

Kenya National Baseline Assessment

on

Business and Human Rights

2017

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Introduction

In 2011, the forty-seven-member United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs). This was the first global standard approved by states addressing the role of business with respect to human rights. The UNGPs are a set of 31 principles that operationalize the ‘Protect, Respect and Remedy’ framework whose fundamentals are that: states have the obligation to protect, respect, and fulfil human rights and fundamental freedoms including protecting against human rights abuses by third parties including business; businesses should respect human rights wherever they operate; and victims of human rights violations by business have a right to access appropriate and effective remedies.

In 2014, the UN Human Rights Council (UNHRC) urged UN member states to develop National Action Plans to implement the UNGPs at national level.¹ To date, fourteen countries, twelve in Europe and two in the Americas - the United States of America and Colombia- have developed action plans but numerous others have committed to while in other countries the civil society or national human rights institutions have taken steps towards the process.² In addition, some countries are enacting laws or issuing guidelines that address aspects of business and human rights. The United Kingdom’s Modern Slavery Act seeks to tackle the issue of modern-day slavery in UK companies and their supply chains including those abroad.³ France recently adopted a law that requires French companies to conduct human rights and environmental due diligence in their supply chains.⁴ In December 2015, the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCME) issued the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains to provide “guidance and support

¹In its report to the twenty-third session of the Human Rights Council, The United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises called upon States to “consider elaborating a national plan of action on implementation to define responsibilities at the national level, identify resource requirements and mobilize relevant actors, building on lessons learned from such experiences in other countries”

(A/HRC/23/32, p. 21 available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/119/28/PDF/G1311928.pdf?OpenElement> (accessed on July 13, 2017). Additionally, the UNWG has offered guidance to states on how to develop, implement and update National Action Plans on Business and Human Rights. See “Guidance on National Action Plans on Business and Human Rights” available at http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf (accessed on July 13, 2017)

² For a summary of the National Action Plans processes that are underway, visit <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed on July 13, 2017)

³ For instance, the UK Home Office has issued a statutory guide on “Slavery and human trafficking in supply chains: guidance for businesses” available at <https://www.gov.uk/government/publications/transparency-in-supply-chains-a-practical-guide> (accessed on July 13, 2017)

⁴ The text is available here (in French) <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>, last accessed on July 13, 2017. For several commentaries on the law see <https://business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains> accessed on July 13, 2017.

to companies which are extracting...to identify, prevent and mitigate their risks of directly or indirectly contributing to conflict, serious human rights abuses and risks of serious misconduct”.⁵

The Committee on Economic Social and Cultural Rights recently adopted a General Comment, No. 24 on State obligations under the International Convention on Economic Social and Cultural Rights in the Context of Business Activities.⁶ The Committee recognises the contribution of business in the realization of numerous Covenant rights, such as health, housing, work, favourable conditions of work, among others. This General Comment was an elaboration of the May 2011 Statement on the Obligations of the State Parties regarding the Corporate Sector and Economic, Social and Cultural Rights.⁷ In the latter, the Committee spelt out the nature state obligations under Article 2(1) of the Covenant. Based on the UNGPs, the General Comment 24 expounds on the statement of state obligations and further seeks to assist business enterprises of all sizes and wherever they operate, to discharge their corporate responsibility to respect human rights under the ICESCR. The General Comment focuses on a number of issues: non-discrimination, where it recognises that people with certain vulnerabilities are at greater risk of experiencing negative impacts of business operations while calling on states to address these specific challenges; extra-territoriality- the Committee calls on state parties to regulate the conduct abroad of business enterprises domiciled in their jurisdictions; remedies-the Committee reiterates the right of access to remedy for those whose Covenant rights have been harmed by business activities. Here the Committee expresses preference for judicial remedies (but points out the importance of non-judicial remedies) and calls on state parties to eliminate substantive, procedural and practical barriers to remedy; and implementation-the Committee supports the development of NAPs that incorporate human rights principles, including including effective and meaningful participation, non-discrimination and gender equality, and accountability and transparency.

⁵ China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, ‘Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains’ available at https://www.globalwitness.org/documents/18138/201512_Chinese_Due_Diligence_Guidelines_for_Responsible_Mineral_Supply_Chains_-_En_K83fxzt.pdf accessed on July 13, 2017

⁶ UN Committee on Economic, Social and Cultural Rights General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, available at http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/E_C-12_GC_24_8228_E.docx

⁷ UN Committee on Economic, Social and Cultural Rights, ‘Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights’ (2011)

Earlier on, during the 2015 UN Universal Periodic Review, Kenya accepted a recommendation to develop a NAP for the implementation of the UNGPs.⁸ This Baseline Report has been prepared to support the development of NAP. The baseline seeks to assess some of the country's key laws and regulations that guide the conduct of business in order to identify the extent to which they speak to human rights, their enforcement, gaps and recommendations. It is as a result of desk review of the extent to which the government of Kenya has implemented its obligations in promoting the respect of human rights, protecting against human rights violations by business enterprises through policies, laws and regulations and their enforcement as well as provision of appropriate and effective remedies for breach.

This report will be complemented by country-wide stakeholder consultations with businesses, communities and civil society organizations and government that seek to identify the most common areas of tension between business and human rights, how they manifest and recommend solutions that address them.

The report is divided into two sections. The first section, introduction, presents a brief summary of the journey towards NAPs including where we are globally; the methodology used in preparing this baseline; and the country context. The second section comprises key findings and recommendations of state obligations under pillars 1 and 3 and assesses the extent to which the government in its policy-making and legislative action, enforcement and provision of judicial and non-judicial remedies adheres to the UNGPs. The report is not exhaustive in its analysis of the current status of implementation, and focuses on the issues of land and natural resources; labour, environment, revenue transparency and; accountability and access to remedy. The choice of the five issues was based on a non-scientific survey of the most common areas of impact by business operations that affect the enjoyment of human rights.

Country Context

Kenya lies on the east coast of Africa fronting the Indian Ocean. Estimates from the Kenya Bureau of Statistics put the population estimate at 42.96 million in 2014 of which 37 percent was aged between 15– 34 years and 42 percent aged 0 -14 years⁹ making it a very young nation. The estimated population growth rate per annum is 1 million people.¹⁰

⁸ Kenya National Commission on Human Rights, 'The National Action Plan on Business and Human Rights in Kenya: Underlying Framework', available at <http://nap.knchr.org/About-Us/Underlying-Framework> accessed on July 13, 2017

⁹ The World Bank, The World Bank in Kenya <http://www.worldbank.org/en/country/kenya/overview> accessed on July 13, 2017

¹⁰ As above

Political and administrative context

Kenya is a constitutional democracy whose government is headed by a president directly elected by the people. The country promulgated a new Constitution in 2010, which introduced far-reaching changes in the country's governance structure. The most significant change was the introduction of a devolved system of governance that established 47 county-government units while retaining the national level government. The Constitution provides that the two levels are 'distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'¹¹.

Economic context

Kenya is the leading economy in East Africa with a GDP per capita of 1133.46 in 2015.¹² The country has a mixed or diversified economy comprising the following sectors: agriculture, tourism, services, manufacturing, public administration and now budding mining and oil and gas sectors.

Kenya also leads her East African neighbours on foreign direct investment with most of the inflows benefitting extractives and infrastructure projects.¹³ While this is encouraging, it is important to remember that these sectors mainly create transient low level jobs and are thus not a panacea to the country's twin challenges of unemployment and economic inequality.

From the UNDP Human Development Index 2017, compared to the rest of East Africa, unemployment is highest in Kenya at 39.1 percent of the Kenyan population of working age compared to Tanzania's 24 percent, Ethiopia's 21.6 percent, Uganda's 18.1 percent and Rwanda's 17.1 percent.¹⁴ Left un-arrested, this situation has the potential to stifle the very growth the country boasts of through, a possibility of rising crime and violence as well as high dependency where a few working people support large numbers of unemployed or underemployed thus causing a strain in growing savings and local investments. The challenge of wealth inequality is equally daunting with the average income of Kenya's richest 10 percent estimated at 100 times bigger than that of the bottom 10 percent.¹⁵

¹¹ Article 6, The Constitution of Kenya

¹² The World Bank, The World Bank Open Data <http://data.worldbank.org/country/kenya> accessed on July 13, 2017

¹³FDI Intelligence: The Foreign Direct Investment Report, 2016 available at http://forms.fdiintelligence.com/report2016/files/The_fDi_Report_2016.pdf accessed on July 13, 2017

¹⁴ Many left behind by human Development Progress in Sub-Saharan Africa, UNDP Report finds, UNDP, May 2, 2017 available at <http://www.ke.undp.org/content/kenya/en/home/presscenter/pressreleases/2017/HDR-Kenya-Launch.html> accessed on July 13, 2017

¹⁵ Kenya mints 900 new dollar millionaires as wealth gap widens, Business Daily March 2, 2017 available at <http://www.businessdailyafrica.com/corporate/Kenya-mints-900-new-dollar-millionaires/539550-3833448-iiFMLV/index.html> accessed on July 16, 2017

Insights from key sectors

Agriculture

This is the dominant and most important economic activity, which contributes 25% to the GDP and provides 20% of employment opportunities and contributes over 50% of export revenues.¹⁶ In 2015 the sector grew by 5.6 percent due to favourable weather conditions and resulted in increased agricultural output.¹⁷ Farming is on both large and small scale. The former is dominated by foreign multinational companies (MNCs) and the latter by subsistence farmers. Livestock farming is for both dairy and meat with former mainly concentrated in areas of high agricultural productivity and the latter in the arid and semi-arid regions.

Historically the sector has had its fair share of human rights concerns. Labour issues are commonplace, a factor that can be attributed to the large numbers of people it employs but also to the transient nature of majority of agriculture work. Environmental degradation as a result of agricultural activities such as sustained chemical use have also been raised as concerns from surrounding communities. In addition, community relations of agribusinesses and the host communities have also suffered due to blockades by companies of access routes, use of excessive force by company guards and criminalization of business and human rights advocacy. The question of land rights in the context of large-scale agriculture is emerging as leases for some of the MNCs near expiration and new large-scale projects seek to be developed. Major human rights concerns include deprivation of land for host communities and limitation of access to water. The latter is a serious challenge given that Kenya is generally water scarce but also that many small scale farmers and pastoralists depend on available surface water from rivers, swamps, dams, canals and shallow wells and boreholes. Subsequently, any water diversion or limitation of access directly impacts the ability to support these livelihood activities.

Manufacturing

In 2015 this sector's output grew by 3.5 percent as compared to 3.2 percent in 2014 driven by increased production of pharmaceutical products; beverages; meat and meat products;

¹⁶ National Bureau of Statistics cited in Deloitte, 'Kenya Economic Outlook 2016: The Story Behind the Numbers', (June 2016) available at <https://www2.deloitte.com/content/dam/Deloitte/ke/Documents/tax/Economic%20Outlook%202016%20KE.pdf>

¹⁷ Economic Survey 2016, Kenya National Bureau of Statistics, <https://www.knbs.or.ke/economic-survey-2016/> accessed on July 16, 2017

plastics; and non-metallic goods¹⁸. Poor working conditions including health and safety at work, casualization of labour are the most common place human rights issues arising from this sector but environmental pollution is also a growing concern. The country is keen to grow this sector so as to boost employment opportunities with one of the strategies having three fully established special economic zones¹⁹ (SEZs). The SEZs will benefit from a number of tax incentives and preferential licensing requirements as well as incentives on other inputs such as reduced power costs.²⁰

Micro, Small and Medium Enterprises (SMEs) constitute a significant constituency the manufacturing sector. They range in the number of employees and their annual turnover.²¹ Dominant human rights concerns among this class of manufacturers include labour-related grievances (such as poor pay, poor working conditions and the lack of freedom of association), lack of ethnic diversity and low tax compliance.

Tourism

Earnings from tourism went down in 2015, as did the number of international visitors.²² Terrorism and insecurity have negatively impacted this sector, but despite the decline it is still a significant sector for the country's GDP, foreign exchange earnings and employment. Human rights concerns from this sector include, racial discrimination in hotel service and allegations of sexual exploitation of children especially along the coast.²³ The sector is prone to unpredictability due to a variety of factors including some emanating from global economic cycles. This makes employment in the sector less reliable compared to others. In 2017 the country witnessed conflict over access to land and land-based resources within private wildlife conservancies and ranches between host communities and private ranches threatening the once-thriving wildlife tourism in the area. Resulting from this conflict, were issues around security, livelihoods and access to land all that need government intervention for the sustainability of private conservation.

¹⁸ As above

¹⁹ Kenya to Roll out Special Economic Zones in First Quarter of 2106, Ministry of Industry, Trade and Cooperatives, <http://www.industrialization.go.ke/index.php/media-center/blog/310-kenya-to-roll-out-special-economic-zones-in-first-quarter-of-2016> accessed on July 16, 2017

²⁰ As above.

²¹ See The Micro and Small Enterprises Act, No. 55 of 2012

²² Note 16 above

²³ Kuoni, Assessing Human Rights Impacts, Kenya Pilot Project, 2012, http://cr.kuoni.com/docs/assessing_human_rights_impacts_0_0.pdf accessed on July 16, 2017

Financial, insurance services and ICT sector

The country has a robust financial and insurance services and ICT sector. In 2015, the finance and insurance sub-sector expanded at 8.7 percent up for 8.4 percent in the previous year.²⁴ Similarly the ICT sub-sector had expanded output by 8.1 per cent in the same period.

The banking industry has been highly profitable even in times of financial crisis elsewhere in the world. The perception was that these profits were in part attributed to the high cost of credit that had risen to among the highest in the world²⁵ when in August 2016 the government moved to cap the interest rates. Law now caps these rates at 4 percent above the base rate set and published by the Central Bank of Kenya. This regulation has not been well received by the banks and access to credit is reportedly slower which could inhibit investments and overall economic growth. The International Monetary Fund has too recently backed the local banks in calling for the law to be scrapped.²⁶ From this sub-sector, human rights concerns include money laundering, corruption (where bank directors have been known to steal depositors money leading to collapse of banks), holding proceeds of crime, knowingly financing businesses involved in international crimes, lack of access to banking by low-income or vulnerable customers, discrimination in service provision and frequent staff layoffs.

However, the challenge of financial non-inclusion is being overcome through innovations from the ICT sector. The pioneering mobile money technology M-PESA and other mobile money services have reduced financial exclusion by almost 50 percent to 75.3 percent in the last 10 years²⁷ and changed the movement of money in the country. Indeed, to tap into this, the government recently successfully floated a retail bond via the mobile technology on a platform dubbed M-AKIBA effectively widening the government securities market within the reach of millions of ordinary Kenyans with the minimum investment being KES 3000 (USD30 equivalent).²⁸ On the part of government, access to cheaper local credit is the obvious advantage. Data privacy is a dominant human rights concern in this sub-sector. In addition, the contribution of telecommunications companies (positive and negative) when

²⁴ Note 16 above

²⁵ Banking Sector Reforms Vital for Kenya, Institute of Certified Public Accountants of Kenya August 2016, <https://www.icpak.com/wp-content/uploads/2016/08/ICPAK-Press-Statement-on-capping-of-interest-rates-.pdf> accessed on July 16, 2017

²⁶ IMF mounts pressure on Kenya to scrap interest rate capping law, Business Daily, April 15, 2017 <http://www.businessdailyafrica.com/news/IMF-pressure-Kenya-interest-rate-cap/539546-3890742-sc66p0z/> accessed on July 16, 2017

²⁷ 2016 Finances Household Survey, February 2016, <http://fsdkenya.org/wp-content/uploads/2016/02/The-2016-FinAccess-household-survey-report1.pdf> accessed on July 16, 2017

²⁸For more information on this government issued retail bond that seeks to enhance financial inclusivity, visit <http://www.m-akiba.go.ke/> accessed on July 16, 2017

used as a platform to disseminate hate speech especially during electioneering season has been documented.²⁹

Construction

According to the Kenya National Bureau of Statistics, in 2015, the sector recorded the fastest growth of 13.4%.³⁰ Increased government spending on public infrastructure has boosted the growth in this sector as has private investments in real estate. The sector has also attracted significant foreign capital for the financing of public infrastructure and foreign players' mainly Chinese companies that have triggered complaints of unfair competition from the local players. Human rights challenges associated with the sector include low pay, poor working conditions,³¹ and inferior standards thus endangering the safety of workers and the public in general.³²

Extractives sector

This sector comprises of activities in the exploration and development of mining and oil and gas resources. There has been a steady growth in investments in this area but the current global decline in commodity prices has seen reduced activity over the last year. Whereas, mining has been taking place for several decades, its contribution to the GDP has been approximately one percent with expected growth to 3 percent by 2017 and 10 percent by 2030.³³ Large-scale mining is currently confined to a few areas, but artisanal and small-scale mining and industrial minerals mining are more widespread.³⁴ On the other hand, oil exploration in the country began in the 1950s but it was not until 2012 when the first oil discovery was made.³⁵ The potential of this sector to contribute positively to economic growth and poverty eradication is recognised in the country's economic blue print, Vision 2030 where it is now included as a priority area of the economic pillar.³⁶ Major human rights risks associated with this sector include, the potential loss of land, environmental pollution,

²⁹ IHRB, Corporate responses to hate speech in the 2013 Kenya Presidential Elections, Case Study: Safaricom, November 5, 2013, <https://www.ihrb.org/focus-areas/information-communication-technology/report-digital-dangers-corporate-responses-hate-speech>

³⁰ Kenya National Bureau of Statistics, 'Economic Survey 2016'

³¹ Standard Gauge Railway workers strike, decry poor pay, Reuben Wanyama, Citizen Digital, October 10, 2015 <https://citizentv.co.ke/news/standard-gauge-railway-workers-strike-decry-poor-pay-102827/> accessed on July 16, 2017

³² Efforts to tackle problem of low-quality construction in Kenya, Oxford Business Group <https://www.oxfordbusinessgroup.com/analysis/build-last-efforts-tackle-problem-low-quality-construction> accessed on July 16, 2017

³³ Ministry of Mining, 'Mining and Minerals Policy, (2016)

³⁴ As above

³⁵ National Oil Corporation of Kenya, 'Oil and Gas Exploration History in Kenya', available at <http://nationaloil.co.ke/site/3.php?id=1> accessed on July 27, 2017

³⁶ Kenya Vision 2030, 'Second Medium Term Plan (2013-2017)

lack of access to information as a result of poor transparency and accountability, gender gap and labour (including child labour) among others.³⁷

Assessing Kenya’s extent of implementation of the UNGPs

The UNGPs have three pillars. These are:

- a) Pillar 1: The State duty to protect against human rights abuses including by third parties such as businesses.
- b) Pillar 2: The responsibility of businesses to respect human rights including by ensuring that their operations do not harm individuals or communities. Additionally, they are required to take positive measures to ensure that they enhance the enjoyment of human rights.
- c) Pillar 3: The obligation of the State and the responsibility of businesses to ensure that victims of human rights abuses by businesses have access to both judicial and non-judicial remedies.

The following sections discuss pillars 1 and 3. The sections follow the UNGPs ‘Implementing the United Nations “Protect, Respect and Remedy” Framework’³⁸ (The Framework). The Framework, comprising of 31 principles, sequentially offers guidance on each of the pillars. For each of the principles discussed, this report highlights steps taken by the State towards meeting her international human rights obligations to protect against business-related human rights abuses. The report goes on to identify the gaps and suggests measures that should be taken to address them.

Pillar 1

Guiding principle 1: State duty to protect human rights

The State duty to protect human rights entails ensuring that third parties, including businesses do not constrain the enjoyment of right-by-right holders. In fulfilling this duty, States are required to take appropriate legislative, administrative, regulatory and judicial steps to prescribe conduct that ensures that private entities do not violate human rights.

The Constitution of Kenya 2010 includes an expansive Bill of Rights that guarantees both civil and political rights, and economic, social and cultural rights.³⁹ This is a progressive

³⁷ Human Rights in the Kenya Extractive Sector: Exploring the Terrain, Institute for Human Rights and Business, December 02, 2016 <https://www.ihrb.org/focus-areas/commodities/human-rights-in-kenyas-extractive-sector-exploring-the-terrain> accessed on July 16, 2017

³⁸ UN Human Rights Council, ‘United Nations Guiding Principles on Business and Human Rights’, (2011)

³⁹ Chapter 4, The Bill of Rights, Constitution of Kenya 2010

departure from the now repealed independence constitution, which only guaranteed civil and political rights.

Article 20 (1) of the Constitution of Kenya 2010 provides that ‘the bill of rights applies to all law and binds State organs and all persons.’ Article 260 defines ‘a person’ to include, ‘a company, association or other body of persons whether incorporated or unincorporated.’ Consequently, corporations operating in Kenya have human rights duties.

- Thus in principle, businesses share in duties for human rights, which is a large bundle of

- This position was given judicial affirmation by the High Court in the following cases: In *Amy Kagendo Mate v Prime Bank Limited, Credit Reference Bureau & another*, the court held that “the Constitution now contemplates both vertical and horizontal application of the Bill of Rights. Article 2(1) and 20(1) both clearly provide that the Constitution binds all persons. This has been the finding of this court in various decisions-see *Abdalla Rhova Hiribae & 3 Others-vs-The Hon Attorney General & 6 Others* High Court Civil Case No. 14 of 2010; *Law Society of Kenya –v- Betty Sungura Nyabuto & Another* Petition No. 21 of 2010 **and** *B.A.O & Another –v-The Standard Group Limited & 2 Others* Petition No. 48 of 2011.”¹

obligations than the ‘responsibility to protect’ espoused by the United Nations Guiding Principles on Business and Human Rights (UNGPs).

- The National Baseline Assessment seeks to assess the extent to which the State has taken concrete measures to protect human rights that may be infringed by businesses, and ensure credible remedy pathways for individuals or groups whose rights have been violated by businesses.
- Kenya is signatory to the key international and regional human rights treaties. Besides endorsing the Universal Declaration on Human Rights, it has ratified the International Covenant on Civil and Political Rights, International Convention on Economic Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, The International Convention on the Elimination of all forms of Racial Discrimination (CERD); and Convention on the Rights of Persons with Disabilities. In addition, it is a signatory to the following ILO fundamental conventions, C029-Forced Labour, C098-Right to Organize and Collective Bargaining, C100-Equal Remuneration Convention, C105-Abolition of Forced Labour,

C111-Discrimination (Employment and Occupation), C138-Minimum Age Convention (specified age being 16 years) and C182-Worst Forms of Child Labour.⁴⁰

- At the regional level, Kenya is party to the following instruments, African Charter on Human and Peoples Rights (Banjul Charter), African Charter on the Rights and Welfare of the Child, AU Convention on Preventing and Combating Corruption, Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol).
- However, several treaty bodies have made recommendation on steps to be taken to ensure Kenya fulfils her obligations, including those that relate to the impact of business on human rights. In 2011, the Committee on the Elimination of Racial Discrimination called upon the country to put in place measures outlawing racial discrimination generally and include it in her policies on housing and employment.⁴¹ Regarding the Convention on the Rights of Persons with Disabilities, the Committee in 2015, called on the State to enforce sanctions for non-compliance with employment quotas for persons with disabilities in both public and private sectors.⁴² Likewise in 2011, the CEDAW Committee has requested the state to take additional measures to raise women's participation in formal employment, guarantee the principle of equal pay for equal work.⁴³ In 2016, the Committee on the Convention of the Child called upon the state to establish a clear regulatory framework to guide businesses to ensure that their operations do not negatively impact on children's rights and to monitor compliance with the same.⁴⁴ During the 2012 review of Kenya's implementation of the ICCPR, the Human Rights Council recommended that the state put in place laws to guide evictions and to also ensure prior consultations with affected persons and for their resettlement. The HRC further recommended that in developing natural resources, the state to respect the rights

⁴⁰ For a list of all ILO Conventions ratified by Kenya, see International Labour Organization, 'Ratifications for Kenya', available at

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103315

⁴¹ See the Concluding observations of the Committee on the Elimination of Racial Discrimination in relation to Kenya, (8 August–2 September 2011), CERD/C/KEN/CO/1-4 available at <http://uhri.ohchr.org/Document/File/e450723c-26e1-4485-b19a-9fc1864a3843/1787464a-3593-471c-a19c-859c127f1d66>

⁴² Concluding observations of the Committee on the Rights of Persons with Disabilities on the initial report of Kenya, 30 September 2015, CRPD/C/KEN/CO/1 available at <http://uhri.ohchr.org/Document/File/0966e87e-d469-4412-be33-48305b945564/8355b2d4-bdcd-4e27-ba62-1918fdcca3b3>

⁴³ Concluding observations of the Committee on the Elimination of Discrimination against Women on Kenya's report, (17 January – 4 February 2011), CEDAW/C/KEN/CO/7

<http://uhri.ohchr.org/Document/File/f35b91df-ae03-4601-88d5-616b00f16c14/143bef49-c00c-44e5-b371-3b58d3a68759>

⁴⁴ Concluding observations of the Committee on the Rights of the Child on the combined third to fifth periodic reports of Kenya, (21 March 2016) CRC/C/KEN/CO/3-5 <http://uhri.ohchr.org/Document/File/2bbcab03-b684-4dc1-8179-06335974b933/db08d411-1fd8-4622-8bc9-6d3cc1e9bcf2>

of minorities and indigenous people to their ancestral land⁴⁵. In 2016, the CESCR Committee made some recommendations to the state that have a bearing on the private sector. They urged the state to develop measures to promote employment of persons with disabilities, youth and women and create an effective system to monitor the employment quota system in favour of persons with disabilities; ensure application of minimum wages and establish a system of indexing the same against the cost of living; allocate adequate resources to the department of occupational health and safety to enable it function effectively; and guarantee security of tenure for all and put in place a framework to guide evictions and resettlement.⁴⁶

- Specific to the ILO conventions, the supervisory bodies have made a number of recommendations, the pertinent ones captured here. With regard to C182, the committee recommended in 2015 that the state finalises the draft and to prevent engagement of children in the worst forms of child labour⁴⁷. On C029, the Committee in 2015 requested more information on the implementation of the national counter-human trafficking framework.⁴⁸ And in 2013, the Committee reviewing Kenya's implementation of C100 requested for further information on the state's efforts to guarantee equal pay for equal work and to provide information on measures taken to this end.⁴⁹ Likewise the Committee in reviewing C111 requested for more information on employment discrimination in the EPZ zones, and on measures taken to eliminate discrimination in employment and occupation.⁵⁰

⁴⁵ Concluding observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012 after Consideration of reports submitted by Kenya under article 40 of the Covenant, (31 August 2012) CCPR/C/KEN/CO/3

<http://uhri.ohchr.org/Document/File/909280e8-0c98-4072-ab8a-1916a97b55d1/b7a670df-1a3c-418d-9db9-e44da1f903f4>

⁴⁶ Committee on Economic, Social and Cultural Rights' concluding observations on the combined second to fifth periodic reports of Kenya, (6 April 2016) E//C.12/KEN/CO/2-5 <http://uhri.ohchr.org/Document/File/fc820936-a107-4811-a154-d4224a0eeb8e/d482ce33-3eee-49be-8b19-20ad32a9bc42>

⁴⁷ See International Labour Organization, 'Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016) *Worst Forms of Child Labour Convention, 1999 (No. 182)* - Kenya (Ratification: 2001)

http://www.ilo.org/dyn/normlex/en/F?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3253391:NO

⁴⁸ See International Labour Organization, 'Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016) *Forced Labour Convention, 1930 (No. 29)* - Kenya (Ratification: 1964)

http://www.ilo.org/dyn/normlex/en/F?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3251850:NO

⁴⁹ See International Labour Organization, 'Direct Request (CEACR) - adopted 2013, published 103rd ILC session (2014) *Equal Remuneration Convention, 1951 (No. 100)* ; available at

http://www.ilo.org/dyn/normlex/en/F?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3142528:NO

⁵⁰ See International Labour Organization, 'Direct Request (CEACR) - adopted 2013, published 103rd ILC session (2014) *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)* available at

http://www.ilo.org/dyn/normlex/en/F?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3142554:NO

- Kenya has also fallen short in implementing the African Charter on Human and People’s Rights. The African Commission on Human and People’s Rights in 2009, found that Kenya in displacing the Endorois from their ancestral land had violated the community’s rights to freedom of Conscience; property; education; free disposal of wealth and natural resources; and the right to economic, social and cultural development⁵¹. And on May 26, 2017, the African Human and People’s Court found Kenya to be in violation of the rights of the Ogiek community⁵². These two cases are important because they uphold the rights of indigenous communities, and that the pursuit of development projects or conservation should not be at the expense of indigenous communities such as the Endorois and Ogiek.
- The Constitution recognizes international law and provides that ‘[A]ny treaty or convention ratified by Kenya shall form part of the law of Kenya...’⁵³ It obligates the State to “enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.”⁵⁴
- Regulation of business conduct is generally provided for in the laws governing the creation of business such as the Companies’ Act while business operations are governed by issue specific laws such as those relating to tax, labour, protection of the environment, anti-corruption, health and safety among others. In addition, there are laws that regulate specific sectors such as mining, petroleum, banking, insurance, and telecommunications.

Laws regulating business conduct in relation to labour rights

- **The Constitution:** Article 41 of 2010 Constitution guarantees every person the right to fair labour practices. It then confers specific rights to workers, employers and trade unions and employers’ organizations. Every worker is entitled to fair remuneration, reasonable working conditions, and the right to join and participate in the activities of a trade union and go on strike as a means of advocating for their labour-related rights.⁵⁵ Employers are entitled to form and join employers’ organizations, and participate in such organizations’ programs.⁵⁶ Trade unions and employers organizations are entitled to organize and form new or join existing

⁵¹ <http://www.achpr.org/communications/decision/276.03/>

⁵² Full citation was not available at the time of writing this report, but a statement from the court is available at, <http://www.achpr.org/press/2017/05/d358/>

⁵³ Article 2 (6)

⁵⁴ Article 21 (4)

⁵⁵ Article 41, The Constitution of Kenya, 2010, available at <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> (accessed on April 20, 2017)

⁵⁶ Article 41 (3)

federations.⁵⁷ It prohibits slavery, servitude and forced labour.⁵⁸ This protection is non-derogable.⁵⁹ The Constitution also provides for the establishment of Industrial and Labour Relations Court.⁶⁰

- Other constitutional guarantees that support labour rights include the guarantee of equality and freedom from non-discrimination⁶¹, protection from ‘any form of violence, from either public or private sources’,⁶² and prohibition against torture “in any manner, whether physical or psychological”.⁶³

Domestic legislation

There are several statutes that regulate various aspects of labour such as disputes, working conditions and protection against discrimination.

- **The Occupational Safety and Health Act, 2007⁶⁴:** This statute was enacted to protect the “safety, health and welfare of workers and all persons lawfully present at workplaces.” It also creates the National Council for Occupational Safety and Health, which is charged with the implementation of the Act. Part VI of the Act prescribes standards required for the workplace including “sufficient and suitable sanitary conveniences”, sufficient and suitable lighting,⁶⁵ access to drinking water, proper drainage, ventilation, and adequate cleanliness.⁶⁶ It mandates employers to provide protective clothes for workers who come into contact with wet or injurious substances. Where there is cause to believe that an illness is due to the conditions or the nature of work,⁶⁷ the Act stipulates that special measures for medical surveillance may be demanded, and the cost borne by the employer. The employer shall bear the cost of medical examination and treatment for work related illnesses or injuries.
- **The Employment Act, 2007⁶⁸:** This law protects workers from exploitation at the workplace by outlawing forced labour, discrimination in employment and

⁵⁷ Article 41 (4)

⁵⁸ Article 30

⁵⁹ Article 25 (b)

⁶⁰ Article 162 (2)

⁶¹ Section 27

⁶² Article 29 (c)

⁶³ Article 29 (d)

⁶⁴ Act no 15 of 2007.

<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/OccupationalSafetyandHealth%28No.15of2007%29.pdf>

⁶⁵ Section 52

⁶⁶ See Part VI of the Act

⁶⁷ Section 103

⁶⁸ Employment Act, Chapter 226, Laws of Kenya, available at

http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EmploymentAct_Cap226-No11of2007_01.pdf

sexual harassment. In relation to sexual harassment, the Act requires that an employer with twenty or more employees should have a policy statement on sexual harassment.⁶⁹ Additionally, it obligates employers to give a contract of service to protect against overexploitation and casualization of labour. Female employees are guaranteed a three months maternity leave with full pay⁷⁰. Other guarantees include paid sick leave (if the employee falls sick in the course of the work), reasonable housing or housing allowance that is sufficient to secure reasonable accommodation, access to drinking water. There is a laid down termination procedure to safeguard against unfair and capricious termination. The Act prohibits employment of children in any activity that constitutes “worst form of child labour,⁷¹ which under the Act includes “work which, by its nature or circumstances in which it is carried out, is likely to harm the health, safety or morals of the child’.⁷² This is necessary because it is common for children in the agriculture and artisanal mining sectors⁷³ to work instead of attending school. Labour officers appointed under the Act are tasked to ensure that employers comply with employment law. An aggrieved party may complain to a labour office or in some cases, police officer. The Act also spells out a dispute settlement mechanism between employers and employees.

- **Labour Relations Act⁷⁴:** It provides for the establishment and regulations of trade unions and prescribes how trade disputes should be handled. It also spells out how employers’ organisations, trade unions and government representatives should conduct collective bargaining agreements.
- **The HIV and AIDS Prevention and Control Act⁷⁵:** The Act prohibits discrimination in the workplace, including denial of access to employment, transfer, and denial of promotion or termination of employment on the grounds of actual, perceived or suspected HIV status.⁷⁶

⁶⁹ No Bed of Roses: The Kenya Flower Pickers Fighting Sexual Harassment, Nicole Kelly BBC5, 2017 available at <http://www.bbc.com/news/business-39103419> accessed on July 17, 2017.

⁷⁰ Section 29, Employment Act

⁷¹ Section 53

⁷² Section 2. This mirrors the definition given in the ILO Convention on the Worst Forms of Child Labour, 182.

⁷³ Human Rights in the Kenya Extractive Sector: Exploring the Terrain, Institute for Human Rights and Business, December 02, 2016 <https://www.ihrb.org/focus-areas/commodities/human-rights-in-kenyas-extractive-sector-exploring-the-terrain> accessed on July 16, 2017

⁷⁴ Act No. 14 of 2007

⁷⁵ Act No 14 of 2006

⁷⁶ Section 31

- **The Children Act⁷⁷:** The Act defines a child as anyone who has not attained the age of 18 years. Section 10 outlaws child labour and states that “[e]very child shall be protected from economic exploitation and any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development”⁷⁸ It defines child labour to include situations where a child provides labour as an assistant there the labour is considered as that of the adult for purposes of payment; or where an individual or institution gains from such labour, regardless of whether the child is paid or not.⁷⁹ However, despite Kenya’s ratification of ILO 182 on Worst Forms of Child Labour, the country is yet to domesticate this undertaking.⁸⁰
- **The Sexual Offences Act.⁸¹** Section 23 of the Sexual Offences Act criminalizes sexual harassment by a person in a position of authority. This includes persons in private entities exercising authority over others.⁸² Recently, a civil court awarded damages to an employee who has been subjected to sexual harassment by her supervisor.⁸³

Laws regulating business conduct in relation to the environment

- **The Constitution of Kenya, 2010**

- Article 42 states 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 through legislative and other measures.
- Article 69 (2) obligates every person to cooperate with the State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.
- Article 70 (1) provides that one may apply to court for redress if the right to a clean and healthy environment under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened. Article 70 (1) thus gives every

⁷⁷ Chapter 141, Law of Kenya, Revised 2010

⁷⁸ Section 10 (1) of the Children Act

⁷⁹ As above Section 10 (5)

⁸⁰ International Labour Organization, Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016) *Worst Forms of Child Labour Convention, 1999 (No. 182) - Kenya*
http://www.ilo.org/dyn/normlex/en/F?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3253391:NO

⁸¹ Sexual Offences Act, No. 3 of 2006

⁸² As above S. 23

⁸³ See ‘G4S to pay Sh35m for illegal sacking, sexual harassment’ Carolyne Kubwa, The Star May 11, 2017, available at http://www.the-star.co.ke/news/2017/05/11/g4s-to-pay-sh59m-for-illegal-sacking-sexual-harassment_c1558726 accessed on July 16, 2017

Kenyan access to a court of law to seek redress in environmental matters without the hitherto restrictive *locus standi* requirements.

- **International law protection of Environment**

- **Universal Declaration of Human Rights:** Article 12 provides that State parties to the covenant should take measures to “The improvement of all aspects of environmental and industrial hygiene”⁸⁴ as part of the measure to secure the right to the “enjoyment of the highest attainable standard of physical and mental health”.
- **International Covenant on Economic Social and Cultural Rights:** Article 12 provides that State parties to the covenant should take measures to “the improvement of all aspects of environmental and industrial hygiene”⁸⁵ as part of the measure to secure the right to the “enjoyment of the highest attainable standard of physical and mental health”.
- **Convention on the Rights of the Child:** Article 24 provides for the children’s right to the enjoyment of the highest attainable standard of health.⁸⁶ Consequently, State parties are required to take appropriate measures to take into “consideration the dangers and risks of environmental pollution”.⁸⁷
- Kenya is a party to a number of important conventions and has also supported key non-binding declarations on the protection of the environment, biological diversity and cultural heritage and is an important global player that also hosts the headquarters of the United Nations Environmental Programme (UNEP).
- World Charter of Nature (1982), securing nature from degradation caused by conflict and other hostilities; the Forest Principles, 1992, provides a framework within which states can benefit from their forests resources but within a framework of forest protection, management and conservation; Agenda 21, 1992 addresses the challenge of combating poverty, hunger, ill health, illiteracy and deterioration of ecosystems; Rio Declaration on Environment and Development sought to balance the need for development and environmental conservation; Convention on Biological Diversity (notably adopted in Nairobi in May 1992) aims to promote conservation of biodiversity, its sustainable use and the question of sharing benefits arising out of utilization of genetic resources, World Heritage

⁸⁴ Article 12 (1)(b)

⁸⁵ Article 12 (1)(b)

⁸⁶ Article 24 (1)

⁸⁷ Article 24 (2) (c)

Convention (1972); Convention on Wetlands of Importance (1972) provides a framework to inform state parties legal framework on wetlands conservation and use; African Convention on the Conservation of Nature and Natural Resources 2003 conservation and wise use of forests and other important habitats; Convention to Combat Desertification, 1994 provides a framework for addressing the threat of desertification; Framework Convention on Climate Change, 1992 and subsequent COP conferences that concerned about stabilization of greenhouse emissions⁸⁸.

- **Domestic legislation**

- **Environmental Management and Co-ordination Act, 1999⁸⁹** (EMCA) as read together with the Environmental Management and Co-ordination (Amendment) Act, 2015⁹⁰ is the key framework law on environmental matters in Kenya. It establishes institutions at both the national and county levels that are charged with the responsibility of implementing the Act. The National Environmental Management Authority (NEMA) has the authority to develop regulations, prescribe measures and standard to be observed in furtherance of its environmental protection mandate. Under the Act, county governments are permitted to enact legislation to give effect to the provisions of the Act or the constitution. Section 29 establishes the County Environmental Committee whose members are drawn from various sectors, including the business community. The committee is “responsible for the proper management of the environment” in the county. Under EMCA, the tools available for use in protecting the environment include Environmental Impact Assessments⁹¹, Environmental audit⁹² and monitoring, and issuance of environmental restoration or conservatory orders and easements.⁹³ The law requires that businesses conduct and environmental impact assessment before commencing operations. For instance, before construction of a commercial residence, one is required to seek NEMA’s approval by submitting an EIA.

⁸⁸ For detailed discussions on environment protection in Kenya, see, Kariuki Muigua, *Nurturing our environment for sustainable development*, (Glenwood Publishers, Nairobi, 2016) and Kariuki Muigua et al, *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015)

⁸⁹ Act No 8 of 1999

⁹⁰ See the Environmental Management and Co-ordination (Amendment) Act, 2015 http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2015/EnvironmentalManagementandCo-ordination_Amendment_Act_2015_No5of2015_.pdf

⁹¹ Part VI of EMCA

⁹² Part VII of EMCA

⁹³ Part 1X of EMCA

- **Climate Change Act** was enacted to “provide a regulatory framework for enhanced response to climate change; to provide mechanisms and measures to achieve low carbon climate development...”⁹⁴

The Climate Change Act provides for the formulation of a National Climate Change Action Plan, which may include measures and mechanisms “to review and recommend duties of public and private bodies on climate change.”⁹⁵ It empowers the National Climate Change Council, which is created to operationalize the provisions of the Act to “impose climate change obligations on the private entities, including periodic reports on the status of their performance of their duties and obligations”.⁹⁶

The Climate Change Act of 2016 is still fairly new and yet to be operationalized. However, it offers a significant opportunity for the State to regulate business practices that may aggravate climate change, and at the same time promote policies that encourage businesses to embrace climate change adaptations strategies.

Laws regulating business conduct in relation to land

- Land is one of the four integral factors of production alongside, labour, capital and entrepreneurship. Resources from land provide raw materials used for production with the income earned by resource owners being referred to as rent.
- Land is essential for the realisation of many economic, social and cultural rights such as, adequate standard of living, housing, food and culture. In addition, it has also been found to be integral to the realisation of civil and political rights as citizenship and right to participate in political processes⁹⁷.
- **Constitution:** In Kenya, “land” is defined under Article 260 of the Constitution as:
 - a. “The surface of the earth and the subsurface rock
 - b. Any body of water on or under the surface
 - c. Marine waters in the territorial sea and exclusive economic zone
 - d. Natural resources completely contained on or under the surface; and
 - e. The air space above the surface”

⁹⁴ Climate Change Act, No 11 of 2016.

⁹⁵ Section 13 (3) (l) Climate Change Act. The National Climate Change Action Plan is yet to be adopted.

⁹⁶ Section 16, Climate Change Act

⁹⁷ Land Rights Issues in International Human Rights Law, Elizabeth Wickeri & Anil Kalhan, https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf accessed on July 16, 2017

Additionally Chapter V of the Constitution -Land and Environment- lays down the principles of land ownership and management. “

- All land in Kenya belongs to the people of Kenya collectively as a nation, as communities or as individuals. “
- It recognizes three categories of land ownership: public, private and community. The categorization of a given land parcel is the key determinant of the rights to acquisition, retention, usage, and transfer. Public land includes land held by a state organ includes land held or used by a public or state organ, minerals and mineral oils, rivers, lakes, territorial sea among others; community land is land held by communities identifiable by way of ethnicity, culture of community of interest and; private land is land held by an individual or person.
- And whereas there is no distinct right to land under the Constitution or international human rights law, the Constitution protects the right to property- land ownership provides the holder with rights and interests which comprise one’s property. Article 40(2) protects against arbitrary deprivation of one’s property and in Article 40(3), the general principles for lawful deprivation of property or of any interest in it, which must be for a public purpose and carried out in accordance with the law.⁹⁸
- A significant addition in the 2010 Constitution is the recognition and protection of community land tenure, an important safeguard for marginalised and minority groups.⁹⁹
- **International Human Rights Law**
 - The right to land is not expressly recognised but the right to property is recognized under numerous international human rights instruments including the Universal Declaration on Human Rights, ICCPR, ICESCR, and the African Charter on Human and Peoples Rights and as mentioned previously it is an important pre-requisite for the realization numerous human rights. These instruments also protect from arbitrary deprivation with compulsory

⁹⁸ Article 40 of The Constitution recognizes the right to ‘property’ and not ‘land’. Under Article 63, communities are entitled to own community land. Additionally, it does not refer to indigenous peoples but ‘marginalized groups’.

⁹⁹ Kenya is not a signatory to both The UN Declaration on the Rights of Indigenous Peoples (2007) and the ILO Indigenous and Tribal Peoples Convention, 1989 which instruments recognize the right to land for indigenous peoples and offer guidelines on how to ensure that they are not unlawfully deprived of their land and resources.

acquisition only allowed in fulfilment of a public purpose and in accordance with the law.

- **Domestic Law**

- National Land Policy, 2009¹⁰⁰. This provides the overall vision towards sustainable and equitable land use and management for the country. The policy addresses the critical issues of land administration including laws and institutions, access, land use planning, historical injustices on land, and environmental degradation. It also suggests rationalization of land laws and institutions (which has now been done). The policy, which preceded the 2010 Constitution greatly, influenced the Land Chapter (V) of the Constitution and continues to be an important document in the administration and management of land and land based natural resources.
- The Ministry of Lands and Physical Planning has put forward a draft Land Use Policy. The policy *'sets out long-term goals on land use management. It addresses issues relating directly to the use of land, its resources and perceptions. It also incorporates all activities that are likely to have an impact on the use of land and its resources'*¹⁰¹.
- Land law is expounded in a number of statutes: the Land Act 2012, the Land (Amendment) Act 2015, the Land Registration Act 2012 and Community Land Act 2016. The first two mainly deal with private land while the third has been enacted in recognition of community land and to guide any dealings that touch on the same. However, lawful deprivation or compulsory acquisition of land is provided for under the Land Act.

Laws regulating business conduct on revenue transparency and accountability

- **Constitution**

- **Revenue Sharing** Chapter 12 of the Constitution of Kenya 2010 addresses the issue of public finance. Openness, accountability, public participation, equity are some of the Constitutional principles that guide financial matters. Revenues raised are expected to be shared equitably between the national and county governments and to promote an equitable society.

¹⁰⁰ Sessional Paper No. 3 of 2009

¹⁰¹ National Land Use Policy (Draft), Ministry of Lands, May 2016, <http://www.ardhi.go.ke/wp-content/uploads/2016/06/Draft-National-Land-Use-Policy-May-2016.pdf>

- The Constitution of Kenya Article 69 (1) obliges the State to ensure equitable sharing of benefits from the exploitation, utilization, management and conservation of the environment and natural resources. Article 69(10) further enjoins the State to ‘utilize the environment and natural resources for the benefit of the people of Kenya’. The country has thus joined other¹⁰² resource-rich countries that recognise the importance of sharing the benefits from mining and oil and gas exploitation with the areas that host such projects. Sharing of revenues with host communities’ can help cope with social and environmental impacts of the exploitation as well as lift the standards of living where projects are hosted in poor and undeserved communities¹⁰³.
- The Commission on Revenue Allocation is one of the commissions established under the Constitution¹⁰⁴ with the mandate to make recommendations to parliament on matters relating to revenue sharing.
- **Transparency and Accountability:** For the Constitutional principles previously mentioned to take effect, it is important that citizens are able to verify the amount of revenue received by the state if they are to know that they are receiving their legal share. It is thus important that information on project-based revenues made available. The right to access to information enshrined in Article 35 of the Constitution is thus a crucial enabler that citizens can use to know the amount of revenue received by the state or paid by the business and how it has been used. Under this provision, it is the right of a citizen to access information held by the state or that held by a private citizen but is required for the realization of human rights. Furthermore there is an additional requirement on the part of the state to publish and publicise important information affecting the nation-revenues from oil, gas and mining are pivotal sources of government revenue and transparency and accountability on the same are important for good governance of the sector and of the country as a whole. Kenya has included in her policy

¹⁰² Natural Resource Revenue Sharing, September 2016, NRG I and UNDP, https://resourcegovernance.org/sites/default/files/documents/nrgi_undp_resource-sharing_web_0.pdf

¹⁰³ As above

¹⁰⁴ Article 248(2)

goals, participation in the Extractives Industries Transparency Initiative (EITI) in the second medium term plan of Vision 2030.¹⁰⁵

- **Corruption:** The Ethics and Anti-Corruption Commission is created pursuant to Article 79 to ensure the implementation and observance of the principles of leadership and integrity contained in the Constitution.
- **International Law** Kenya is a signatory to the UN Convention against Corruption and the African Union equivalent, AU Convention on Preventing and Combating Corruption. The UN Convention seeks to develop a comprehensive response to the global challenge of corruption. The Convention criminalises both public and private acts of corruption and calls on states to, prevent and combat; cooperate with other states in the fight against corruption including asset recovery; and promote integrity, accountability and proper management of public resources.
- The 1992 Convention on Bio Diversity to which Kenya is a party, provides for fair and equitable sharing of benefits derived from utilization of genetic resources.¹⁰⁶

- **Domestic/Statute law**

- **Revenue sharing:** Foreign businesses investing in Kenya benefit from a number of financial incentives. The Export Processing Zone (EPZ) Act, Cap 517, Section 29 enumerates the benefits due to businesses operating within the EPZ. Among them are exemption from value added tax, excise duties, and a 10 years tax holiday.
- The Mining Act 2016 provides for revenue sharing between the national and county governments and host communities at the percentage ratio of 70, 20, and 10 (Section 183(5)). Whereas the Petroleum (Exploration and Production) Act, Cap 386 is silent on revenue sharing, the proposed Petroleum (Exploration, Development and Production) Bill also has provision for revenue sharing at, 75; 20; 5 between the national, county and community levels respectively. New proposals on the sharing formula elicited fierce opposition with an agreement yet to be reached.
- **Transparency and accountability:** This is a critical issue for the extractives sector. The Mining Act 2016 has a number of provisions on

¹⁰⁵ Kenya Vision 20130, 'Second Medium Term Plan (2013-2017)

¹⁰⁶ <http://kenyalaw.org/treaties/treaties/87/Convention-on-Biological-Diversity>

the same. Section 117(1) that provides for parliamentary approval of mining agreements whose investment value is over \$500,000million. Additionally, Section 119 provides for the publication of all mineral agreements on the ministry website. Furthermore, the Cabinet Secretary is required to make regulations to 'provide for accountable and transparent mechanisms of reporting on mining and mining related activities' including revenues and production volumes. Public availability of this information is key to support monitoring of revenues – this is currently on-going.

- The current petroleum law, Petroleum (Exploration and Production) Act is silent transparency and accountability of petroleum revenues. However, the proposed Petroleum (Exploration, Development and Production) Bill, 2015 in Clause 111 requires there to be developed a framework for reporting, transparency and accountability. The framework will provide for among others publication of contracts and reporting on payments made and revenues including those received national and county governments and communities.
- **Corruption:** Corruption is addressed in the following key statutes: Ethics and Anti-Corruption Commission Act-2012, Public Officer Ethics Act 2003, Anti-Corruption and Economic Crimes Act and the Bribery Act 2016 (came into effect in January 2017). The first three addresses corruption in the public sector while the latter has a wide scope and covers, the general public, public officers and private entities.
- Others relevant laws include the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2017, Leadership and Integrity Act, Public Procurement and Disposal Act.
- Furthermore, Section 21 of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act 2017 establishes the Kenya's Financial Intelligence Unit, The Financial Reporting Centre (FRC). The FRC is an independent agency charged with the principle mandate of combating money laundering and identifying the proceeds of crime.
- The government also has in place a multi-agency taskforce whose members include, FRC, EACC, KRA, National Police Service, Office of

the Director of Public Prosecution, and the Assets Recovery Agency, a positive step towards addressing other aspects of illicit financial flows.¹⁰⁷

- Voluntary/soft law: The Extractives Industry Transparency Initiative (EITI) is a global voluntary standard to promote transparency and accountability in the management of extractives resources¹⁰⁸. Discussions on EITI are only just starting in Kenya and as previously mentioned participation in EITI is one of the policy goals under Vision 2030. Despite this, there have been no steps taken towards membership.

Guiding Principle 2: Respect for human rights by all businesses

The UNGPs call for respect for human rights by all businesses, including those that are within the State’s control but operating extraterritorially. There are many businesses that are headquartered in Kenya and operating in the region. These include those in finance and banking, health, and construction sectors.

- As earlier stated, the bill of rights applies to all businesses operating in Kenya, whether local or multinational, registered or not registered. However, apart from this constitutional provision, regulation of the informal ‘jua kali’ sector, which employs a huge percentage of the population, is minimal. This effectively affects the range of protections offered to those negatively impacted by the operations of such businesses. In regard to extraterritorial obligations, neither the Constitution nor statutory legislation expands the scope of businesses responsibility/obligations to outside Kenya.
- The Kenya National Human Rights Commission Act gives mandate of human rights violations ‘in the Republic’.¹⁰⁹ Additionally, the Climate Change Act “shall be applied in all sectors of the economy by the national and country governments...”¹¹⁰ These provisions in these two statutes seems to exclude Kenyan businesses that are operating outside the country.
- The Bribery Act 2016 has extraterritorial application in respect of conduct by a Kenyan citizen or a private or public entity outside of Kenya, which would constitute an offence under the Act if such conduct took place within Kenya.

¹⁰⁷ Tax Evasion Task Force Recovers Sh 2 billion from firms in 2 Years, Abel Muhatia, The Star June 28, 2017 http://www.the-star.co.ke/news/2017/06/28/tax-evasion-task-force-recovers-sh2-billion-from-firms-in-2-years_c1586770 accessed on July 17, 2017.

¹⁰⁸For general information, see <https://eiti.org/>

¹⁰⁹ Kenya National Commission on Human Rights Act

¹¹⁰ Section 3 (2) (a) of the Climate Change Act

Gaps

- A number of Kenyan businesses operate within several countries in the region and the state is yet to take any steps to regulate the conduct of these enterprises abroad, something that is recommended by the UNGPs.

Recommendation

- The state should consider issuing guidance for companies operating abroad on how to operate in a human rights-respectful way.

Guiding Principle 3: Regulatory and policy functions

States are obliged to enforce the law, encourage businesses to respect human rights, offer guidance on how to respect human rights, including in some cases, mandatory due diligence requirements. State failure to enforce the law might encourage businesses to violate human rights.

- Constitution: Article 21 obliges the State and its organs to observe, respect, promote and fulfil fundamental rights and to put in place legislation in fulfilment of its international human rights obligations. In so doing, the State should ensure that the legislative and other measures offer guidance to businesses on their duties as regards human rights.
- Generally, there are a myriad of laws and regulations that guide the establishment and operation of business in Kenya. However, a majority of business activities fall under the *jua kali* rubric¹¹¹: These are largely informal by way of establishment and minimally regulated but the fact that they are widespread means that their cumulative impacts should be of concern. In 2012 a Micro and Small Enterprises Act, whose main objective is to ‘provide for the promotion, development and regulation of micro and small enterprises was enacted’¹¹². It also establishes the Micro and Small Enterprises Authority and provides for a Micro and Small Enterprises Tribunal. Its primary concern is in promoting the registration of associations of micro and small enterprises and thereafter assisting them access business development funds and markets for their products. It does not set out their responsibilities as business players.
- With regard to formal businesses, these are created under the Registration of Business Names Act 2012, the Limited Liability Partnership Act No 42 of 2011 and the Companies Act No 17 of 2015.

¹¹¹ Small and Medium Enterprise firms comprise 98% of business in Kenya, <http://www.mygov.go.ke/?p=5038>

¹¹² Micro and Small Enterprise Act, 2012

- Of these laws, the Companies' Act is key as it concerns big business whose footprint can be equally large. This law underwent extensive revision the result of which is a new law, the Companies Act No 17 of 2015. One of the new provisions in this law is the requirement for a Business Review as part of the directors' report for companies that are not under the 'small companies' regime¹¹³. The Business Review shall contain a fair review of the business, a description of principle risks and uncertainties facing the company-Section 655(3). Further in the in the case of a stock exchange-quoted company, the Business Review shall be specific to (the extent necessary for an understanding of the development, performance or position of the company), the main trends and factors likely to affect future performance and business position, information on environmental matters including actual environmental impacts of the business, information on employees, social and community issues including the efficacy of the companies policies on these issues as well as information about other persons with whom the company has contractual or other relationship essential to the business-Section 655(4).
- This is positive and if complied with, could go a long way in reporting and holding companies to account for their impacts on the environment and impacted communities, Section 655(5) and Section 655(6) confirms that the Business Review report may exclude such information if disclosure would in the opinion of the directors be detrimental to company's interest or in the case of persons with essential contractual or other arrangements, if disclosure would seriously prejudice that person and be contrary to public interest. A company that excludes this information is not obliged to give reasons for the exclusion, thus making it subjective rather than objective.
- The Capital Markets Authority (CMA)¹¹⁴ is a key statutory body in the growth and regulation of business particularly in facilitating mobilization and allocation of investment capital. The CMA also has regulatory authority and issues regulations and guidelines in furtherance to this from time to time. One such guidance that has human rights implications is the Capital Markets Authority's Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, for application by both listed and unlisted public companies in Kenya. This requires companies to have in place a policy ensure diversity in their boards and thus promoting participation of underrepresented groups.

¹¹³ These are unlisted private companies as opposed to a publicly-owned or stock exchange-listed company

¹¹⁴ Established by the Capital Markets Act, Cap 485A, Laws of Kenya

- The Kenya National Commission on Human Rights is the “principal organ in ensuring State compliance with its international and regional human rights obligations”.¹¹⁵ In relation to business and human rights, KNCHR “sees its role as supporting both government **and business** to quicken” the uptake of their individual responsibilities under the UNGPs.¹¹⁶

Gaps

- Reporting requirements under Section 655 of the Companies Act seem more voluntary in nature.

Recommendations

- Make reporting under section 655 mandatory and enhance the reporting to include the human rights protected under the Bill of Rights.

Labour

- Kenya has a regulated minimum wage, which has been progressively increasing and is intended to cushion the lowest income earners. However, on one hand this wage is often viewed as way below the living wage, given the rate of inflation¹¹⁷ and on the other as cost that the private sector can ill afford.¹¹⁸ Additionally, there is need for follow up to ensure that this is implemented and that businesses do not declare workers redundant thus defeating the purpose of the directive.¹¹⁹
- The Export Processing Zones Act regulates businesses operating in exporting processing zones has been criticized as favoring investor interests as opposed to the workers’ welfare.¹²⁰
- The government has offered incentives to businesses to employ persons with disabilities. The Persons with Disabilities Act¹²¹ encourages the employment of persons with

¹¹⁵ Kenya National Commission on Human Rights, ‘Compliance with international Obligations’, available at <http://www.knchr.org/OurWork/Compliancewithinternationalobligation.aspx>

¹¹⁶ Kenya National Commission on Human Rights, ‘Business and Human Rights’ available at <http://www.knchr.org/OurWork/Businessandhumanrights.aspx>

¹¹⁷ For instance, see the general trend of inflation in 2017 according to the [Kenya National Bureau of Statistics](#). Also see “Cost of living rises to a 56-month high in February”, Constant Munda, The Star, available at http://www.the-star.co.ke/news/2017/03/01/cost-of-living-rises-to-a-56-month-high-in-february_c1515946

¹¹⁸ See, <http://www.businessdailyafrica.com/news/Manufacturers-criticise-minimum-wage-increment-/539546-1799418-15j6ljdz/index.html>

¹¹⁹ See ‘Why Minimum wage increases are not such a big deal after all’ Jaindi Kisero, Daily Nation, May 03, 2017 available at <http://www.nation.co.ke/oped/Opinion/minimum-wage-increases-not-such-a-big-deal-/440808-3911644-xpctx3/>

¹²⁰ See Musembi, Boniface, ‘Health and Safety Labour Rights in Kenya: A Case Study of the Export Processing Zone (EPZ)’, LLM Thesis, University of Nairobi (2017) available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/11716/Musembi_Health%20and%20safety%20labour%20rights%20in%20Kenya.pdf?sequence=1

¹²¹ Act No 14 of 2003, available at <http://ncpwd.go.ke/images/docs/PersonswithDisabilitiesAct.pdf>

disabilities. It provides that the National Council for Persons with Disabilities shall ‘endeavor to secure the reservation of five percent of all casual, emergency and contractual positions in employment in the public and private sectors for persons with disabilities’.¹²² Section 15 provides for non-discrimination in employment of persons with disabilities. Section 16 encourages private employers to take positive measures to hire persons living with disabilities, besides modifying physical facilities to provide reasonable accommodation. Incentives for private employers who engage a person with disabilities is entitled to apply for a deduction from his taxable income equivalent of 25 per cent of the amount paid as salary and wages to such an employee. Additionally an employer who modifies or improves physical facilities to benefit employees with disabilities is entitled to a deduction from the net taxable income equivalent to 50 per cent direct cost of the improvement.¹²³

- The Kenya National Commission on Human Right Act gives the Commission the mandate to advise State on the laws that need to be aligned to its international obligations to respect human rights.¹²⁴

Gaps

- Enforcement of minimum wage remains a challenge.

Recommendations

- Consider revising the minimum wage to reflect the cost of living.
- Ministry of Labour should strictly monitor the implementation of the minimum wage regulations and take stern action against defaulters.

Environment

- NEMA’s functions includes to “advise the Government on legislative and other measures for the management of the environment or the implementation of relevant international conventions, treaties and agreements”. It also advises “the Government on regional and international conventions, treaties and agreements to which Kenya should be a party and follow up the implementation of such agreements.”¹²⁵
- Although it is yet to be operationalized in many aspects, the Climate Change Act states that it shall be applied by both national and country governments to

¹²² Section 13, Persons with Disabilities Act 2003, Laws of Kenya

¹²³ Section 16, Persons with Disabilities Act 2003, Laws of Kenya

¹²⁴ Section 8, Kenya National Commission on Human Rights Act, 2011, Laws of Kenya

¹²⁵ National Environment Management Authority, see

http://www.nema.go.ke/index.php?option=com_content&view=article&id=2&Itemid=137

“...provide incentives and obligations for private sector contribution in achieving low carbon resilient development”.¹²⁶

- **Land**

- The Constitution recognises three categories of land: private, community and public¹²⁷. Furthermore, the Constitution in Article 40(1) allows person(s) to acquire or own property but non-citizens may only hold land on leasehold tenure and for a period not exceeding ninety-nine years (Article 65(1)). The Constitution also protects against arbitrary deprivation of land without due process and the prompt payment of full and just compensation.¹²⁸
- The Land Act 2012 together with the Land Laws (Amendment) Act 2016, the Land Registration Act 2012 and the Community Land Act 2016 are the main statutes on administration and management of land with the key institutions being the Ministry of Lands and Physical Planning and the National Land Commission. Thus businesses will need to first establish the land tenure in their area of operation so as to know the applicable law.
- Moreover, foreigners including business cannot own land but can lease the same for a period of 99 years and are renewable. Previously some land leases were up to a period of 999 years, which was quashed by the Constitution of Kenya 2010.¹²⁹
- Generally, land is acquired voluntarily on a willing buyer-willing-seller basis. But with regards to community land the Community Land Act provides the procedure through communities reach a decision to dispose or alienate land with the aim of ensuring inclusive participation of members.¹³⁰ Moreover, with regard to the exploitation of natural resources on community land, the Act provides that an agreement for such investment shall only be made after a free, open and consultative process.¹³¹

¹²⁶ Section 3 (2) (f) of the Climate Change Act

¹²⁷ Article 61(2)

¹²⁸ Article 40(3), Constitution of Kenya, 2010

¹²⁹ Article 65, Constitution of Kenya, 2010

¹³⁰ Section 15 (5) Any decision of a registered community to dispose of or otherwise alienate community land shall be binding if it is supported by at least two thirds of the registered adult members of the community, while all other decisions of the registered community shall be by a simple majority of the members present in a meeting. Furthermore, quorum for decision making should be no less than two thirds of the community assembly, which consists of all registered members –sections 15 (1) an (2).

¹³¹ Section 36(1) Community Land Act 2016.

- However businesses that require huge tracts of land such as large-scale agriculture, mining, oil and gas and tourism, may face challenges in the acquisition process especially where they have to deal with multiple land owners. In such cases, the Land Act 2012 provides the procedure for compulsory acquisition of land applicable to all the categories of land.
- The acquiring national or county government institution¹³² must satisfy the NLC¹³³ that the land is required for the fulfillment of a stated public purpose. The Act also provides the procedure for such acquisition including hearings on issues relating to rights, interests and compensation¹³⁴. Just and full compensation must be paid promptly¹³⁵ but one can opt to receive a grant of land whose value does not exceed the amount due as compensation¹³⁶.
- For mining and oil and gas, the state may initiate the compulsory acquisition process of the land needed for extractives developments. Under Section 40 of the Mining Act 2016, the Cabinet Secretary can take steps to compulsorily acquire land on behalf of the government, where in his view land owners unreasonably withhold consent or where in his opinion it is contrary to national interests. Similarly, the Petroleum (Exploration, Development and Production) Bill 2015¹³⁷ provides for compulsory acquisition of land through an application by the Cabinet Secretary to the agency responsible for land management where the CS is satisfied that a license holder *‘(a) reasonably requires land for purposes of constructing, modifying or operating any upstream petroleum infrastructure or for incidental purposes; and (b) has failed to acquire the land by agreement after making reasonable attempts to do so’*¹³⁸. In which case compensation payable will be determined in accordance with the Constitution other relevant laws.¹³⁹
- Whereas compulsory acquisition is a lawful means of alienating land, where large tracts of land have to be set aside for use by private entities and indeed for any development processes, robust public participation is crucial in obtaining and maintaining public support

¹³² Section 107(1), Land Act 2012

¹³³ The NLC sets the criteria for compulsory acquisition and also has the authority to enter the land in question to ascertain its suitability for the stated purpose-Section 107 and 108, Land Act 2012

¹³⁴ Section 112, Land Act 2012

¹³⁵ Section 111, Land Act 2012

¹³⁶ Section 114(2), Land Act 2012

¹³⁷ <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/PetroleumExplorationDevelopmentandProductionBill2015.pdf>

¹³⁸ Clause 108(1)

¹³⁹ Clause 108(2)

Gaps

- There is no clarity or uniformity in the processes and procedures used by business in the voluntary acquisition of land or by the state in acquiring land in the interest of business. This is often lacking despite the Constitutional guarantee of the right to access to information.¹⁴⁰ In this regard impacted persons would favour more time and information from project proponents to support informed decision-making.
- Guidelines on compulsory acquisition, compensation and resettlement are yet to be formulated. Unscrupulous individuals have exploited this gap and recently allegations of corruption on part of the NLC surrounding compulsory acquisition have emerged.¹⁴¹
- Businesses and even government argue that the application of open market rates for compensation are often inflated due to speculation, resulting in higher costs for the acquiring entity. On the other hand, land owners and communities have contested land valuation by the government valuer as too low. This contestation is often the cause of project delay and the invocation of compulsory acquisition.
- Incomplete and slow land adjudication process. Land adjudication is crucial in determining rights and claims over land and thus a prerequisite for the protection of the right to property. This is especially crucial for community land, which has the most potential for mining, oil, and gas finds but is also the target for the establishment of large-scale agriculture as well as tourism business.
- The lack of a land use policy has resulted in uncontrolled and haphazard developments that have resulted in land and environmental degradation.

Recommendations

- The Ministry of Lands and Physical Planning and the National Land Commission should introduce procedural guidelines that can be used by businesses, individuals and communities negotiating land acquisition.
- NLC in consultation with other relevant stakeholders should draft a resettlement policy and framework as well as a compensation policy and framework.
- The Ministry of Lands and Physical Planning in consultation with other stakeholders should review the current land valuation with a view to establish one that is more acceptable to all stakeholders.

¹⁴⁰ Article 35(1)

¹⁴¹ Mukinda, Fred, 'EACC raids homes of top lands officials, Daily Nation, MAY 4 2017, available at <http://www.nation.co.ke/news/EACC-raid-Swazuri-home/1056-3913322-axy5faz/>.

- Expedite land adjudication and registration in the country but special focus should be given to areas where there is community land
- The Ministry of Lands and Physical Planning should partner with civil society organizations in the dissemination and education of communities on land laws and other regulatory frameworks important for the protection of their claims and rights to land.
- Relevant investigative and prosecutorial agencies should expeditiously deal with land related corruption cases to increase confidence in the public justice system.
- Ministry of Lands and Housing and other relevant stakeholders to finalize the drafting and adoption of the Land Use Policy.

Revenue transparency and accountability

- Accessibility of information on business revenues: Companies are required by law to prepare annual financial reports and to file annual tax returns with the Registrar of Companies and the Kenya Revenue Authority respectively. Generally, with the exception of publicly quoted companies who are required to publish an annual report including financials, this information is not publicly available. In principle and based on Article 35, a citizen has the right to access this information if one can show that it is necessary for the exercise or protection of any right or fundamental freedom provided in the Constitution of Kenya 2010. This right is operationalized by the Access to Information Act, 2016.
- Political on part of government to publish contracts and revenue information from extractive activities: Whereas it is not practicable to publish financial and revenue related reports for all businesses, revenue and accountability reporting provisions have been made for the extractives sector as discussed under Principle 1 with the onus placed on the state to publish the contracts and reports as confidentiality clauses¹⁴² bar companies against disclosure.
- Public perception of EACC's ability to combat corruption: A 2015 household survey by the EACC found that 33.9% of respondents had no confidence in the institution's ability to fight corruption and asked what it should be doing 34.9% of the respondents wanted the Commission to do more to prosecute persons suspected of corruption¹⁴³.

¹⁴² For more discussions on confidentiality clauses see, Contracts Confidential 'Ending Secret Deals' Resource Watch International, 2009

¹⁴³ Ethics and Anti-Corruption Commission, 'National Ethics and Corruption Survey 2015', <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf>

Gaps

- The state is yet to publish any of the extractives contracts but regulations governing the same under the Mining Act are currently under consideration. Once adopted, this will pave way for such publication. A similar process is expected to be followed once the Petroleum (Exploration, Development and Production) Bill is passed in to law. However, nine oil contracts (production sharing contracts) are available on OpenOil¹⁴⁴- an organization that specializes in data on natural resources.
- Furthermore, there is no legal framework in place yet for the management of revenues from the extractives sector. This is particularly crucial for county governments and communities that will be recipients of shared revenues.
- Entrench the tax evasion multi-agency taskforce in law and enhance its capacity to deal with all categories of illicit financial flows.
- Corruption remains a major threat to the achievement of economic and social development in Kenya. The latest Transparency International corruption perception index ranked Kenya at 145 out of 176 countries.¹⁴⁵

Recommendations

- Parliament should pass the Petroleum (Exploration, Development and Production) Bill as a first step towards enhancing transparency and accountability in the upstream oil and gas sector. Moreover, in terms of legal frameworks, the Ministry of Mining should hasten the implementation of the transparency and accountability provisions in the Mining Act.
- Parliament should also enact a law to guide recipient counties and communities on the management of extractives revenues.
- Kenya must adopt more credible robust measures to combat all forms of corruption and put in place legislation to address the threat of illicit financial flows. Given that the country's revenues from extractives are set to grow exponentially, putting in place preventative measures is an imperative.

Guiding Principle 4: State-owned enterprises

The State is required to take “additional steps” to State-owned/controlled businesses, given that statutory authorities closely regulate their operations. They also benefit from taxpayers support for their operations. Where appropriate, the State should require mandatory human rights due diligence by such businesses.

¹⁴⁴ <http://openoil.net/>

¹⁴⁵ Transparency International, 'Corruption Perceptions Index 2016', available at http://www.transparency.org/news/feature/corruption_perceptions_index_2016

- Governed under the State Corporations Act, Cap 446, Laws of Kenya. In addition, there is a Code of Governance for State Corporations, 'Mwongozo'¹⁴⁶, issued jointly in January 2015 by the Public Service Commission and the State Corporations Advisory Committee. The two instruments lay emphasis on financial management and good corporate governance.
- However, The Public Officer Ethics Act stipulates, "In carrying out his duties, a public officer shall not violate the rights and freedoms of any person under Part V of the Constitution".¹⁴⁷ The definition section states that public officers includes an employee, part-time, temporary or permanent of "any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law"¹⁴⁸ This could be interpreted to infer human rights obligations.

Gap

- There are no special measures or higher threshold such as mandatory due diligence expected of State-owned enterprises whose operations have a high likelihood of violating human rights.

Recommendation

- State Corporations Advisory Committee in collaboration with the Public Service Commission to develop specific guidelines for parastatals on their obligations to respect human rights and linked with their role as state enterprises.

¹⁴⁶ Public Service Commission & State Corporations Advisory Committee, 'Mwongozo: The Code of Governance for State Corporations, January 2015, available at <http://www.jkf.co.ke/downloads/MWONGOZO.pdf>

¹⁴⁷ Section 10 of the Public Officer Ethics Act.

¹⁴⁸ Section 2 (d)

Guiding Principles 5: Privatized services and businesses regulated by legislation

The State should exercise “adequate oversight” to meet its international human rights obligations when it contracts businesses to provide privatised services. The same standard of care is required when the State enacts legislation to regulate businesses to provide services that may impact human rights.

- The following economic socials and cultural rights are recognized under Article 43 of the Constitution: health and health care services; housing and sanitation; food; clean and safe water; social security and; education.
- However, public services in this regard are inadequate and not been able to meet the needs of the population. To meet the shortfall private actors provide a significant portion of the services. Moreover other services notably water and sanitation have been privatized. In addition, a few companies provide some of these social services to their employees while others as part of their corporate social responsibility/investments provide the same to the host community. With this comes the challenge of over-reliance on company provided services.
- Moreover, there are instances where businesses providing privatised services have failed to take appropriate measures to protect human rights. For example, there are cases where sexual assault of minors has been reported as perpetrated within the private school environment. There have also been cases of denial of emergency medical care by private hospitals leading to fatalities.
- The Public Officer Ethics Act regulates the conduct of persons working in privatized public services. This is by pursuant to section 2 (a) which includes the definition of a public officer as an employee of “any department, service or undertaking of the Government”¹⁴⁹ Employees of such institutions are therefore required to ensure that in undertaking their duties, they do “**not violate the rights and freedoms** of any person under Part V of the Constitution”.¹⁵⁰

Gaps

- There are other statutes that deal with specific sectors such as construction but lack any guidance on safety issues, especially given the human rights footprint of the sectors. For instance, in the last couple of years, numerous commercial buildings

¹⁴⁹ Section 2 (a)

¹⁵⁰ Section 10 of the Public Officer Ethics Act.

under construction have collapsed, putting the construction workers at risk. Additionally several audits of the structural integrity of commercial buildings have revealed a high prevalence of sub standards workmanship. Despite the regulation of these sectors by legislation such as the National Construction Act, they lack sufficient assurance of safety, revealing gaps in enforcement.

- Ensuring that Article 43 (Constitution of Kenya 2010) public services offered by business enterprises are affordable, accessible, of good quality and culturally appropriate is a challenge. There are laws that regulate the provisions of these services though there is gap in enforcement.

Recommendations

- The state should increase regulatory oversight over public services offered by private sector in line with the state's obligations to protect, respect and fulfil human rights.
- Ensure that corporate social responsibility/investments are sustainable, have a real impact on targeted beneficiaries and are aligned to public-sector development objectives.

Guiding Principle 6: State contracted companies

“States should promote respect for human rights by business enterprises with which they conduct commercial transactions”

- In the Kenyan context, this Principle is applicable in public procurement for goods and services and also to the tendering for exploration of minerals and oil and gas or other process through which the state invites private investors to explore and exploit the natural resources in return for cost reimbursement and profit share.
- The Public Procurement and Disposal Act does not have any special provisions that raise the threshold for respect of human rights by companies contracted by the State.
- The Public Procurement Oversight Authority (PPOA) is the body mandated with superintending the country's public procurement under the Public Procurement and Disposal Act 2005. Section 3 of the establishing Act includes equality and non-discrimination as one of the guiding principles of public procurement. While human rights due diligence is not mentioned in the Act, Section 41 provide that a person or entity can be debarred for no less than three years from participating in public procurement and disposal if found guilty of a serious violation of fair employment practices.

- In the context of mining, the Mining Act obliges mineral rights holders (businesses) to comply with laws relating to the environment, occupational health and safety, sustainable land use in conformity to the conditions of the licence and including site rehabilitation and restoration-Part XI Mining Act 2016. Likewise Part VIII of the proposed Petroleum (Exploration, Development and Production) Bill requires contractors (businesses) to adhere to environment laws including taking liability for damage from pollution, occupational health and safety laws. Additionally, Clause 117 of the Bill, provides for community rights which include: right, to be informed prior to commencement of upstream operations and to raise inquiries on the same, compensation for land taken for operations and for environmental damage, right to raise objections or concerns, to participate in planning for corporate social responsibility projects.

Gaps

- Currently there is no framework for monitoring compliance that impacted persons or interested stakeholder can use.
- Delay in the enactment of the Petroleum (Exploration, Development and Production) Bill

Recommendation

- Amend the relevant procurement laws to include human rights compliance as part of public procurement policies and laws and ensure enforcement by all state and public agencies.
- Since companies in the extractive sector are licensed by and on behalf of the State, the State should develop a human rights compliance framework.
- Include human rights considerations in mineral rights agreements and Production Sharing Contracts (PSCs)

Guiding Principle 7: Businesses operating in conflict areas

The State should help businesses operating in conflict areas to identify human rights issues and devised how to address them, paying attention to the vulnerable groups. This should include human rights due diligence requirements, if necessary. The State should also cease providing public support to businesses that are complicit in conflicts.

- Kenya experiences localised violent conflict intermittently with the main causes of conflict being competition for natural resources such as water and grazing land-in the vast northern and eastern regions-and politically instigated violence-mainly affecting the

rift valley and the three largest urban centres of Nairobi, Mombasa and Kisumu. These two manifestations of conflict are important because in the case of resource-based conflict, those same locations are currently hosting mining, oil and gas, other renewable energy, tourism (conservation projects) and large-scale agriculture projects. With regards, to political violence the three urban centres often most impacted are also important business hubs.

Land related conflict

- Annexation of land in favour of businesses means that less land is available to local communities thereby contributing to increased competition for water and other resources, which can exacerbate existing conflicts. This calls for a balancing of the needs of business and those of host communities taking into account the cultural, social and livelihood impacts, opportunities and costs of enabling the necessary change.
- It is not uncommon for communities to stage demonstrations (which if not well handled can turn violent) against companies when they feel that their concerns are not addressed. Indeed, a number of such demonstrations have been seen¹⁵¹. The handling of such protests or conflict then becomes an important area of focus because security is provided by Kenyan public security who are mandated with providing security have a poor human rights record. An additional dilemma is balancing human rights and property rights. In fact this has been witnessed in the recent conflict between ranchers and host communities where public security forces have been accused of various forms of human rights violations including, torture, killings, and destruction of property in a bid to protect private ranches¹⁵².
- In addition, where private security providers provide security including in conflict zones, it should be in compliance with the recently enacted Private Security Regulation Act 2016.
- The Code of Conduct for private security providers contained in the Second Schedule to the Private Security Regulation Act, provides that persons that have previously committed human rights violations should not be employed as security personnel and for

¹⁵¹ In October 2013, Tullow Oil was forced to shut down operations following community protests, during which one of their exploration facilities was overrun. See Akumu, Washington, 'Tullow Oil woes expose the soft underbelly of EA', *The East African*, November 9, 2013. In another incident Kenya public security officers providing who were providing security to Simba Energy shot and injured five people as they protested against the company's activities, see Kenya News Agency, 'Wajir East legislator decries shootings', September 16, 2016, available at <http://kenyanewsagency.go.ke/en/wajir-east-legislator-decries-shootings/>

¹⁵² The Star, 'Cattle starving to death on Laikipia ranches after herders wreak havoc', April 4, 2017 http://www.the-star.co.ke/news/2017/04/04/cattle-starving-to-death-on-laikipia-ranches-after-herders-wreak-havoc_c1538110

the development of detailed guidelines on use of minimum force in line with international standards.

Gaps

- There is more opportunity for the State to engage communities hosting strategic mining and energy infrastructure in partnering in the provision of security for the benefit of both the community and business. This is imperative given that most of these natural resources are found in historically insecure areas.
- There is no explicit requirement for private security providers to respect human rights. In fact the only mention of human rights is in barring employment of persons that have previously committed human rights violations. While this is positive, the development of such guidelines should be prioritized and should include parameters that will ensure the respect for human rights by private security companies which is currently a gap area barely covered by the new law.

Recommendations

- The draft National Land Use Policy when adopted should provide guidance on balancing the needs of the community vis a vis those of business.
- Action on addressing historical land injustices and in particular the controversies around ranches and conservancies, legacies of the now repealed Group Ranch Acts.

Guiding Principle 8: Policy coherence

The State should balance the need to encourage businesses and the imperative to protect human rights. This includes ensuring vertical and horizontal policy coherence. Vertical involves ensuring that there are laws and regulations in place, while having horizontal coherence involves ensuring that government agencies and departments regulating business conduct are acting in a manner compatible with the State's human rights obligations.

Environment

- The 2010 Constitution has ensured that there is a clear demarcation of the powers of the county government and those of the national government. However, there is lack of inter-ministerial coherence on how to approach issues related to business and human rights.

- With the introduction of the county governments, EMCA was amended appropriately to reflect the new realities of the devolved governments to avoid conflicting mandate with the national governments.¹⁵³
- Despite the existence of a legal framework, there have been instances where critics have suggested that the State is favoring business interest at the expense of social safeguards.

Land

- Chapter Five of the Constitution of Kenya 2010 sets out extensive principles of land and environment management and includes specific principles on natural resource management. They include equitable access, security of land rights, transparent and cost effective administration, sound conservation, non-discrimination, sustainable exploitation of natural resources and benefit sharing. The Constitution also recognizes three categories of land in the republic; private, public and community and mandates parliament to enact laws giving effect to the provisions therein.
- Consequent to the promulgation of the Constitution, in 2012 the Land Act and the Land Registration Act were enacted to revise and consolidate existing land laws and in 2016 the Community Land Act was enacted to provide for the administration and management of community land and the Land Laws (Amendment) Act 2016 to introduce some amendments to the 2012 laws.
- Administration and management of land involves the following three main players; Ministry of Lands and Physical Planning, National Land Commission and the 47 county governments. The Ministry¹⁵⁴ implements national policies and laws including, physical planning, adjudication, registration and land information systems. The National Land Commission¹⁵⁵ on its part, among other functions, manages public land on behalf of national and county governments, makes policy recommendations, advises on registration programmes, investigates present or historical land injustices *suo moto* or based on a complaint and recommends redress, monitors and oversees the land use planning. The county governments are involved in planning¹⁵⁶ (land survey and mapping,

¹⁵³ See the Environmental Management and Co-ordination (Amendment) Act, 2015
http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2015/EnvironmentalManagementandCo-ordination_Amendment_Act_2015_No5of2015_.pdf

¹⁵⁴ Ministry of Lands and Physical Planning, 'About the Ministry', available at http://www.ardhi.go.ke/?page_id=6

¹⁵⁵ For more on the National Land Commission, see <http://www.landcommission.go.ke/about-nlc/mandate-function>

¹⁵⁶ See county government functions, fourth Schedule, Constitution of Kenya

boundaries and fencing etc.) and are also trustees of unregistered community land on behalf of the community¹⁵⁷.

- However, there have been disputes over mandate between the Ministry and the NLC that need to be addressed by ensuring clarity in law and uniform interpretation of the same. Moreover, the role of county governments needs to be clarified vis-à-vis the Ministry on planning and surveying which function is shared.
- Another area of land access and acquisition that demonstrates the need for policy coherence is compulsory acquisition. This is allowed under Article 40(3) of the Constitution provided it is, lawful, for a public purpose or in public interest, prompt payment in full of just compensation and access to court by persons with interests or rights over the subject property. The Land Act 2012 then lays down the procedure for compulsory acquisition that includes the NLC inquiring into the public purpose stated by the acquiring national or county government entity. The NLC is also mandated with handling compensation aspects including establishing the compensation criteria and paying out of the compensation. A challenge comes when oil and gas or mining companies require land for development of extractives projects and the fact that the cabinet secretaries in charge of ministries of mining¹⁵⁸ and energy and petroleum¹⁵⁹ can invoke the compulsory acquisition doctrine for projects that do not fit within the public purpose definition.
- Another Statute the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012¹⁶⁰. This law which came into force in January 2013, recognizes and seeks to protect a person or groups displaced from their homes or places of habitual residence due to among other reasons large scale development projects in public interest, which it construes to be ‘the development interests of, and for the benefit of, the people of the Republic as whole, including persons displaced by such project’¹⁶¹. Furthermore for displacement due to large development projects to be lawful the public interest has to be *compelling*¹⁶² and

¹⁵⁷ Section 6, Community Land Act 2016

¹⁵⁸ Section 40, Mining Act 2016

¹⁵⁹ Clause 108, Draft Petroleum (Exploration, Development and Production) Bill 2015

¹⁶⁰ Kenya: Act No. 56 of 2012, The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 [Kenya], 4 January 2013, available at: <http://www.refworld.org/docid/511219962.html> [accessed 7 April 2017]

¹⁶¹ Section 2(a) The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012

¹⁶² Emphasis mine

*overriding*¹⁶³ (narrow individual interests)-Section 6(3). Section 21(1) enjoins the state to prevent displacement by private actors and (2) only in *exceptional*¹⁶⁴ circumstances as relates to development or environmental preservation is displacement allowable. This law sets a higher threshold for assessing public interest as is evident from the drafting language. The law, which is modelled against the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, and the United Nations Guiding Principles on Internal Displacement, remains largely unimplemented for several reasons. According to experts the handicaps are that no subsidiary legislation has been developed to guide implementation and the law itself does not make any linkages to the Land Act 2012, the main legal instrument that guides compulsory acquisition of land which mechanism government uses to acquire land for development projects¹⁶⁵.

Guiding Principle 9: Investment treaties and contracts

‘States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts’.

The Constitution of Kenya Article 2(6) provides that all treaties and conventions ratified by the state shall form part of the law of Kenya. While the Constitution does not spell out a hierarchy of laws, it states that the treaties are part of the laws of Kenya, and all laws in the country are subservient to the Constitution, thus the Constitution takes Supremacy over them and they can be declared null and void should they be inconsistent with the Constitution. Additionally, Article 71 requires parliamentary ratification of agreements relating to natural resources. Pursuant to the above, a Treaty Making and Ratification Act of 2012 was enacted to provide procedural guidelines for the same. The Act applies to both multilateral and bilateral treaties. With regards bilateral treaties it applies to those that address issues of security, sovereignty, independence; rights and duties of citizens; status of Kenya under international law; relationship between Kenya and international organizations; and environment and natural resources– Section 3 (2). However, the government may enter into other bilateral agreements concerning, government business, and technical, administrative or executive matters – Section 3(4). From the foregoing, investment treaties and those relating to exploitation and use of natural resources are subject to the Constitution and the Act.

¹⁶³ Emphasis mine

¹⁶⁴ Emphasis mine

¹⁶⁵ Kibugi, R., Mwathane, I., and Makathimo, M., (2016) Large Scale Land Acquisitions for Investment in Kenya: Is there Equity for Local Communities through Meaningful Participation, and Benefits? A case study of the situation in Lamu, Isiolo and Siaya Counties. Land Development and Governance Institute, Nairobi.

- The Ministry of Foreign Affairs and International Trade, the Ministry of Industry, Trade and Cooperatives and the State Law Office and the Department of Justice are involved in negotiating and concluding investment treaties. Additionally the ministries of Mining, Energy and Petroleum and Agriculture, Livestock and Fisheries, are involved in negotiating and concluding investment contracts that relate to their respective mandates.
- Kenya has signed 19 bilateral investment treaties (BITs)¹⁶⁶ and some multilateral investment treaties including the American Growth and Opportunity Act (AGOA) and East Africa Community European Union Economic Partnership Agreement. There have been some concerns about the extent to which these treaties factor human rights impacts on local communities including labour rights and livelihoods.¹⁶⁷
- The Constitution obligates state agencies to promote respect for human rights. In addition the Public Officer Ethics Act requires public officers in carrying out their duties to ensure that they do not violate rights and fundamental freedoms enshrined in the Constitution. Consequently, in negotiating investment treaties the law expects them to ensure that the treaties are consistent with the state duty to protect, promote and fulfill human rights.

Guiding Principle 10: Multilateral institutions

States are required to leverage their membership of a multilateral institution to ensure that those institutions do not constrain the members' ability to fulfill their international human rights obligations. Additionally, they should actively encourage the respect of human rights by the institutions and the individual members.

- Kenya is a member to a number of multilateral institutions. These include the East Africa Community (EAC) and the Common Market for East and Southern Africa (COMESA) that also double as trading bloc, the Africa Development Bank (AfDB) and the East Africa Development Bank (EADB).
- Kenya continues to cooperate with these bodies in their endeavour to ensure that activities undertaken in furtherance to their mandate do not infringe on human rights. For example, in 2015 the AfDB's Compliance Review and Monitoring Unit (CRMU) was

¹⁶⁶ See UNCTAD, 'International Investment Agreements Navigator: Kenya', available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/108>

¹⁶⁷ For instance see, Hickel, Jason, 'What is AGOA and why is it bad for Africa', available at <https://therules.org/whats-agoa-bad-for-africa/>. Also see Kenya Human Rights Commission, 'An Assessment of the Possible Implications of the EAC-EU EPA on Kenyan Agricultural Sector and its Compatibility with WTO Rules' available at <http://www.khrc.or.ke/publications/107-eac-eu-epa-implications-report/file.html>

involved in a problem-solving initiative in response to complaints about destruction of property emanating from a major sewerage improvement funded by the bank.¹⁶⁸

Pillar 3: State duty to ensure remedies

Guiding Principle 25: State's obligation to provide for remedies

In a bid to adequately protect human rights violations by business-related activities, States are obligated to ensure that there are effective remedies when businesses violated human rights.

- Articles 22 and 23 of the Constitution provide for the justifiability and enforcement of the Bill of Rights. Whenever rights are denied, violated, infringed or threatened, any person, or group of persons can on their own behalf or on that of another or in public interest institute court proceedings. In granting relief, the court can make: a declaration; grant an injunction; conservatory order; strike out any law that is incompatible with the Bill of Rights except in cases of allowable limitations¹⁶⁹; order compensation; or order judicial review.
- There have been efforts to reform the public justice system to ensure that the main actors are credible in their efforts to promote the rule of law. This includes more financial allocation to the various actors in the public justice system including the National Police Service, the office of the Director of Public Prosecutions and the Judiciary and vetting police officers and judicial staff for suitability to hold office.
- In 2008 a Judiciary Training Institute was established to provide judicial training for judges and magistrates. This important institution undertakes regular training to improve their skills and deepen their knowledge in existing and new areas of law. Through this avenue, the judiciary could be trained on business and human rights and the requisite frameworks on the same.
- Additionally, the judiciary has established more courts and hired more personnel, including in geographical areas where none existed.
- Despite these reforms, the public still perceives the police as the most corrupt institution in Kenya and courts too have been accused of corruption¹⁷⁰ and generally the country continues to score poorly on Transparency International's corruption perception index.

¹⁶⁸The Independent Review Mechanism: Annual Report 2015, African Development Bank, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM_Annual_Report_2015_version-En-.pdf accessed on July 16, 2017

¹⁶⁹ Article 24 of the Constitution provides for criteria for limitation of rights and fundamental freedoms

¹⁷⁰ Kenya Anti-Corruption Commission, 'Corruption in Kenyan Judiciary' (2010) available at <http://www.icgg.org/downloads/2010/Sitienei.pdf>

This perception compromises the State's effectiveness in enforcing penal laws against businesses.

- In pursuing remedies for the violation of human rights contained in the bill of rights, the Constitution has removed the *locus standi* requirement that has been historically used to block public interest litigation.

Gap

- Addressing the corruption and perceived corruption risk within the judicial remains a weak point.

Recommendation

- The access to justice players must continuously strive to eliminate corruption from among their ranks.

Guiding Principle 26: Domestic Judicial mechanisms

States should take appropriate measures to remove substantive and procedural barriers to access to justice by victims of business-related human rights abuses.

State-based judicial mechanisms

- **Establishment of the courts in the Constitution**
 - Article 159. It is one of the three separate arms of government and comprises, the superior and subordinate courts. Superior courts are the Supreme Court, the Court of Appeal and the High Court while subordinate courts are Magistrates' Courts, Kadhis Courts, Court Martial, and any other court or local Tribunal established by an Act of Parliament. The High Court is further divided into four divisions, environment and land, constitution and human rights, commercial and admiralty, and judicial review.
 - The Industrial and Labour Relations Court is established pursuant to Article 162 (2) of the Constitution of Kenya, 2010.¹⁷¹ It has the status of a High Court, and hence its decision and jurisprudence is binding on all courts lower in rank that it or if overturned by a superior court, in this case the Court of Appeal or the Supreme Court.¹⁷² Most cases that are filed before the court relate to unfair termination and failure to remit

¹⁷¹ Article 162 (2) of the Constitution of Kenya, 2010.

¹⁷² See compendium of labour-related cases <http://kenyalaw.org/caselaw/cases/actions/8/>

statutory deductions including National Social Security Fund and the National Hospital Insurance Fund.

- The HIV AIDS Tribunal - established under Section 25 of the HIV Prevention and Control Act.¹⁷³ The Tribunal has the authority of a subordinate court- can summon and compel attendance, including sanctions for non-attendance.¹⁷⁴ However, it took a long time to provide the tribunal with the appropriate facilities to operate from.¹⁷⁵ Additionally, the tribunal is still hampered by lack of funds, which erodes its capacity to adjudicate cases.¹⁷⁶
- The Environment and Land Court (E&LC) is among the special courts envisaged in the Constitution.¹⁷⁷ It was established under the Environment and Land Act, 2011.¹⁷⁸ It has the same jurisdiction as a High Court, including original and appellate jurisdiction on land and environment matters. This enabling statute gives the court the power to hear and determine disputes “relating to environmental planning and protection...and any other dispute relating to environment and land.”¹⁷⁹ What more there is the Environmental Tribunal is established under Section 125 of EMCA. A right of appeal lies against the decisions of the tribunal.
- Currently there are twenty-four E&LC stations in the country presided over by thirty-three judges¹⁸⁰. The government’s efforts to boost this court are notable with twenty new judges being appointed to this division at the close of 2016. This was timely following the successful contestation against an administrative order by the then Chief Justice conferring jurisdiction over magistrates’ court to hear and determine environment and land matters under the Act¹⁸¹. While the challenge of backlog persists, the Judiciary has an on-going initiative to clear it dubbed, justice@last

¹⁷³ Established under Act No 14 of 2006

¹⁷⁴ As above

¹⁷⁵ See UNAIDS’ Q & A with Ambrose Rachier, Chair of HIV Equity Tribunal in Kenya’, February 23, 2012, available at <http://www.unaids.org/en/resources/presscentre/featurestories/2012/february/20120223kenya>

¹⁷⁶ http://www.the-star.co.ke/news/2016/12/01/hiv-tribunal-has-received-800-cases-in-three-years-arwa_c1465278

¹⁷⁷ Article 162 (2)

¹⁷⁸ Act No 19 of 2011

¹⁷⁹ Section 13 (2) of Environment and Land Act.

¹⁸⁰ The Judiciary: List of Judges January , 2017

http://www.judiciary.go.ke/portal/assets/filemanager_uploads/2017%20news/LIST%20OF%20JUDGES%20.pdf accessed on July 16, 2017

¹⁸¹ Constitutional Petition No 3 2016, <http://kenyalaw.org/caselaw/cases/view/127421/>

that targets to prioritise the determination of cases that have been in court for ten years and beyond¹⁸².

- The Climate Change Act provides for the enforcement of rights related to climate change. It gives the Environment and Land Court jurisdiction to hear cases where a person is alleging that some conduct has or is likely to adversely affect climate change mitigation or adaptation efforts.¹⁸³ The court may give appropriate orders to stop the conduct that is harmful to the environment including compelling a public officer to take measures to discontinue the harmful conduct. In other cases, it may order compensation to a victim of a violation relating climate change duties.¹⁸⁴
- The judiciary in line with Article 159 of the Constitution also recently initiated a Court Annexed Mediation program that seeks to promote alternative dispute resolution mechanisms. The project, which is currently only limited to commercial and family matters, is in its pilot phase after which it will be rolled out across the country¹⁸⁵.

Gaps

- Cost of legal representation still high
- There is no credible state-sponsored legal aid

Recommendation

- The government should allocate more funding towards legal aid and to work with institutions such as the Law Society of Kenya and civil society towards this end.

Guiding Principle 27: State-based non-judicial grievance mechanisms

The State should consider expanding the mandate of existing authorities to give them a quasi-judicial function to address any gaps in the provision of remedy for business-related human rights abuses.

- The Kenya National Commission on Human Rights is established by an Act of Parliament.¹⁸⁶ Its functions include to “monitor, investigate and report on the observance of human rights in all spheres of life in the Republic...receive and investigate complaints

¹⁸² <http://www.judiciary.go.ke/portal/blog/post/chief-justice-launches-an-initiative-to-conclude-old-cases>

¹⁸³ Section 23, Climate Change Act

¹⁸⁴ Ibid

¹⁸⁵ Kenya Law, ‘Judiciary opens its doors to mediation’, April 18, 2016 available at <http://kenyalaw.org/kenyalawblog/judiciary-opens-its-doors-to-mediation/>

¹⁸⁶ Kenya National Commission on Human Rights Act, No. 14 of 2011, available at http://knchr.org/Portals/0/Articles/KenyaNationalCommissiononHumanRights_Act_No14of2011.pdf?ver=2016-08-01-132051-907

about alleged abuses of human rights [except those under the mandate of the gender and equality commission].¹⁸⁷

- KNCHR may also on its own initiative or on the basis of complaints investigate or research matters in respect of human rights and make recommendations to the State on improving compliance with human rights standards.¹⁸⁸
- KNCHR has statutory powers to, upon a complaint or on its own initiative, investigate any matter relating to human rights violations in a private institution. It is encouraged to use reconciliation, negotiation and mediation to resolve such matters
- KNCHR has held public inquiries on the impact of mining in Taita Taveta and on salt mining in Malindi.¹⁸⁹The inquiries were pursuant to systemic complaints alleging infringement of human rights brought to the Commission by the members of the public with regard to the aforementioned business activities.
- Through their elected parliamentary representatives, members of the public and civil society organizations have also petitioned the August house on alleged violations of human rights by business.¹⁹⁰This strategy can be useful in cases of inaction by regulators as parliament is able to use its power to question or summon them to respond.
- Administrative action: a number of statutes have inbuilt complaints procedures. For example under the Mining Act disputes can be referred to the Cabinet Secretary. Similar provisions are found in the draft Petroleum (Exploration, Development and Production) Bill 2015. However, the right to a court appeal against decisions arrived using this procedure is also guaranteed.
- Due to targeted civic education by State agencies and private actors, rights holders are more aware of the remedy options and their varying levels of effectiveness. Anecdotal evidence from KNCHR is that the institution is

¹⁸⁷ Section 8 (d), Kenya National Commission on Human Rights Act

¹⁸⁸ Section 8 (e) KNCHR Act

¹⁸⁹ See Kenya National Commission for Human Rights, 'The Malindi Inquiry Report 2016: Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi' (2016) available at http://www.knchr.org/Portals/0/EcosocReports/Malindi_Inquiry.pdf?ver=2013-02-21-141657-360

¹⁹⁰ The Parliamentary Committee on Natural Resources and Environment visited Kilifi following report of environmental degradation by HURIA-an human rights NGO. See Habari Kilifi, 'Athi River Mining company denies allegations of environmental degradation', available at <http://habarikilifi.com/news/athi-river-mining-company-denies-allegations-of-environmental-degradation/>. Another case is an ongoing tussle between Dominion Farm Limited whose operations are in Yala. Its CEO has been summoned by parliament in the ongoing saga, see Kamau, John, 'Rumours, Truths and Lies on Dominion Farm', Daily Nation, February 26, 2017, available at <http://www.nation.co.ke/news/Rumours-truths-lies-Dominion-Farm/1056-3827670-3n14phz/> (accessed on July 16, 2017)

receiving more complaints of business-related human rights abuses more than any other time in its history.

Labour

- Labour officers appointed under the Employment Act are tasked to ensure that employers comply with employment law. An aggrieved party may complain to a labour office or a police officer if they allege violation. The Act also spells out a dispute settlement mechanism between employers and employees.
- Labour disputes are handled through collective bargaining agreement, which involves tripartite meetings between the government, employers' representative and workers representatives.
- Labour officers established under the Labour Relations Act are responsible for ensuring compliance with labour laws at the operational level. However, they are faced with various handicaps, including the sheer workload assessed against their number.

Environment

- The National Environment Management Authority is the mandate to monitor private entities' compliance with their obligations under the Climate Change Act.¹⁹¹
- Complaints to the National Council on Climate Change regarding private entities' compliance with their climate change obligations are not entirely unforeseeable.
- The Climate Change Act empowers the National Council on Climate Change to require any private entity that has climate change obligations to report on its compliance status. The council may compel any private entity that has failed in its obligations to prepare a report within a specified time, detailing the actions it intends to take to ensure performance of those duties.

Gap

- Generally, the reach and effectiveness of the above mechanisms is primarily limited due to inadequate resources.

¹⁹¹ Section 17 of the Climate Change Act

Recommendation

- The government should sufficiently resource the concerned institutions through technical capacity training, recruitment of additional personnel, and with the requisite infrastructure and equipment.

Guiding Principles 28: Non-state based grievance mechanisms

The state should “consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms”

- With the encouragement by the State agencies, some business associations have been instrumental in seeking solutions in relation to the impact of businesses on human rights.
- The State has severally heeded to calls by the private sector to take positive measures and address several issues such as food insecurity and conflict.
- With regards to SOE’s the Mwongozo, tasks the board to ensure that disputes among and with stakeholders be resolved efficiently and expeditiously and to take reasonable steps to use alternative dispute resolution mechanisms to settle such disputes

Gap

- There is no legal requirement for businesses to have in place grievance mechanisms (with the exception of labour issues). Consequently only a few businesses have these in place and where they exist, they have no link to the state mechanisms. Moreover there is little, if any at all, monitoring by independent external parties, which affects their credibility as dispute resolution arenas.

Recommendation

- The state obligation to protect includes a positive duty to adopt a legal framework that requires business to remedy abuse occasioned by its operations. Thus the government should consider including in law, the requirement that business have in place a grievance mechanism, as well as guidelines on setting up grievance mechanisms.