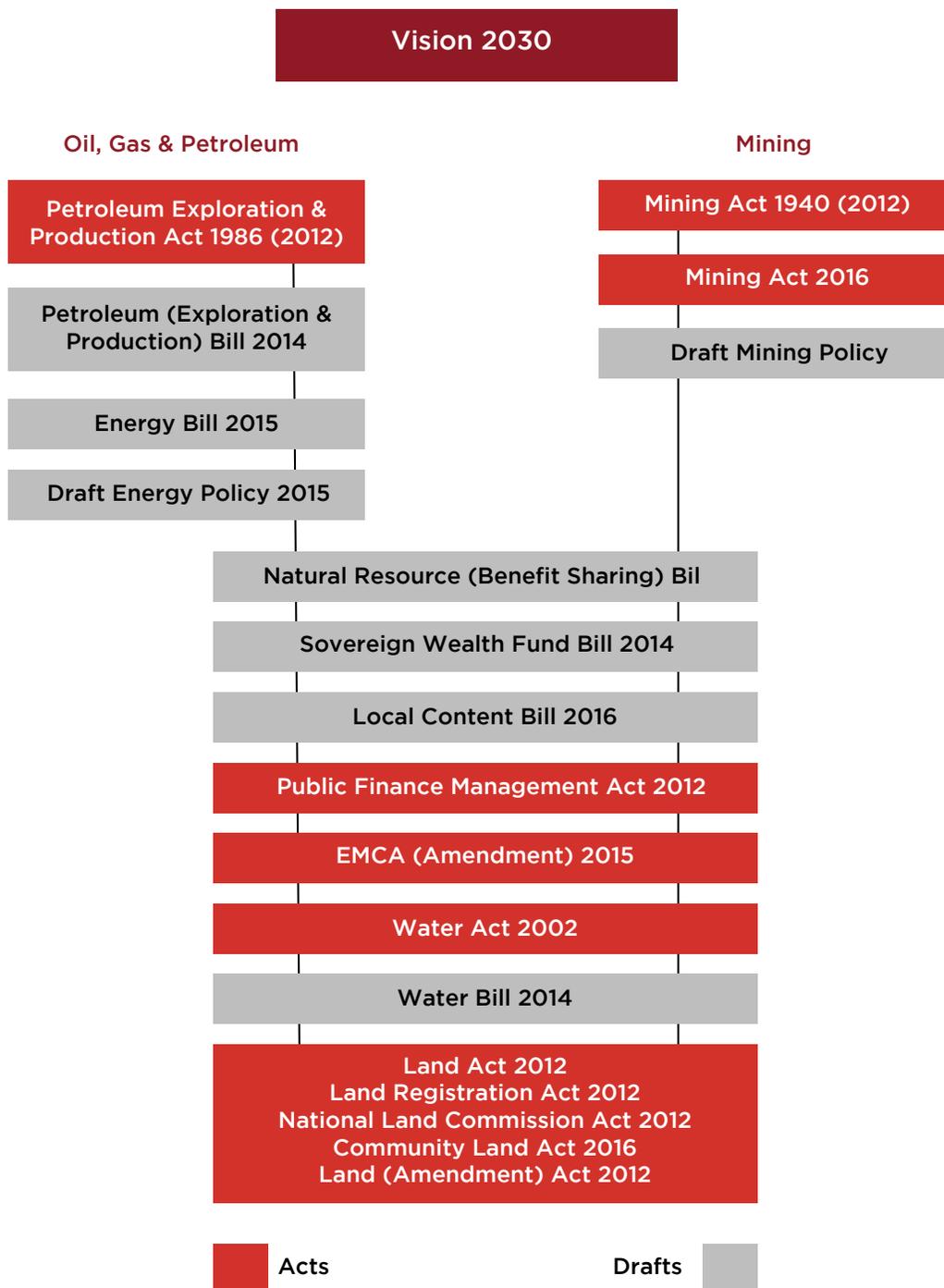
The principles of consultation and free, prior and informed consent (FPIC) are instrumental to rights of participation and self-determination and are part of a wider process of engagement with indigenous peoples on the wider set of rights that may be impacted by extractive operations. FPIC is also part of a wider set of safeguards to protect indigenous peoples rights, including human rights due diligence, the use of impact assessments, prevention and mitigation measures, benefit-sharing and compensation schemes. The FPIC process envisioned between indigenous peoples, the government and companies seeks to provide an important process to enable indigenous peoples to set their own priorities and strategies for development. Where extractive projects will go ahead subject to FPIC (or within limited scope of exceptions to FPIC),<sup>42</sup> the process can set the terms for sustainable relationships between indigenous peoples and extractive companies based on genuine partnerships.

The path to recognition of FPIC and the broader suite of rights of indigenous peoples by governments and extractive companies had been a long and at times fraught discussion both in principle and in practice, but with some significant improvements in the overall recognition of indigenous peoples rights and in particular examples of laws that seek to provide a consent process and wider recognition in company policy and practice. Application of the concept of FPIC by companies, especially where it is not recognised in national law remains challenging on numerous levels. A continuous, open, and meaningful engagement of governments and indigenous communities constitutes the *sine qua non* for FPIC to fulfill its purpose. The absence of such government-indigenous interaction shifts responsibilities from the government to companies and burdens the FPIC process with demands that often are unrelated to projects impacts or beyond the competencies of companies. Yet there is a worrying trend to unload such responsibilities on companies, weakening the guarantor and arbitration role the government must play. This is an area where continued, collaborative dialogue involving government, the private sector and indigenous peoples is needed to continue to evolve new models that can provide broader benefits to indigenous peoples.

## 2.4 Policy & Legal Framework for the Extractive Sector

The legal framework for the extractive sector is changing rapidly in Kenya. The Government is amending the principle laws governing the extractive sector and developing a new suite of laws relevant to the sector.

### 2.4.1 Mining Policy & Legal Framework



## The Draft Mining Policy 2015<sup>203</sup>

The Draft 2015 Mining Policy is aimed at reforming the mining sector through a strengthened institutional framework to address governance and operational issues, environmental protection, equity, mineral value addition, post-mine closure activities, capacity building and mainstream artisanal and small scale mining. And because the policy has almost been developed concurrently with the new mining law, these aspirations have been integrated into the latter.

However, the following provisions of the draft Mining Policy would undermine its effectiveness if included in the final version. First, while the Policy importantly sets out intergenerational equity and sustainable utilisation of mineral resources as among the Policy's guiding principles, the Policy does not address how these principles will be turned into implemented requirements or even considerations in licensing mining concessions. The draft Policy also lacks provisions on human rights. The value of having explicit human rights concepts and language included in policymaking is that then specifically validates the use of a human rights approach in analysing the issues and addressing identified challenges. Thus despite the mention in the draft document of gender and child labour, environment, and land issues, there is very little on how these the Government will protect these rights – either through specific steps it will take or in the requirements it will impose on mining companies to develop specific steps to address women and children.

## The Mining Act 2016

The 2016 Mining Act expressly seeks to give effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution<sup>204</sup> in so far as they apply to minerals. The Act repeals a 1940 law by the same title and provides a number of improvements.<sup>205</sup>

One of the most notable improvements is that it creates a distinction between large-scale and small-scale mining operations<sup>206</sup> by setting up a separate regulatory system for each. Large-scale mining operations are governed by the licensing system – prospecting<sup>207</sup>, retention<sup>208</sup>, and mining<sup>209</sup> – and small scale mining operations are governed by the permitting system – prospecting<sup>210</sup> and mining<sup>211</sup> – and each system provides different requirements to operation and built-in protections for the environment, communities, and social development. If the Government is able to back up this new permitting system with much needed advice and guidance to ASM operators to assist them in the permitting process, this will be an important step forward.

The new law also provides for increased transparency and access to information, and requires consent for access to land, social investment and opportunities for livelihood, and environmental protection.

Under the Act, the right of communities and even private owners seem to have been strengthened by the fact that the Cabinet Secretary is now obligated to give notice to communities or land owners and to publish a notice with boundaries of the land in relation to applications for a mineral right. The land owners and communities can register their objections and have them heard and determined by the Cabinet Secretary.<sup>212</sup> Moreover, prospecting and mining rights shall only be issued where there has been express consent with the land owners.<sup>213</sup> However, the Act still allows for the compulsory acquisition of

land, if consent is “*unreasonably withheld*” or if withholding of consent is considered to be “*contrary to the national interest*.”<sup>214</sup> This in effect means that there is no right to veto mining projects but rather open and meaningful dialogue between companies and affected communities must take place as a start in all cases.

The environmental requirements in the Act are significantly better defined than under the repealed law. Moreover, the law requires artisanal miners to pay due regard to the protection of the environment. Other notable improvements include the requirement for the restoration of abandoned mines and quarries,<sup>215</sup> restoration of land to its original status or an acceptable and reasonable condition after mining or prospecting,<sup>216</sup> requirements to prevent the seepage of toxic waste from entering into water bodies,<sup>217</sup> and to ensure that blasting and related activities are kept at reasonable and permissible levels.<sup>218</sup> It also precludes small-scale miners from using mercury and cyanide,<sup>219</sup> which carry severe detrimental environmental and health impacts, although it does not preclude large-scale operations from doing so. Additionally, applicants for any license must provide a bond or some other form of financial security sufficient to cover costs associated with the implementation of the environmental and rehabilitation obligations.<sup>220</sup>

Finally, and importantly, the Act creates obligations that require investment in the livelihood opportunities of Kenyan citizens. First, only a Kenyan citizen or a corporate body wholly owned by Kenyan citizens can qualify to do business under the small scale mining scheme.<sup>221</sup> Large-scale mining companies must create plans to carry out skill transfer and capacity building in Kenya, including the recruitment and training of Kenyan citizens.<sup>222</sup> Second, it requires a hiring preference for Kenyan nationals, laying out several general criteria,<sup>223</sup> and a plan on the procurement of local goods and services.<sup>224</sup> The Ministry is currently developing regulations to give specificity to these provisions. Third, the Act requires where necessary and applicable that large scale companies in consultation with the affected community come up with a community development agreement—the details of this will be in an upcoming regulation on the same. It will be crucial to develop this regulation in a way that avoids purely philanthropic activities and instead co-develop investment programmes with local communities that focus on longer-term goals such as poverty reduction and skills development.

The above referenced regulations are among others that the Ministry of Mining has drafted and that are required both for the implementation of the Act and to strengthen the capacity of the ministry to regulate the sector. The regulations have now been published on the Ministry's website for public comments.<sup>225</sup>

## Current Licensing Information for the Mining Sector

At the present time, there is no way to ascertain the number of prospecting or mining licenses that have been applied for, issued, or are currently in use. The Ministry is in the process of developing a comprehensive registry and cadastre to be available on the Ministry's website for public access. To date, the cadastre is on the Ministry's website but only available to existing mineral rights holders or prospective rights applicants.<sup>226</sup>

## 2.4.2 Oil & Gas Policy and Legal Framework

### The Draft Energy Policy 2015<sup>227</sup>

The draft Energy Policy is designed to govern petroleum and coal resources. It includes references to a number of socio-economic impacts relating to land, environment, health and safety, resettlement, and the benefit sharing framework.<sup>228</sup> The Policy proposes the establishment of an institutional framework, the National Upstream Petroleum Advisory Committee, which is responsible for upstream petroleum exploration and development matters as well as the National Coal Advisory Committee, which is responsible for coal exploration and development matters. The draft Policy also commits the Government to developing mechanisms for benefits sharing between national and county level governments as well as local communities as well as corporate social responsibility (CSR) programmes, training, employment, and technology transfer. The draft Policy proposes a revenue and profit sharing split of 75% to national government, 20% to county government and 5% to the local community.

With regard to land and socio-economic related rights, the Policy notes that energy development projects have numerous impacts on communities, including economic and physical displacement where the projects are implemented. The Policy recognises that energy production poses various dangers to human life and the environment and that energy sector players face a real challenge in creating affordable, competitive, reliable and sustainable energy whilst upholding people's rights relating to land, the environment, and health and safety. The draft Policy also calls for a Resettlement Action Plan (RAP) Framework for energy related projects in order to address issues of livelihood restoration following physical displacement of communities. A RAP Framework that builds on human rights norms<sup>229</sup> and international standards<sup>230</sup> could provide important protection for local communities while at the same time providing more certainty for companies as well as local governments on the procedures to be followed.

### The Petroleum (Exploration and Production) Act 1986 – Updated 2012

The petroleum sector is currently regulated by the Petroleum (Exploration and Production) Act, which was first passed into law in 1984 and later revised in 1986 and 2012. The Act regulates all activities surrounding the production of petroleum from exploration to production.<sup>231</sup> However, it has a number of shortcomings. The law fails to provide guidance on criteria for evaluating applications for exploration licenses, petroleum agreements, including gas sharing terms and rules on the transfer of interests in PSCs, or provisions governing corporate social responsibility. Accordingly, the Act has been criticised by various commentaries as inadequate to address human rights issues that may arise with petroleum activities. For example, the law does not require prior consent before entering privately owned land, but instead only requires forty-eight hours of notice to the occupier of the land, *"and if practicable to the owner"*.<sup>232</sup>

## The Draft Petroleum (Exploration, Development, and Production) Bill 2015

The purpose of this draft Bill is to replace the current Petroleum (Exploration and Production) Act (2012) law on all matters governing upstream petroleum operations.<sup>233</sup> While the Bill proposes to address several key issues relevant to human rights and environmental protection, such as minimising environmental contamination and protecting the health and safety of workers,<sup>234</sup> there are important points that will have to be fleshed out in subsequent regulations:

### *Oversight of shared revenue*

The Bill provides that upstream petroleum profits shall be shared based on the 75/20/5 ratio, to be paid to the national government, county government, and local community, respectively.<sup>235</sup> While the Bill apportions a share of the profit to the community, which shall be held in trust by a board or trustees established by the county government,<sup>236</sup> it fails to provide any criteria for distributing the funds to impacted communities. In principle, redistributing financial benefits to communities who have experienced the negative impacts of operations is a model to be encouraged, recognising that specific instances of environmental, social or human rights impacts on particular individuals or groups should be addressed and remedied specifically, rather than relying on the distribution of revenue to compensate for damages done. These are two distinct dimensions of managing the impacts of extractive sector operations. However, there could be several factors at play including potential elite capture, corruption, and misguided management that could potentially result in such funds exacerbating inter-communal strife rather than supporting sustainable development. The technical assistance provided through the KEPTAP or Norwegian Oil for Development Programme will presumably include support in establishing a more detailed benefit distribution system. The Government of Kenya has refrained from joining the EITI and has pointed to its forthcoming legislation on revenue sharing, including the accountability and transparency provisions, as a potential substitute for EITI participation. Given the scope and depth of EITI procedures required in country to make the system work effectively, there will be much work to be done to put in place systems to ensure the transparency and effectiveness of such revenue sharing programmes. CSO participation in establishing a revenue management system is a core part of any EITI system; there are no such guarantees under the draft Petroleum Bill.

### *Compensation for Land*

While land compensation is a widely recognised shortcoming of the current law, the proposed Bill also fails to provide guidance on how to calculate adequate compensation packages for land, assets and any injury directly or indirectly related to company activities or to point to appropriate authorities mandated with establishing such guidance. Instead, the Bill only provides that compensation be "*fair and reasonable*".<sup>237</sup> Moreover, compensation alone may not always be adequate: it is important to also include provisions on resettlement of those that may have to be moved from their land voluntarily or involuntarily. This is one area where the National Land Commission can step in and develop compensation guidelines for land required for public purposes.<sup>238</sup>

### *Consent*

As an improvement to the current law, the draft Bill requires that an investor seek prior consent of the land owner before accessing land for upstream petroleum related activities.<sup>239</sup> However, immediately following that requirement the Bill states that consent shall not be *"unreasonably withheld"*<sup>240</sup> but fails to clarify what might be considered unreasonable thus lending itself to subjective application. In fact, the draft Bill allows for compulsory acquisition of land if the license holder *"reasonably requires [the] land"* and *"has failed to acquire the land by agreement after making reasonable attempts to do so"*.<sup>241</sup> If there are no subsequent regulations adopted to provide further details and protections for communities, these provisions effectively at best limit, if not negate, the right of communities to withhold consent to exploration and exploitation activities on their land. The proposed Community Land Bill requires that there be a 'free, open and consultative process' as a pre-requisite for agreements for investments on community land.<sup>242</sup> However, community land may still be subject to compulsory acquisition<sup>243</sup> and thus the free, open and consultation process is not guaranteed.

### *Transparency*

The Bill requires *"publication of all petroleum agreements, records, annual accounts and reports of revenues, fees, taxes, royalties and other charges, as well as any other relevant data and information that support payments made...and payments received"*.<sup>244</sup> The provision is an important step forward and aligned with evolving international norms on natural resource contract transparency involving petroleum.<sup>245</sup> Further regulations will be required to make this provision effective in practice so that the general public can easily access – and understand – how national natural resource assets are being managed and how revenues are being used.

### *Injury and/or Damage*

The Bill expressly provides that the owner or occupier of land shall be compensated upon demand for any loss or damage caused by the company,<sup>246</sup> environmental damage or pollution,<sup>247</sup> and injury and/or illness directly or indirectly related to upstream petroleum operations.<sup>248</sup> This is an important principle to establish in the law; the challenge will be in developing regulations, company awareness and accessible remedy mechanisms to be able to bring these claims and obtain redress.

## **Energy Bill 2015**

The draft Energy Bill, which proposes to replace the Energy Act of 2006, focuses on midstream and downstream oil and gas production as well as nuclear energy sources, and the mining of coal. The Bill seeks to consolidate and harmonise current laws relating to energy, as well as complement the Petroleum (Exploration, Development, and Production) Bill 2015 in its governance of oil and gas exploration and production. Similar to the Petroleum (Exploration, Development and Production) Bill 2015, while the draft Energy Bill proposes several improvements on the current legal structure, there are still a number of concerns that are similar to those addressed above under the 2015 Petroleum Bill. These include:

### *Oversight of Shared Revenue*

The Bill lays out a profit sharing scheme for coal revenues to be shared among the national government, county government, and community, but it provides a slightly different breakdown to the sharing of petroleum revenues – with the county government receiving twenty percent of the government share<sup>249</sup> and the community to receive one-quarter of the amount due to the county government.<sup>250</sup>

### *Compensation for Land*

While a few provisions reference the need for compensation where land is injured or acquired, the Bill fails to address how compensation should be calculated. Additionally, the Bill is entirely silent on how issues of compulsory acquisition and resettlement should be addressed. The draft Bill requires that any damage or loss caused to the land must be compensated,<sup>251</sup> but it fails to provide any guidance regarding how compensation shall be determined.

### *Consent*

The draft Energy Bill presents concerns similar to those in the Petroleum Bill (2015).<sup>252</sup>

### *Information Sharing*

While several provisions address the company's duty to provide relevant information<sup>253</sup> there are no requirements about sharing this information with the impacted community.

### *Human and Environmental Impacts*

The Bill does provide some improved protections for workers, the community and the environment by requiring that petroleum and coal license issuing authorities consider all potential impacts on the integrity of the community,<sup>254</sup> environment,<sup>255</sup> and health and safety standards<sup>256</sup> prior to issuing the requested license. Further, it requires that all reasonable and necessary steps be taken to ensure the protections of its workers' welfare, health and safety, as well as to prevent pollution and waste from contaminating the environment.<sup>257</sup>

A cross section of stakeholders have raised concerns that this Bill is not harmonised with the Mining Bill 2014 and the Natural Resources Sharing Bill 2014. There should be harmonisation of the core protections of the environment, workers and the community. Each sector will have unique dimensions but the protections afforded to those impacted by the sectors should be equivalent.

### *2.4.3 Environmental Laws Relevant to the Extractive Sector*

#### **The Environmental Management and Coordination Act 2015 (EMCA)**

The EMCA is the primary environment management law in Kenya. The EMCA provides for the establishment of a legal and institutional framework for the management of the environment and improves the legal and administrative coordination of the diverse environmental initiatives in order to improve national capacity in this area. The law established the National Environment Council (NEMC) to be responsible for policy formulation. It also established NEMA to exercise general supervision and coordination over all matters relating to the environment. The EMCA was amended in October 2015 and among the changes introduced was the establishment of the Standards Enforcement and Review Committee whose principal function is to set standards for water quality, air quality, and waste classification to ensure proper handling, pesticide residues in raw agricultural commodities, noise emissions, noxious smells, and ionising radiation. These standards will provide more specific emissions and effluent limits for the extractive sector.

In addition, the amended Act now includes provisions for strategic environmental assessments for all policies, programmes and plans<sup>258</sup> and it is under this provision that the petroleum and mining SESA's are being undertaken. NEMA shall publish on its website the summaries of the EIA reports.<sup>259</sup> If this is done, it will represent a significant improvement in access to information as currently, only some reports are available. NEMA maintains a database of EIAs - a quick search during the course of this study revealed that it is very difficult to use as the reports are not categorised or titled in any useful manner and not all the reports are online. However, NEMA maintains that a copy of each of the EIAs is available at their county offices. Some companies have also started posting summaries of the EIAs on their websites.

EIAs are required in all extractive projects and must be carried out before exploration and commencement of extraction. The companies that were interviewed for the Report indicated that they carried out comprehensive EIAs followed by the implementation of Environmental Management Plans (EMP) that guide the day-to-day environmental practices of the extractive operations.

A study commissioned by the UK Department for International Development in 2013 found that the National Environment Agency (NEMA), the body tasked with environmental protection, lacked sufficient resources and training to conduct environmental oversight. During the field research for this Report, many NEMA officers corroborated this point. They noted that despite extractive companies carrying out EIAs, the required monitoring and oversight of company operations is not sufficiently robust. This is, in part, due to the low capacity for enforcement as each NEMA officer has responsibility over a large geographical area and engages with a high number of projects.

# 3

## Pillar II

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



Image:  
Charles Wanguhu

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

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

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

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

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

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

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

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

### *3.2.1 Groups at Risk*

#### **Women**

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

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

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

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

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

## Children

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

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

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

– Local education officer, Migori

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

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

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

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

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

## Youth

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

## Persons with Disabilities

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

## Minorities and Marginalised Groups

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

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

### Older Members of Society

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

### 3.2.2 Community Engagement

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

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

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

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

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

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

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

### 3.2.3 Labour Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *3.2.4 Land Ownership*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *3.2.5 Livelihoods*

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

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

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

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

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

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

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

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

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

### *3.2.6 Environment, Health & Safety*

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

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

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

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

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

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

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

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

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

### *3.2.7 Community and Public Security*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Women**

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

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

#### **Children**

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

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

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

## Youth

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

## Persons with Disabilities

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

## Minorities and Marginalised Groups

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

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

### **Older Members of Society**

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

### **Community Engagement**

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

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

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

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

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

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

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

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

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

### *3.3.2 Access to Information and Transparency*

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

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

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

One Lamu fisherman said:

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

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

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

### *3.3.3 Labour Rights*

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

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

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

### *3.3.4 Land Ownership*

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

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

### *3.3.5 Livelihoods*

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

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

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

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

### 3.3.6 Environment, Health & Safety

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

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

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

### *3.3.7 Community and Public Security*

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

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

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

# 4

## Pillar III

Access to Remedy for  
Extractive Sector Impacts



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

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

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

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

### 4.2 Constitutional Analysis of Access to Remedy

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

## 4.3 Remedy in Kenya and through International Mechanisms

### 4.3.1 Judicial Mechanisms in Kenya

According to the Constitution, there are a number of hierarchal courts in a two-tiered system. The first tier is the superior courts, consisting of the Supreme Court,<sup>310</sup> the Court of Appeal,<sup>311</sup> the High Court,<sup>312</sup> and those courts established by Parliament to hear and determine disputes relating to employment and labour relations; and environment and land under Article 162(2). The second tier comprises the subordinate courts, which include the Magistrates courts, the Kadhis' courts, the Courts Martial, and any other courts or tribunals established under Article 169.<sup>313</sup> The Supreme Court is the highest Court in the country and has exclusive original jurisdiction over presidential election petitions and crucial constitutional interpretations.<sup>314</sup> Next is the Court of Appeal that deals with all appeals from the High Court and any other court or tribunal as prescribed by law.<sup>315</sup> The High Court which has unlimited original jurisdiction in criminal and civil matters; jurisdiction to determine if there has been a violation of fundamental rights and freedoms under the Bill of Rights; and other matters listed in Articles 165(3)(c-e)-(4). Subordinate courts include the Magistrates courts, Kadhi's courts, Courts Martial and other tribunals established by Statute.<sup>316</sup>

### Examples of Communities Bringing Cases about Extractive Operations

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

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

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

### 4.3.2 Non-Judicial Mechanisms in Kenya

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

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

#### State-Based Non-Judicial Grievance Mechanisms: KNCHR

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

The KNCHR is Kenya's NHRI, which is tasked with the overall responsibility of promoting human rights. KNCHR's existence and mandate is provided for in the Kenya Constitution, which requires it to promote the protection and observance of human rights in public and private institutions.<sup>322</sup> It is tasked with the following mandate<sup>323</sup> covering eight thematic areas, including promoting human rights in business:<sup>324</sup>

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

The KNCHR can play a positive role in resolving social conflict involving extractive industries alongside other Government institutions with responsibilities in this area, including courts, executive agencies, minerals and energy commissions, environmental protection agencies, and legislative bodies.<sup>325</sup> The KNCHR's Strategic Plan 2013-2018<sup>326</sup> makes clear that it may on its own initiative or on the basis of complaints "*investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs.*"

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

### *Engagement with other Stakeholders*

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

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

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

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

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

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

### *Gaps and Growth Opportunities for KNCHR*

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

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

## **Non-State-based Non-Judicial Grievance Mechanisms**

### *Traditional Community Grievance Handling*

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

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

### *CSO Involvement in Handling Complaints<sup>328</sup>*

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

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

## In Focus:

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

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

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

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

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

### *Company Operational Level Grievance Mechanisms*

In Focus:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### *4.3.3 International and Regional Grievance Mechanisms*

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

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

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

The African Commission on Human and Peoples' Rights<sup>335</sup> and the African Court on Human and Peoples' Rights<sup>336</sup> can hear complaints from individuals and CSOs, but only concerning violations by a State party to the African Charter on Human and Peoples' Rights of one or more of the rights covered by the Charter, rather than against companies. Kenya is a state party.<sup>337</sup> The Endorois case<sup>338</sup> is an example of a case brought to the Commission with relevance to the extractive sector. The Endorois community had tried to petition national courts and tribunals against eviction from their traditional lands along the shores of Lake Bogoria. Their complaint was that in the 1970s the Government of Kenya had evicted them from their land to pave way for a national reserve and tourism facilities. In 2003, the community with the help of two non-governmental organisations, Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International brought the case before the African Commission on Human and Peoples Rights. In May 2009, the African Commission ruled that the Kenyan Government in evicting the community had breached their rights to property, health, culture, religion and natural resources. It went on to give an order that the Government restore them to their traditional lands and provide compensation. In 2006, the African Commission ruled against the Government for licensing the mining of rubies in another part of Endorois land. The company withdrew after this ruling.<sup>339</sup> In February 2010, the African Union adopted the decision of the Commission making it legally binding on Kenya. However, to date, the Government is yet to implement the decision. In 2013, the Attorney General called for a team of experts to advise on the implementation of the decision. The tenure of the task force lapsed without any progress being made.

### **The East African Court of Justice**

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

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

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

### **OECD National Contact Points (NCPs)**

Companies involved in extractive sector operations in one of the 46 countries<sup>344</sup> adhering to the OECD Guidelines on Multinational Enterprises<sup>345</sup> face another potential grievance mechanism. A 'specific instance' (complaint) can be filed with the OECD National Contact Point in the home country of the company. This is done when the complainant (typically a civil society organisation or a trade union) considers that a company has not observed the OECD Guidelines for Multinational Enterprises in their operations or through their business relations.<sup>346</sup> The Guidelines comprise a set of recommended standards for conduct across a range of topics, including human rights and labour rights. The NCPs are charged with contributing to the resolution of issues that arise from the alleged non-observance of the Guidelines. NCPs are supposed to offer investigation and mediation, either themselves or through independent mediators, to work with the parties and agree on steps to resolve complaints. Many of the specific instances to date have involved the extractive sector.<sup>347</sup>

### **International Accountability Mechanisms of Multilateral and Bilateral Development Banks**

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

## Voluntary Multi-Stakeholder Initiatives

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

### *The Voluntary Principles on Security and Human Rights (VPSHR)*

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

### *The International Code of Conduct for Private Security Providers*

The International Code of Conduct for Private Security Providers<sup>353</sup> both calls upon signatory companies to establish grievance procedures<sup>354</sup> and is in the process of establishing a complaints procedure to receive complaints from individuals or their representatives on alleged violations of the Code and / or the non-compliance of Member Companies' grievance mechanisms with the Code. The ICoCA will establish a process to support and oversee companies' responsibility to provide fair and accessible grievance procedures that offer effective remedies to address claims alleging violations of the Code.<sup>355</sup> Currently, there is only one Kenyan company that is a member of ICoCA, but as the number of members continues to expand, more Kenyan private security providers may join.<sup>356</sup>

# 5

## Conclusion & Recommendations



# 5. Conclusion & Recommendations

## 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 housing<sup>357</sup> and other relevant human rights and drawing on international standards, such as IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement.<sup>358</sup> 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 Forum<sup>359</sup> 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.<sup>360</sup> 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.<sup>361</sup> 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.<sup>362</sup> 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.<sup>363</sup>

### 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.

# Annex 1. Research Methodology

## Sampling and Sample Size

The information for this Report was obtained through one of four methods: in-depth interviews, focus group discussions (FGD), field observations, and desk research. A purposive sampling technique was used to select the respondents for qualitative data collection. The respondents were selected based on their basic understanding of the extractive industry and the associated human rights issues as well as their direct experiences with the extractive industry. Respondents were selected across three major stakeholder groups – government, business, and civil society organisations, which comprise members from non-governmental organisations, church leaders, relevant ministries, public oversight bodies, licensing & regulatory authorities, KNCHR, religious representatives and community-based organisations as well as community members who were identified to give accounts of human rights issues observed from the resident extractive industries.

The field research was carried out by an experienced Kenyan researcher.

*Table 4: Key Respondent Manifest*

	Government	Mining	Oil & Gas	Civil Society Organisation	Focus Group Discussion
Total Interviewed	36	7	2	13	195
Composition of the Interviewees	County Level: 32	Int'l: 3	Int'l: 1	FBO: 3	All Women: 84
	National Level: 4	Nat'l: 0	Nat'l: 1	NGO: 8	All Men: 100
		Large: 1	Large: 0	CBO: 2	Mixed Gender: 11
		Small: 0 Artisanal: 3	Small: 0		

## Data Collection Methods

Each respondent was asked to respond to a series of survey questions in one of two methods – (1) the one-on-one interview or (2) focus group discussion.

### *In-depth interviews*

In the one-on-one interview, the researcher interviewed each respondent using the questions contained in the survey.<sup>364</sup> In-depth interviews were held with a total of fifty-eight (58) key informants who come from different backgrounds but have an interest in the extractive industry. These included national government ministries officials, county government officials, oversight body representatives, extractive companies, religious leaders, village leaders, and civil society.

### *Focus Group Discussion (FGD)*

Representative case studies were selected to undertake FGDs in communities where oil and gas exploration and mining exploration and exploitation are taking place, with a view to highlight the overall challenges and opportunities for government, business, and civil society stakeholders – as well as KNCHR – to ensure greater human rights accountability and protecting the rights of communities from adverse impacts linked to the extractives sector. At least two FGDs were sampled in every county and these emanated from the communities found near the extractive industry operations. In the FGD interviews, the researcher worked with a local organizer to gather groups of approximately eight to ten respondents comprised of members from CSOs and CBOs. The FGDs were mainly carried out separately for women and men. It is noted, however, that there were no female FGD respondents in Lamu, and this is partly due to the nature of the extractive industry in Lamu – offshore oil & gas exploration – and the focus in this context was to find the experiences of the fishermen who may be affected by the offshore oil and gas explorations.

### *Field Observations*

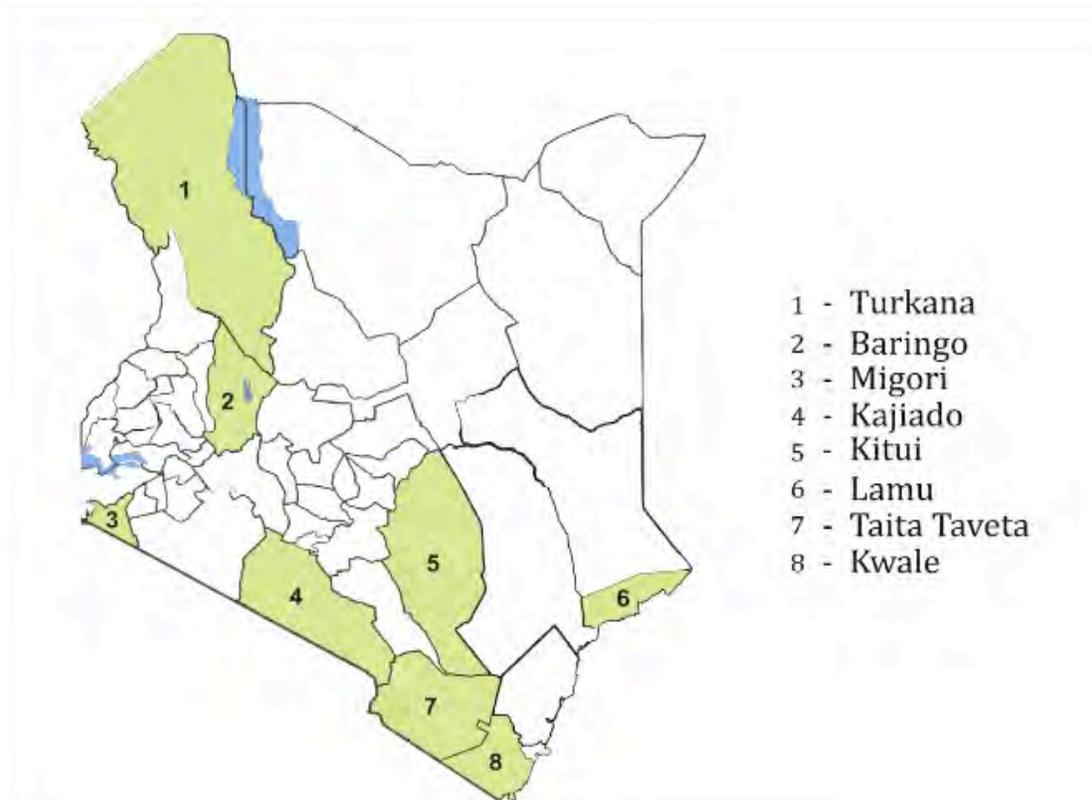
Observation was used to capture the nature of human rights abuses on the ground as well as the activities being undertaken by communities to promote their rights. Observations were presented as anecdotes and used to supplement the analysis of data collected in the other forms.

### *Desktop Review*

A thorough desktop review of literature on the extractive sector, Kenya and East Africa was carried out.

## A Brief Description of the Extractive Sector Areas Covered

Figure 2: Research Study Counties in Kenya



Source: Researcher's compilation

### Turkana

Turkana is the northernmost County in Kenya and it is one of the poorest counties.<sup>365</sup> This county is largely arid with very little arable potential. It is a vast county that borders Lake Turkana which is the world's largest permanent desert lake and the world's largest alkaline lake and some of the major archaeological finds of early man have been made near the lake. This fact has led Turkana to be christened 'the Cradle of Mankind'<sup>366</sup> and it is a UNESCO World Heritage Site. Despite these accolades, the region has historically been marginalised on socio-economic development. Most residents in this county live below the poverty line and the literacy levels here are very low, which exacerbates many of the human rights challenges associated with the development of the extractives sector. One of the economic lifelines of the county has been the tourism industry, which in the recent past has suffered a recession due to insecurity in the coastal region. There are several sites in the county undergoing oil exploration and in 2012 there was a discovery in Lokichar basin (Block 12BB), making it the only site in Kenya with confirmed finds of commercially viable oil deposits.<sup>367</sup>

## *Baringo*

Baringo County, found in the former Rift Valley Province, is a largely semi-arid area that includes three fresh water lakes and is known to contain a number of unexploited mineral resources. Most of the residents in this county depend on livestock farming and small scale crop farming for their livelihoods. Accordingly, access to land and potable water are incredibly important resources for the people who live here. This is further evidenced by the number of interethnic clashes that have transpired over the control of natural resources in this county. Further, the literacy levels are relatively low and the majority of Baringo residents live below the poverty line. In 2013, Tullow Oil Company commenced exploration in the Kerio Valley area of the county (Block 12A) and since has made initial discoveries of oil with continual appraisals of the reserves.

## *Kajiado*

Kajiado County, which is largely semi-arid, borders Nairobi County to the South and is one of the host counties of the Maasai community. Due to this county's proximity to the capital, there has been a good deal of development near the border areas. However, the development is concentrated in several commercial centres so as one moves away from the Nairobi border and towards the sparsely populated interior the level of poverty increases. Oil exploration activities by National Oil Corporation of Kenya (NOCK) commenced in early 2014 at the Magadi area (Block 14T). This exploration area happens to be one of the poorest and driest areas in the county, placing an additional strain on access to land and water for people who are less equipped to advocate for their human and environmental rights. Further, the presence of the Maasi community, which is accustomed to the open use and movement on the land presents particular challenges for oil exploration in this county.

## *Migori*

Migori is located in western Kenya in the former Nyanza province. It borders Tanzania to the south and is a relatively arable and fertile county with a thriving agricultural sector, comprised of subsistence farming and commercial sugar cane farming. The prominent industry in Migori, however, is artisanal and small scale gold mining, which has a deep seeded history in Migori, dating back to the 1930s. To date, no medium or large scale mining companies are stationed here, but the industry continues to attract new residents, placing a strain on access to, and reliance on, land. This is particularly true because artisanal mining is less mechanized, and often illegal, and it occurs in many land clusters, owned either by individuals or communities. The socio-economic conditions in Migori have created a group of fairly educated residents with average literacy levels.

## *Kitui*

Kitui County, found in the former Eastern Province of Kenya, is a vast county bordering seven different counties and is home to two major towns: Kitui and Mwingi.<sup>368</sup> The County is topographically diverse with some areas consisting of semi-arid land while others are arable allowing for active farming. Livelihoods in Kitui depend on crop farming, fish farming, livestock farming, and micro trading. However, literacy levels in Kitui are quite

low. Kitui boasts a range of mineral resources such as gemstones, limestone, iron ore and coal, which is expected to attract more EI activities in the future. While most of the gemstone mining is carried out by artisanal miners, the majority of the limestone mining is done by medium-sized companies. In 2010, coal was discovered around the Mui Basin and since then a concession was given to Fenxi Corporation to exploit the mineral. Most other minerals in the County remain unexploited.

### *Lamu*

The Lamu County is home to Kenya's oldest continually inhabited town (Lamu Town), which is on an island and part of the larger Lamu Archipelago. It is one of the original Swahili settlements along coastal East Africa and it was founded in 1370. UNESCO recognised the Lamu Old Town as a World Heritage Site, resulting in efforts to preserve the architecture of the island town. The main economic activities in Lamu are fishing, agriculture, and tourism.<sup>369</sup> There have been several oil exploration activities off the coast of the Lamu archipelago carried out by a number of oil exploration companies such as Anadarko and Pancontinental Plc. Literacy levels in Lamu remain low.

### *Taita Taveta*

Taita Taveta County, one of the counties found in the former Coast Province, shares a border with Tanzania to the south and six other counties in Kenya, including Kwale.<sup>370</sup> This County hosts fertile highlands, and a lower grassland, which is not very arable. However, the County is geologically located within the Mozambique Belt,<sup>371</sup> and is endowed with one of the richest minerals deposits in Kenya and the Eastern Africa region. The mineral resources include industrial minerals and gemstones, both of which have been studied, prospected and commercialized for several years generating considerable wealth to various mining prospectors and investors. Gemstones are mainly mined by small scale players and a few medium scale companies such as Rockland Company Limited and Chawia Minerals Association. Iron ore is also being mined by Wanjala Mining Company. Despite the influx of mineral resource exploitation, a sizeable section of the County remains quite poor and the literacy levels are low.

### *Kwale*

Kwale County, found in the former Coast Province, is considered to be one of the poorest<sup>372</sup> counties in Kenya. In fact, 29% of Kwale residents live below the poverty line<sup>373</sup> and according to the Kenya National Bureau of Statistics, Kwale has one of the lowest literacy levels in the country. Although the land in Kwale County is fertile, not much agricultural activity takes place here. One of the economic lifelines of the county is the tourism industry which in the recent past has suffered a recession due to insecurity-related reasons in the coastal region. The mineral sands project in Msambweni – undertaken by Base Resources Limited – is the only major mining project in the County and the project has created a range of challenges within the community when exploration started several years ago. Also, rare earth minerals, worth billions of dollars, were discovered in the County, but these have yet to be exploited.

## Annex 2. Oil & Gas and Mining Companies Operating in Kenya

Table 5: Mining Exploration Blocks by Company

Mineral	Mining Company
Titanium	Base Titanium Kenya
Gold	ASM, Africa Barrick Gold, Acacia Mining Plc
Soda Ash	Tata Chemicals
Limestone	Athi River Mining & other cement companies
Iron Ore	Wanjala Mining Company
Flourspar	Flourspar Mining Company
Ruby	Rockland Kenya
Diatomite	Africa Diatomite Industries
Carbondioxide	Carbacid Investments
Gypsum	Delta Mining Company, Kenjoro Enterprises
Copper	Macalder Gold and Copper Mines

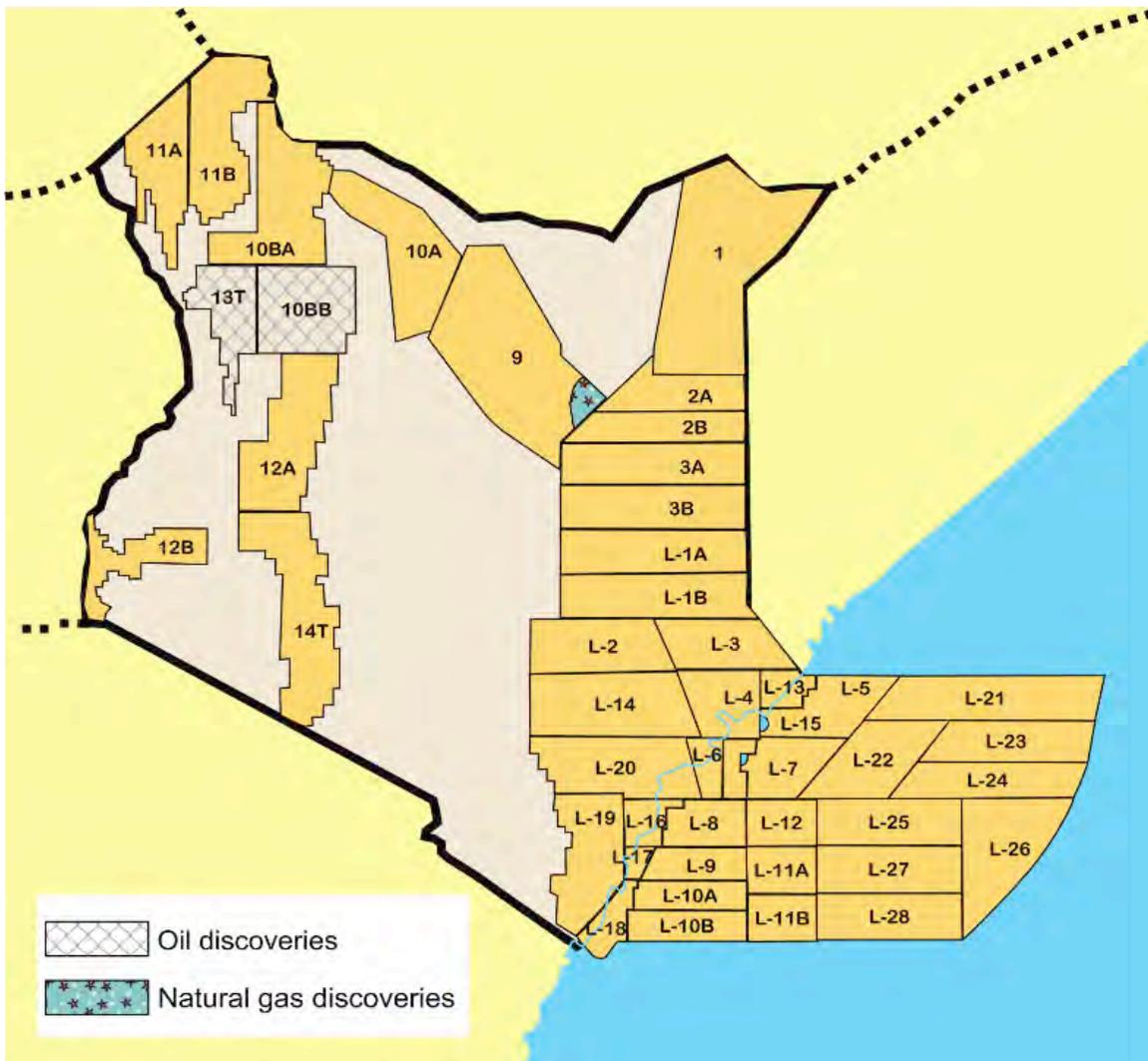
Table 6: Oil Exploration Blocks by Company

Operating Company	Block Number	Operating Company	Block Number
Damantine Energy	11B, L-18	Imara Energy	L-2
Afren Oil	L-17, 1	Nock	14T
Africa Oil	9	Ophir Energy	L-9, L-15
Anadarko	L-11B, L-12, L-11A, L-7, L-5	Pacific Seaboard	L-20
Apache	L-8	Rift Energy Corp	L-19
A-Z Petroleum	L-1A, L-3	Simba Energy	2A
BG Group	L-10B, L-10A	Swiss Oil Company	L-4, L-13
Camac Energy	L-16, L-1B, L-27, L-28	Taipan Resources	2B
Edgo Group	L-14	Total	L-22

Eni	L-21, L-23, L-24	Tullow Oil	10BA, 10A, 10BB, 13T, 12B, 12A
Erhc Energy	11A	Vangold	3B, 3A
Far Limited	L-6		

Source: Ministry of Energy and Petroleum website ([www.energy.go.ke](http://www.energy.go.ke))<sup>374</sup>

Figure 3: Oil Exploration Blocks in Kenya



Source: Researcher's illustration derived from Ministry of Energy and Petroleum website [www.energy.go.ke](http://www.energy.go.ke)

## Annex 3. Mineral Occurrences in Kenya

Table 7: Mineral Occurrences in Kenya

Region	County	Minerals
Rift Valley	Kajiado	Soda Ash, Feldspar, Limestone Gypsum, Gemstones, Marble & Granite (dimension stone)
	Elgeyo Marakwet	Fluorspar
	Baringo	Gemstones (Baringo Ruby), Diatomite
	Nakuru	Diatomite
	Turkana	Gold, Gemstones, Gypsum
	West Pokot	Gold, Gemstones, Chromite
	Samburu	Gold, Gemstones, Manganese, Chromite, Vermiculite
	Narok (Trans Mara)	Gold
	Nandi (Kibigori)	Gold
	Western	Kakamega
Nyanza	Siaya	Gold, Iron Ore
	Migori	Gold, Copper
	Homa Bay	Iron Ore, Gold
Central	Kiambu	Carbon Dioxide, Diatomite
Eastern	Machakos	Gypsum, Pozzolana,
	Kitui	Coal, Iron Ore, Copper, Gemstones, Limestone, Magnetite
	Makueni	Vermiculite, Gemstones
	Tharaka Nithi	Iron Ore, Gemstones
	Isiolo	Gemstones

Coastal Kenya	Taita Taveta	Iron Ore, Gemstones, Manganese, Graphite
	Kwale	Gemstones, Heavy Mineral sands (titanium minerals), Silica Sand, Rare Earth Elements, Niobium
	Kilifi	Titanium Minerals, Manganese, Barytes, Gypsum, Gemstones
	Tana River	Gypsum
North Eastern	Garissa	Gypsum
	Mandera Marsabit	Gypsum Gold, Gemstones, Manganese, Chromite
	Wajir	

*Source: Researcher's compilation from Ministry of Mining*

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- <sup>96</sup> 2010 Kenya Constitution, Art. 53(1)(d).
- <sup>97</sup> 2010 Kenya Constitution, Art. 53(1)(b).
- <sup>98</sup> 2010 Kenya Constitution, Art. 53(1)(c).
- <sup>99</sup> 2010 Kenya Constitution, Art. 260.
- <sup>100</sup> Government of the Republic of Kenya, Ministry of Mining, "Kenya Mining Investment Handbook", (2015), p.14. Available at: [http://www.mining.go.ke/images/banners/Kenya\\_Mining\\_Investment\\_Handbook.pdf](http://www.mining.go.ke/images/banners/Kenya_Mining_Investment_Handbook.pdf).
- <sup>101</sup> 2010 Kenya Constitution, Art. 55.
- <sup>102</sup> 2010 Kenya Constitution, Art. 55(a).
- <sup>103</sup> 2010 Kenya Constitution, Art. 55(c).
- <sup>104</sup> 2010 Kenya Constitution, Art. 55(d).
- <sup>105</sup> U.S. Department of State, "Kenya 2014 Human Rights Report", (2014), p.58. Available at: <http://www.state.gov/documents/organisation/236582.pdf>.
- <sup>106</sup> Ibid. ("According to a Handicap International survey, 85% of persons with disabilities experienced verbal abuse as a result of their disability and 17% experienced gender-based violence," with almost half neither reporting the incident to authorities nor seeking medical help or counselling).
- <sup>107</sup> Ibid. ("KNCHR estimated that 67% of persons with disabilities obtained a primary education, 19% attained secondary education, and 2% reached university level").

<sup>108</sup> Ibid. (Surveying persons with disabilities in certain counties in 2012, “the KNCHR...found most government buildings in these counties inaccessible to persons with disabilities and that the lack of sign language interpretation or braille texts at public places...prevented persons with disabilities from meaningful public participation”).

<sup>109</sup> 2010 Kenya Constitution, Art. 261.

<sup>110</sup> 2010 Kenya Constitution, Art. 54(1)(a).

<sup>111</sup> 2010 Kenya Constitution, Art. 54(1)(b).

<sup>112</sup> 2010 Kenya Constitution, Art. 54(1)(c).

<sup>113</sup> 2010 Kenya Constitution, Art. 54(1)(e).

<sup>114</sup> U.S. Department of State, “Kenya 2014 Human Rights Report”, (2014), p.60. Available at: <http://www.state.gov/documents/organisation/236582.pdf> (noting eight major ethnic communities identified in the 2009 Census: Kikuyu, 6.6 million; Luhya, 5.3 million; Kalenjin, five million; Luo, four million; Kamba, 3.9 million; Kenyan Somali, 2.3 million; Kisii, 2.2 million; and Mijikenda, 1.9 million).

<sup>115</sup> 2010 Kenya Constitution, Art. 56(b).

<sup>116</sup> 2010 Kenya Constitution, Art. 56(c).

<sup>117</sup> 2010 Kenya Constitution, Art. 56(d).

<sup>118</sup> 2010 Kenya Constitution, Art. 56(e).

<sup>119</sup> 2010 Kenya Constitution, Art. 260.

<sup>120</sup> 2010 Kenya Constitution, Art. 260.

<sup>121</sup> U.S. Department of State, “Kenya 2014 Human Rights Report”, (2014), p.63. Available at: <http://www.state.gov/documents/organisation/236582.pdf>.

<sup>122</sup> 2010 Kenya Constitution, Art. 260.

<sup>123</sup> 2010 Kenya Constitution, Art. 57(a).

<sup>124</sup> 2010 Kenya Constitution, Art. 57(b).

<sup>125</sup> 2010 Kenya Constitution, Art. 57(d).

<sup>126</sup> 2010 Kenya Constitution, Art. 69(1)(d).

<sup>127</sup> See Awuor, Linda, (Kenya Law), “Emerging jurisprudence on public participation and the link to stakeholder engagement”, (2015). Presented at the Extractive Sector Forum, 20 April 2016, Institute for Human Rights and Business.

<sup>128</sup> *Musyoka et al. v. Permanent Secretary Ministry of Energy et al.*, Constitutional Petition No. 305 of 2012 (High Court of Kenya, 2014).

<sup>129</sup> See Awuor, Linda, (Kenya Law), “Emerging jurisprudence on public participation and the link to stakeholder engagement”, (2015), p.14. See, e.g., *Pasred Youth Group/Forum et al. v. Attorney General et al.*, Petition No. 621 of 2014 (High Court of Kenya at Nairobi, 2015); *Munkasio et al. v. Kedong Ranch Limited et al.*, Petition No. 57 of 2014 (ELC at at Nakuru Munyao, 2015).

<sup>130</sup> 2010 Kenya Constitution, Art. 35(1)(a).

<sup>131</sup> 2010 Kenya Constitution, Art. 35(1)(b).

<sup>132</sup> 2010 Kenya Constitution, Art. 35(2).

<sup>133</sup> 2010 Kenya Constitution, Art. 60(1)(d).

<sup>134</sup> *Friends of Lake Turkana Trust v. Attorney General et al.*, ELC Suit Co. 825 of 2012 (May 19, 2014).

<sup>135</sup> *Friends of Lake Turkana Trust v. Attorney General et al.*, ELC Suit No 825 of 2012 (ELC at Nairobi, 2014).

<sup>136</sup> 2010 Kenya Constitution, Art. 41(1).

<sup>137</sup> 2010 Kenya Constitution, Art. 41(2)(a).

<sup>138</sup> 2010 Kenya Constitution, Art. 41(2)(b).

<sup>139</sup> 2010 Kenya Constitution, Art. 41(2)(c).

<sup>140</sup> U.S. Department of State, “Kenya 2014 Human Rights Report”, (2014), p.66. Available at: <http://www.state.gov/documents/organisation/236582.pdf>

<sup>141</sup> Ibid, p.64.

<sup>142</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>143</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>144</sup> The Act aims to give effect to Articles 67(2)(e) and 68(c)(i) of the Constitution and to provide procedures for eviction from land. See: [http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/LandLaws\\_Amendment\\_Act\\_28of2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/LandLaws_Amendment_Act_28of2016.pdf)

<sup>145</sup> See: [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CommunityLandAct\\_27of2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CommunityLandAct_27of2016.pdf)

<sup>146</sup> 2010 Kenya Constitution, Art. 61.

<sup>147</sup> 2010 Kenya Constitution, Art. 62(a)-(b).

<sup>148</sup> 2010 Kenya Constitution, Art. 62(1)(n).

<sup>149</sup> 2010 Kenya Constitution, Art. 62(1)(d)-(e).

<sup>150</sup> 2010 Kenya Constitution, Art. 62(1)(f).

<sup>151</sup> 2010 Kenya Constitution, Art. 62(1)(g).

<sup>152</sup> 2010 Kenya Constitution, Art. 62(1)(i).

<sup>153</sup> 2010 Kenya Constitution, Art. 62(1)(j).

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- <sup>156</sup> 2010 Kenya Constitution, Art. 63(2)(d)(i).
- <sup>157</sup> 2010 Kenya Constitution, Art. 63(2)(d)(ii).
- <sup>158</sup> 2010 Kenya Constitution, Art. 63(2)(d)(iii).
- <sup>159</sup> 2010 Kenya Constitution, Art. 64(a).
- <sup>160</sup> 2010 Kenya Constitution, Art. 64(b).
- <sup>161</sup> 2010 Kenya Constitution, Art. 64(c).
- <sup>162</sup> 2010 Kenya Constitution, Art. 40(1).
- <sup>163</sup> 2010 Kenya Constitution, Art. 41(2)(a).
- <sup>164</sup> 2010 Kenya Constitution, Art. 43(1)(b).
- <sup>165</sup> 2010 Kenya Constitution, Art. 43(1)(c).
- <sup>166</sup> 2010 Kenya Constitution, Art. 43(1)(d).
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- <sup>168</sup> 2010 Kenya Constitution, Art. 43(1)(f).
- <sup>169</sup> *Engineer Charo Wa Yaa et al. v. Municipal Council of Mombasa et al.*, Miscellaneous Civil Application No. 8 of 2011 (High Court in Mombasa, 2011), p.18.
- <sup>170</sup> *Satrose Ayuma v. Registered Trustees of the Kenya Railways et al.*, Petition No. 65 of 2010 (High Court of Kenya at Nairobi, 2013).
- <sup>171</sup> 2010 Kenya Constitution, Art. 42.
- <sup>172</sup> 2010 Kenya Constitution, Art. 60(1).
- <sup>173</sup> 2010 Kenya Constitution, Art. 60(1)(a).
- <sup>174</sup> 2010 Kenya Constitution, Art. 60(1)(c).
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- <sup>176</sup> 2010 Kenya Constitution, Art. 69(1)(a).
- <sup>177</sup> 2010 Kenya Constitution, Art. 69(1)(f).
- <sup>178</sup> 2010 Kenya Constitution, Art. 69(1)(g).
- <sup>179</sup> 2010 Kenya Constitution, Art. 69(1)(h).
- <sup>180</sup> 2010 Kenya Constitution, Art. 33.
- <sup>181</sup> 2010 Kenya Constitution, Art. 37.
- <sup>182</sup> 2010 Kenya Constitution, Art. 29(c).
- <sup>183</sup> 2010 Kenya Constitution, Art. 29(d).
- <sup>184</sup> 2010 Kenya Constitution, Art. 29(e).
- <sup>185</sup> 2010 Kenya Constitution, Art. 29(f).
- <sup>186</sup> 2010 Kenya Constitution, Art. 238(1)(b).
- <sup>187</sup> 2010 Kenya Constitution, Art. 244(d).
- <sup>188</sup> See: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN)
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- <sup>190</sup> U.S. Department of State, "Kenya 2014 Human Rights Report", (2014), p.60. Available at: <http://www.state.gov/documents/organisation/236582.pdf> (noting eight major ethnic communities identified in the 2009 Census: Kikuyu, 6.6 million; Luhya, 5.3 million; Kalenjin, five million; Luo, four million; Kamba, 3.9 million; Kenyan Somali, 2.3 million; Kisii, 2.2 million; and Mijikenda, 1.9 million).
- <sup>191</sup> See: Report of the UN Working Group on the Universal Periodic Review, Kenya, A/HRC/15/8, 17 June 2010, para. 109. See also, IWGIA, « Overview of Indigenous Peoples' Issues relating to Kenya's Commitments under the Universal Periodic Review », available at : [http://www.iwgia.org/iwgia\\_files\\_news\\_files/1148\\_IPs-UPR\\_Overview-Kenya\\_2014.pdf](http://www.iwgia.org/iwgia_files_news_files/1148_IPs-UPR_Overview-Kenya_2014.pdf)
- <sup>192</sup> See: <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx>
- <sup>193</sup> See: [http://www.un.org/esa/socdev/unpfii/documents/faq\\_drips\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf)
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- <sup>195</sup> <http://www.achpr.org/mechanisms/indigenous-populations/about/>
- <sup>196</sup> See: [http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr\\_wgip\\_report\\_summary\\_version\\_eng.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf)
- <sup>197</sup> Ibid. See also, the InterAmerican Commission on Human Rights for a view from Latin America, "Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities," (2015), available at: <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf>
- Oxfam, "Free, Prior, and Informed Consent in Africa An emerging standard for extractive industry projects,"(2016), available at: <https://www.oxfamamerica.org/explore/research-publications/fpic-in-africa/>
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<sup>199</sup> Ibid., p. 10.

<sup>200</sup> Taken from: [http://www.ihrb.org/uploads/reports/2015-02-05%2C\\_IHRB-UNDP\\_Report%2C\\_Promoting\\_Human\\_Rights%2C\\_Ensuring\\_Social\\_Inclusion\\_and\\_Avoiding\\_Conflict\\_in\\_the\\_Extractives\\_Sector.pdf](http://www.ihrb.org/uploads/reports/2015-02-05%2C_IHRB-UNDP_Report%2C_Promoting_Human_Rights%2C_Ensuring_Social_Inclusion_and_Avoiding_Conflict_in_the_Extractives_Sector.pdf) pp. 17-18

<sup>201</sup> See Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, "Extractive industries and indigenous peoples", A/HRC/24/41 (2013) available at: <http://unsr.jamesanaya.org/study/report-a-hrc-24-41-extractive-industries-and-indigenous-peoples-report-of-the-special-rapporteur-on-the-rights-of-indigenous-peoples>

<sup>202</sup> Ibid, para. 31-36.

<sup>203</sup> Available at: <http://www.kenyachambermines.com/publications/documents#9>

<sup>204</sup> Laws of Kenya, the Mining Act, 2016, available at: [http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MiningAct\\_No12of2016.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/MiningAct_No12of2016.pdf)

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<sup>212</sup> The Mining Act, 2016, Section 34(4).

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<sup>216</sup> The Mining Act, 2016, Section 179(d).

<sup>217</sup> The Mining Act, 2016, Section 179(b).

<sup>218</sup> The Mining Act, 2016, Section 179(c).

<sup>219</sup> The Mining Act, 2016, Section 140(g).

<sup>220</sup> The Mining Act, 2016, Section 180(1).

<sup>221</sup> The Mining Act, 2016, Section 124.

<sup>222</sup> The Mining Act, 2016, Section 46.

<sup>223</sup> The Mining Act, 2016, Section 47.

<sup>224</sup> The Mining Act, 2016, Section 50.

<sup>225</sup> See: <http://www.mining.go.ke/downloads.html>

<sup>226</sup> <https://portal.miningcadastre.go.ke/Site/CustomHtml.aspx?PageID=d7f3f61d-4689-4280-a59a-b865f002dd60>

<sup>227</sup> See: [http://www.erc.go.ke/images/docs/National\\_Energy\\_Petroleum\\_Policy\\_August\\_2015.pdf](http://www.erc.go.ke/images/docs/National_Energy_Petroleum_Policy_August_2015.pdf)

<sup>228</sup> Norwegian Church Aid, "Local Communities in Kenya's Extractive Sector: From paternalism to partnership." (2015), p.60. Nairobi, Kenya.

<sup>229</sup> Any resettlement framework should be grounded in the right to housing in particular. See OHCHR, Basic Guidelines on Development-Induced Displacement (2007) [http://www2.ohchr.org/english/issues/housing/docs/guidelines\\_en.pdf](http://www2.ohchr.org/english/issues/housing/docs/guidelines_en.pdf), and UN Habitat, Fact Sheet on Right to Adequate Housing. Available at: [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf)

<sup>230</sup> IFC, Performance Standard 5 on Land Acquisition and Involuntary Resettlement, (2012), [http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES)

<sup>231</sup> Petroleum (Exploration and Production) Act, Art. 4(2).

<sup>232</sup> Petroleum (Exploration and Production) Act, Art. 10(1).

<sup>233</sup> Petroleum (Exploration, Development and Production) Bill, Art. 3.

<sup>234</sup> Petroleum (Exploration and Production) Act, Art. 86, 93, and 94.

<sup>235</sup> Petroleum (Exploration and Production) Act, Art. 85.

<sup>236</sup> Petroleum (Exploration and Production) Act, Art. 85(4).

<sup>237</sup> Petroleum (Exploration and Production) Act, Art. 108(3).

<sup>238</sup> See : <http://www1.uneca.org/Portals/lpi/CrossArticle/1/Land%20Policy%20Documents/Sessional-paper-on-Kenya-National-Land-Policy.pdf>

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<sup>240</sup> Petroleum (Exploration and Production) Act, Art. 100(2)(b).

<sup>241</sup> Petroleum (Exploration and Production) Act, Art. 108.

<sup>242</sup> Community Land Bill 2015, Clause 37.

<sup>243</sup> Community Land Bill 2015 Clause 23.

<sup>244</sup> Petroleum (Exploration and Production) Act, Art. 111.

<sup>245</sup> See generally, EITI Standard provisions on contract transparency. Available at: [https://eiti.org/files/eiti\\_brief\\_on\\_contract\\_transparency.pdf](https://eiti.org/files/eiti_brief_on_contract_transparency.pdf); EU Country-by-Country Reporting Requirements for the Extractive sector. Available at: [http://europa.eu/rapid/press-release\\_MEMO-13-541\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-541_en.htm).

- <sup>246</sup> Petroleum (Exploration and Production) Act, Art. 102(1)(b).
- <sup>247</sup> Petroleum (Exploration and Production) Act, Art. 117(d).
- <sup>248</sup> Petroleum (Exploration and Production) Act, Art. 117(e).
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- <sup>254</sup> Energy Bill 2015, Art. 112(1)(a) and 156(a).
- <sup>255</sup> Energy Bill 2015, Art. 112(1)(b) and 156(b).
- <sup>256</sup> Energy Bill 2015, Art. 112(1)(c) and 156(c).
- <sup>257</sup> Energy Bill 2015, Art. 267.
- <sup>258</sup> EMCA Cap 387, Section 57A.
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- <sup>260</sup> For further explanations of each step see: European Commission – Oil & Gas Sector Guide on Implementing the Corporate Responsibility to Respect (2014). Available at: [https://www.ihrb.org/uploads/reports/EC-Guide\\_OG.pdf](https://www.ihrb.org/uploads/reports/EC-Guide_OG.pdf). And see other sources in the bibliography to the Guide and in the bibliography to this Report. See also: See for example, IPIECA's guide to Integrating human rights into environmental, social and health impact assessments (2013). Available at: <http://www.ipieca.org/news/human-rights-day-and-the-oil-and-gas-industry/> and ICMM, Integrating human rights due diligence into corporate risk management processes (2012). Available at: <http://www.icmm.com/en-gb/publications/integrating-human-rights-due-diligence-into-corporate-risk-management-processes>
- <sup>261</sup> For a further explanation of the responsibilities vis-à-vis business relationships, see European Commission – Oil & Gas Sector Guide on Implementing the Corporate Responsibility to Respect (2014) Available at: [https://www.ihrb.org/uploads/reports/EC-Guide\\_OG.pdf](https://www.ihrb.org/uploads/reports/EC-Guide_OG.pdf) and see other sources in the bibliography.
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- <sup>275</sup> International Finance Corporation, "Performance Standard 5: Land Acquisition and Involuntary Resettlement," (2012). Available at: [http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/3d82c70049a79073b82cfaa8c6a8312a/PS5_English_2012.pdf?MOD=AJPERES).
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<sup>313</sup> 2010 Kenya Constitution, Art. 169.

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<sup>339</sup> <https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>

<sup>340</sup> Article 5(3) of the Treaty for the Establishment of the East African Community, available at: [http://eacj.org/?page\\_id=33](http://eacj.org/?page_id=33)

<sup>341</sup> Article 6 (d) of the Treaty : good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights

<sup>342</sup> Interestingly, the Court notes that "The jurisdiction of the Court may be extended to human rights at a suitable date to be determined by the Council"(see: [http://eacj.org/?page\\_id=27](http://eacj.org/?page_id=27).), see also: <http://eacj.huriweb.org/wp-content/uploads/2013/09/Overview-of-the-EACJ.pdf>

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- <sup>359</sup> See: <http://www.ihrb.org/focus-areas/kenya/>
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- <sup>366</sup> See, e.g. UNESCO, World Heritage Papers No. 33, "Human origin sites and the World Heritage Convention in Africa", (2012), p.16. Available at: [http://whc.unesco.org/documents/publi\\_paper\\_series\\_33\\_en.pdf](http://whc.unesco.org/documents/publi_paper_series_33_en.pdf) (considering Kenya part of the reason why Africa, as essential to human history through fossil discovery, is considered the cradle of mankind).
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- CITATION?
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# Human Rights in Kenya's Extractive Sector

## Exploring the Terrain

### Background

Kenya is a resource rich developing democracy, and while it maintains a consistently low score on the transparency and corruption index, it has a newly implemented and progressive Constitution (2010) that has dramatically changed the structure of the country's government and judicial system. In 2012, large oil reserves estimated to be worth USD 62.4 billion were discovered, causing a heightened interest in foreign direct investment and extractive sector exploration and development.

### Message

This report is the product of desk-based and on-the-ground interviews to assess the existing human rights and environmental impacts attributed to Kenya's increasing extractive sector activities.

Recognising that the policy and legal framework plays an important role in setting the conditions to reinforce the corporate responsibility to respect human rights in the extractive sector, the Report includes an in-depth analysis of the policy and legal framework from a human rights perspective. Where these frameworks leave gaps or contradict international human rights standards, they present a challenge to a level playing field among companies, as the gaps can be filled by good – and bad – practices.

This can result in significant adverse impacts for local communities, as the field research highlights. The field-based, on-the-ground interviews provide perspectives from local communities, businesses and local governments on challenges and the impacts across a range of human rights.

The report highlights a number of concerns across a range of human rights, but chief among them were those related to land. Communities hosting extractives operations were concerned about inadequate consultation prior to companies accessing land, inadequate compensation for land and land improvements, inadequate protection of land rights due to lack of ownership title both for individual owners or communities that hold community title. Related to this were threats to livelihoods as a result of deprivation of land, as well as possible environmental degradation by the extraction activities.

Implementation gaps, in particular by government regulators, present a further critical driver of human rights challenges in the context of Kenya's extractive sector. This is compounded by information asymmetry between communities and business, diminishing the chances of successful advocacy on behalf of impacted communities.

### Implications

All stakeholders in Kenya's extractive sector – the Kenyan Government, oil, gas, mining companies, investors, home governments, and civil society organisations – are encouraged to explore the terrain of human rights in Kenya's extractive sector. This Report serves as a tool to better understand where the gaps exist and use the stakeholder-specific recommendations to effectively prioritise and advocate to close these gaps, providing a solid basis for the further expansion of Kenya's extractive sector in line with sustainable development.