

THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS



SCOPING  
PAPER: HUMAN  
RIGHTS AND  
THE ENERGY  
TRANSITION IN  
KENYA

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For more information contact Nora Götzmann at [nog@humanrights.dk](mailto:nog@humanrights.dk)  
You can read more about the Responsible Business Conduct in Sub-Saharan Africa project here: <https://www.humanrights.dk/projects/responsible-business-conduct-sub-saharan-africa>

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Wilders Plads 8K

DK-1403 Copenhagen K

Phone +45 3269 8888

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# INTRODUCTION

This scoping paper explores the human rights dimensions of renewable energy and the energy transition in Kenya. It seeks to serve as a resource for stakeholder engagement and discussion in working towards a human rights-based energy transition in Kenya. As such, the paper presents initial research and ideas, rather than comprehensive analysis.

- Part I introduces the structure of the energy sector and potential for renewable energy in Kenya.
- Part II explores the human rights context for renewable energy projects.
- Part III identifies possible state, business and investor pathways to mitigate risks of human rights abuse in the context of renewable energy investments, as well as opportunities for contributing towards an energy transition that is respectful and supportive of human rights.

The paper was produced through initial desktop research by commissioned consultants and Danish Institute for Human Rights (DIHR) staff, and supplemented by six online interviews with key informants from civil society organisations, state regulatory institutions and a business association in renewable energy, in Kenya. The scoping paper was also informed by an online workshop on human rights and the energy transition in Kenya, co-hosted by the Kenya National Commission on Human Rights (KNCHR) and the DIHR in August 2021. At the workshop, representatives from five civil society organisations discussed the draft scoping paper, sharing their insights and expertise on the human rights dimensions of the energy sector, and key points emerging from the discussion have been integrated into this final version of the paper.

Kenya is the fourth largest economy in Sub-Saharan Africa, with an approximate GDP of USD 70 billion in 2016.<sup>1</sup> Installed on-grid capacity is at 2 819 MW.<sup>2</sup> Kenya has a flourishing industrial sector, responsible for 60% of electricity consumption (see Figure 1). It has outstanding renewable energy resources and is one of the lowest cost developers of geothermal power in the world.<sup>3</sup>

Due to Kenya's economic growth, the country's electricity supply is under growing pressure. Between 2004 and 2013, power demand increased by 18.9% yearly.<sup>4</sup> However, regular droughts, and variable renewable power as well as reserve margin requirements, mean supply is not considered sufficient to meet demand.<sup>5</sup> According to 2015 figures, more than 39% of Kenya's electricity is generated by hydropower, therefore, the situation is specifically challenging during the drier months.<sup>6</sup> Capacity gaps are settled

with expensive thermal generation based on fossil fuels. Increasing economic activities and a growing population result in a growing domestic energy demand in Kenya, which is usually fulfilled by imports of foreign energy. The high cost of energy imports notably slows economic growth in the country. For example, imported crude petroleum accounts for around 25% of the national import bill.<sup>7</sup> The unreliable energy infrastructure contributes to the high energy costs; on average, Kenyan companies lose almost 10% of their production due to power outages and fluctuations. As a result, affordable, sustainable and reliable domestic energy for all citizens is declared an important objective in national policy.<sup>8</sup>

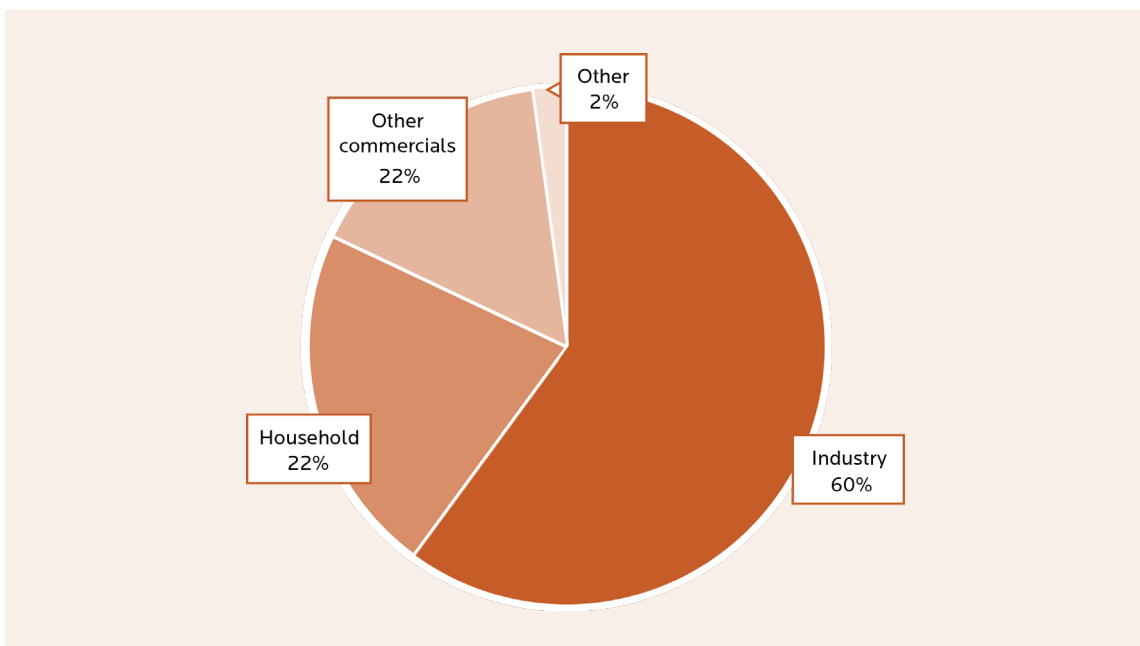


Figure 1: Electricity consumption by sector in 2018, Kenya<sup>9</sup>

# 1. PART I: STRUCTURE OF THE ENERGY SECTOR AND RENEWABLES POTENTIAL

## 1.1 ENERGY SECTOR

Most of the country's generation capacity (70%) is owned and operated by KenGen, which is 70% government-owned.<sup>10</sup> Kenya was one of the first countries in Sub-Saharan Africa to open up to electricity contributions to the grid from Independent Power Producers (IPPs).<sup>11</sup> IPPs are private entities which own and/or operate facilities to generate electricity and then sell it to a utility, central government buyer and end users.<sup>12</sup> About 30% of Kenya's installed generation capacity is owned and operated by IPPs across 15 plants, consisting of three small-scale hydro plants, one geothermal plant, one biomass plant and ten fuel oil plants.<sup>13</sup> IPPs make up 1 048 MW of on-grid capacity.<sup>14</sup> Overall, the GWh 9651 of produced electricity draws on geothermal (46%), hydro (39%), oil (12%) and small amounts of solid biofuels and wind power (see Figure 2).

Kenya has significant potential for power generation from renewable energy sources.<sup>15</sup> Large solar, wind, hydro, biomass and geothermal resources resulted in the government looking to expand renewable energy generation. Following a least-cost approach, the government has placed emphasis on the development of geothermal and wind energy plants, as well as solar-fed mini-grids for rural electrification.<sup>16</sup>

Electricity Production	GWh	Percentage
Coal	0	0
Oil	1,205	12%
Gas	0	0
Biofuels (solid biofuels)	122	1%
Waste	0	0
Nuclear	0	0
Hydro	3,787	39%
Geothermal	4,479	46%
Solar PV	1	0
Solar thermal	0	0
Wind	57	0.6%
Tide	0	0
Other sources	0	0
Electricity production	9,651	100%

Figure 2: Electricity production in GWh<sup>17</sup>

### 1.1.1 ENERGY ACCESS

The government is focussing on universal access by 2022.<sup>18</sup> In 2018, about 75% of the population had access to electricity.<sup>19</sup> Kenya's electrification programme contains one of the highest levels of off-grid power – power systems that supply electricity to equipment outside of mainstream utility power<sup>20</sup> – in the world, showing the strong enabling framework that was established by the Energy Regulatory Commission (ERC). Electricity consumption has not increased at the same rate as connections. Initially, a firm policy commitment by the government to universal access around 2020 saw the government dedicate public resources through Kenya Power & Lighting Company, thereby increasing the pace of electrification. Extra resources from donors have since followed.

### 1.1.2 ELECTRICITY EXPORTS AND REVENUE

Currently, Kenya is importing electricity from Uganda due to capacity constraints on its grid in the west of the country,<sup>21</sup> and exporting small amounts to both Tanzania and Uganda.<sup>22</sup> The East African Power Pool<sup>23</sup> (EAPP)'s connection with the Southern African Power Pool (SAPP) through the Zambia-Tanzania-Kenya (ZTK) interconnection, currently under construction, could be a gamechanger.<sup>24</sup> There is also scope to connect Tanzania, Kenya and Ethiopia through new transmission lines, providing Ethiopia specifically with an opportunity to export power (see Figure 3).

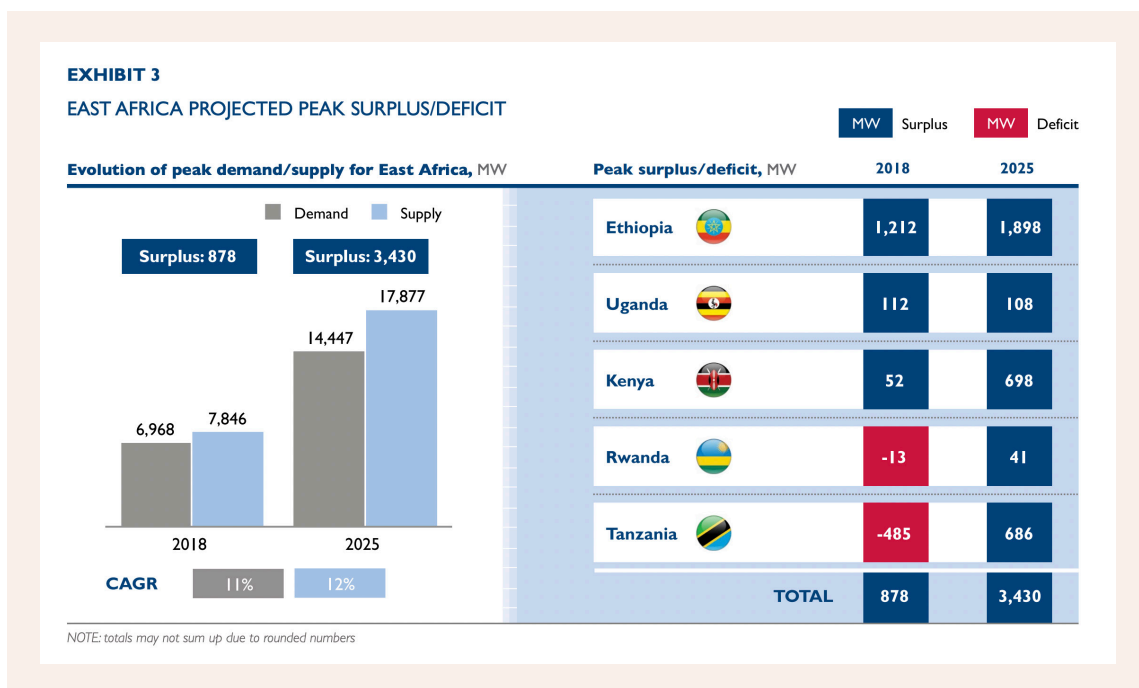


Figure 3: East Africa projected electricity peak surplus/deficit<sup>25</sup>

### **1.1.3 BIO-ENERGY**

The country's agricultural activity produces huge amounts of agricultural waste,<sup>26</sup> ideal feedstock for biogas and biomass for electricity generation. The 2014 Draft National Energy Policy sets out a biogas expansion target of 10 000 small and medium-sized digesters by 2030.<sup>27</sup>

### **1.1.4 WIND**

Kenya has some high wind regime areas due to its topography. The north-west of the country (Marsabit and Turkana districts) and the edges of the Rift Valley are the two windiest areas (with average wind speeds of over 9m/s at 50 metres).<sup>28</sup> According to wind resource maps, about 25% of the country is understood to be appropriate for wind power technology. There is notable potential to utilise wind energy for wind farms connected to the grid, as well as for isolated grids and off-grid community electricity and water pumping. Kenya recently experienced a wave in wind energy installations for electricity generation,<sup>29</sup> including Africa's biggest windfarm (300 MW) (the Turkana Wind Power Project),<sup>30</sup> Kipeto Wind Farm on Ngong Hills (5.1 MW) which is operated by KenGen, and 80-100 small wind turbines. However, access to land has been a challenge for both site selection as well as transmission connection.

### **1.1.5 SOLAR**

Kenya has big insolation rates, with an average of 5-7 peak sunshine hours and average daily insolation of 4-6 kWh/m<sup>2</sup>.<sup>31</sup> The total potential for solar photovoltaic (PV) power generation is estimated at 23 046 TWh/year. Solar power is considered an option for rural electrification due to its cost-effectiveness for decentralised application. Stand-alone solar PV systems for households and public institutions have been subsidised and the government is aiming to install a further 500 MW and additional 300 000 domestic household solar systems by 2030.<sup>32</sup> Commercial and industrial applications are also growing in popularity: flower and vegetable farms have already installed renewable energy systems to add to the power supply on their premises. Moreover, hybrid PV-diesel island grids are increasing: 18 MW of existing diesel-run stations are proposed to be retrofitted for the use of solar power in the next few years.<sup>33</sup> There are also grid-connected solar PV projects in development and construction currently, each around 40 MW.<sup>34</sup> However, challenges relating to the prolonged power purchase agreement negotiation and land access process, as well as the slowing growth in power demand, cast a shadow on the younger PV projects whose initial 'expression of interest' has been approved but whose permitting status is less advanced.<sup>35</sup>



### **1.1.6 HYDRO**

The potential for large hydroelectric power development is approximately 1 500 MW, of which 1 310 MW is viable for projects with a capacity of at least 30 MW.<sup>36</sup> Of these, 434 MW has been identified in the Lake Victoria basin, 264 MW in the Rift Valley basin, 2019 MW in the Athi River basin, 604 MW on Tana River basin and 146 MW on Ewaso Ng'iro North River basin. Nonetheless, the expected generation costs for these sites mean they are not included in the Least Cost Power Development Plan. Small, mini and micro hydroelectric systems (with capacities below 10 MW) are expected to go ahead and generate 3 000 MW nationwide.<sup>37</sup> In 1997, Kenya's Electric Power Act granted IPPs the leeway to supply electricity to the grid, but small decentralised schemes, such as micro hydropower, were not addressed.<sup>38</sup>

### **1.1.7 GEOTHERMAL**

Kenya is equipped with ample geothermal resources, particularly in the Rift Valley, with a total national potential between 7 000 and 10 000 MW. Production started in 1981 when a 15 MW plant was authorised in Olkaria. Two projects, one owned and operated by KenGen and another one by an IPP, currently generate a total of 129 MW.<sup>39</sup> Geothermal power has been recognised as a cost-effective power option in Kenya's Least Cost Power Development Plan with 5 000 MW of geothermal power being the national target for 2030. The nation has three pathways for the deployment of geothermal power generation, namely contracts for sites owned by KenGen, partnerships with the government-owned Geothermal Development Company (which takes on the exploration and sells the geothermal resource to power plant developers), or independent development on sites assigned by the government (in which the private developer assumes the exploration).<sup>40</sup> Kenya has also had a readily available access to loans from development finance institutions, generally.<sup>41</sup> Yet, geothermal project development is a lengthy process, which needs several years from conception to commissioning.<sup>42</sup>

## **1.2 REGULATORY AND INSTITUTIONAL FRAMEWORKS IN RENEWABLE ENERGY IN KENYA**

The Kenyan government has dedicated itself to providing favourable conditions for renewable energy enterprises. Several laws and policies have been enacted or formulated to address both the administrative and regulatory frameworks relating to renewable energy production as well as human rights in renewable energy development. State institutions have been set up to administer energy production, including energy transition. While Kenya has made strides in developing renewable energy sources to

provide the energy required to support the realisation of Vision 2030, which aims to achieve 100% green energy,<sup>43</sup> the country has also continued to exploit non-renewable energy sources. This includes the Lamu Coal Power Plant, part of the government's flagship Lamu Port South Sudan Ethiopia Transport (LAPSSET) Corridor Project.<sup>44</sup> Similarly, Kenya's Nuclear Agency has submitted impact studies for a USD 5 billion power plant and said it is on course to build and start operating the facility in about seven years.<sup>45</sup>

In 2018, the Government of Kenya, in partnership with the World Bank, launched the Kenya National Electrification Strategy.<sup>46</sup> The strategy offers a roadmap to achieving universal access to electricity for all Kenyans by 2022. With the assistance of the geospatial tool, this strategy has pinpointed least-cost options for supplying electricity to households and businesses throughout the country.<sup>47</sup>

Generation by IPPs is regulated under the Energy Act. The private sector generates 28% of Kenya's centralised electricity supply.<sup>48</sup> Of the 2 700 MW capacity additions intended over the next five years, 80% is expected to come from private investment.<sup>49</sup> The private sector is protected from political fluctuations by the partial privatisation of utilities. Only the Geothermal Development Company and the Kenya Electricity Transmission Company are fully state-owned enterprises.<sup>50</sup>

### **1.2.1 ENERGY INDUSTRY STRUCTURE**

Different state institutions play different roles in the energy sector. Those whose responsibilities relate to electricity sit under the Ministry of Energy.<sup>51</sup> Figure 4 provides an illustration of government institutions and their roles in the energy sector, and the accompanying box gives a short overview of their roles. In Part II of the paper, additional relevant structures, such as those relating to land and other natural resources management, are further elaborated.

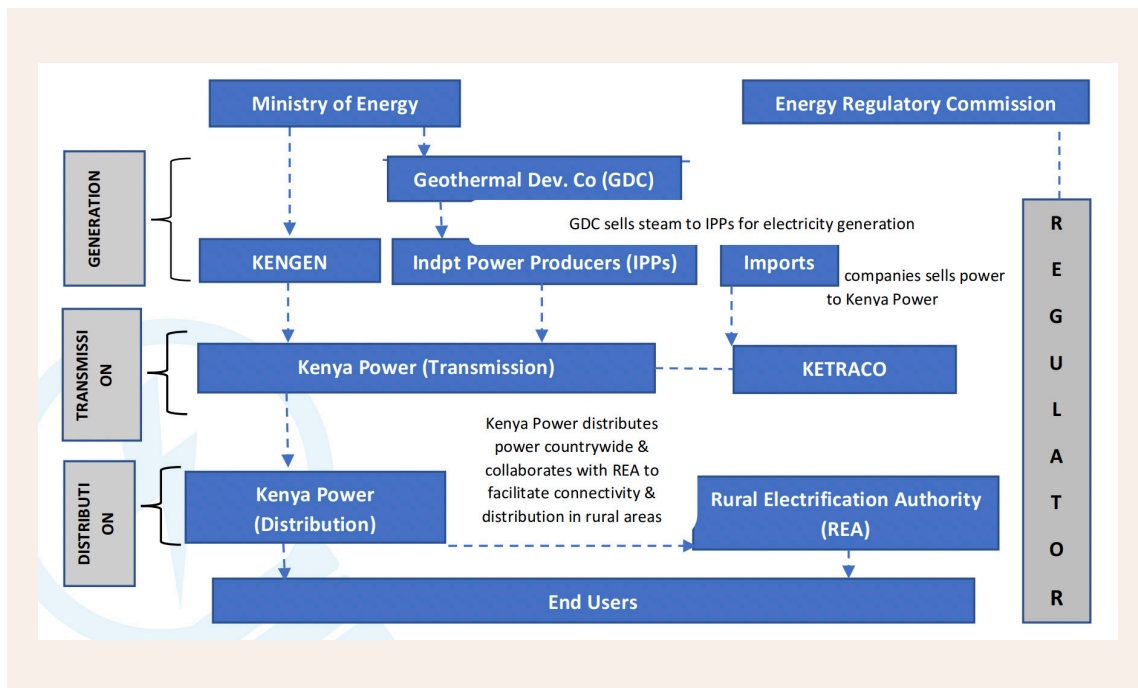


Figure 4: Government institutions and their roles in the energy sector<sup>52</sup>

### KENYA'S POWER SECTOR INSTITUTIONS<sup>53</sup>

- **Ministry of Energy and Petroleum:** This ministry is responsible for developing sector policies and managing utilities.
- **Energy Regulatory Commission:** Created in 2007, this independent commission works under annual performance contracts with the Ministry of Energy and Petroleum. It regulates the whole energy sector, including renewable energy development, and approves power purchase agreements. It is also the primary data hub for the sector and produces national energy plans. To achieve its mandate of producing such plans, the commission developed a Least Cost Power Development Planning Committee in 2009.
- **Rural Electrification Authority:** A state-owned entity that was formed in 2007 to control implementation of rural electrification projects from Kenya Power & Lighting Company.
- **Kenya Electricity Generating Company (KenGen, formerly KPC):** A partly privatised company with 70% government ownership. KenGen owns more than 70% of total installed capacity in Kenya.
- **Geothermal Development Company:** A 100% government-owned company established in 2008 to speed up development of geothermal resources. The company sells steam to KenGen for electricity generation.
- **Kenya Power & Lighting Company:** A partly privatised transmission and

distribution company (the government share is 51%) and grid operator. The company is responsible for distribution and producing distribution lines/substations of 66kV and below. It manages both the high-voltage transmission lines and the mini-grids owned by the Rural Electrification Authority. It acts as a single buyer in the electricity market; all power generating companies must sign power purchase agreements with it.

- **Kenya Electricity Transmission Company:** Formed in 2008, the company is a state-owned utility responsible for designing, constructing, operating and maintaining new high-voltage electricity transmission lines (over 132 kV).
- **Independent Power Producers (IPPs):** Private sector actors in the power sector managing thermal (conventional) energy or renewable energy sources under the government's feed-in-tariff policy. The IPPs collectively contribute to nearly the remainder of Kenya's power generating capacity (see KenGen).
- **National Environmental Management Authority:** This government body manages the enforcement of environmental laws and regulations. It is established under the Environmental Management and Coordination Act.<sup>54</sup> Under its mandate, the authority coordinates various environmental management activities undertaken by the lead agencies; and promotes integration of environmental considerations into development policies, plans, programmes and projects.<sup>55</sup>
- **The Energy and Petroleum Regulatory Authority:** Established under the Energy Act 2019, this government body is responsible for leading the planning, development, implementation, promotion and execution of structures for the development and regulation of renewable energy and energy efficiency through: research and planning; development of standards and regulations; and compliance and enforcement.
- **Centre for Energy Efficiency and Conservation:** The centre was founded jointly by the Government of Kenya and the Kenya Association of Manufacturers to promote energy efficiency and conservation efforts in Kenya.

### 1.2.2 PUBLIC COMPANIES

The public sector plays an important role in power generation. The government owns the majority of power projects in the country. The major growth of geothermal energy in Kenya would not have been possible without publicly funded exploration of the resource between 2007 and 2015 and successive investment by KenGen to expand generation capacity.<sup>56</sup> Although licenses for geothermal development have been available to private companies for 20 years, only one IPP with a capacity of 139 MW has been established since 1998.

### 1.2.3 PRIVATE ACTORS

IPPs are private companies which generate power and sell electricity in bulk to Kenya Power & Lighting Company. Kenya has more experience with IPPs than most countries in Sub-Saharan Africa.<sup>57</sup> Between 1996 and 2015, the country produced 12 IPP projects, having a total capacity of about 1 106 MW and worth more than USD 2.3 billion in investment.<sup>58</sup> Two decades after the first wave of reforms, IPPs make up almost 30% of installed generation capacity. Around three-quarters of the IPPs procured since 1996 operate on medium-speed diesel or heavy fuel oil.<sup>59</sup>

### 1.2.4 DEVELOPMENT FINANCE INSTITUTIONS

Development finance institutions are significant players as they provide financial backing to renewable energy projects. They can contribute to due diligence through establishing human rights relevant conditions for lending or for providing project grants. In the Akiira geothermal project in western Kenya, for example, the European Investment Bank cancelled its 19.5 billion Kenyan shillings (USD 190 million) loan.<sup>60</sup> The project was at the heart of tensions between the population and local authorities.<sup>61</sup> Some of the contestations were related to alleged human rights abuses in the development of the project.<sup>62</sup> While the European Investment Bank withdrew from the project for unspecified reasons, this example illustrates the potential leverage of financial institutions that are investing in renewable energy projects.

However, some key informants interviewed in the development of this paper, also noted that the nature of financial or lending organisations, being for-profit organisations, can limit the scope for their leverage for the respect of human rights by the state and developers. In addition, while the guidelines set by development finance institutions are often progressive and relevant to addressing human rights challenges in supported projects, the accompanying monitoring and evaluation processes have been noted to fall short in practice. Furthermore, interviewees noted that redress mechanisms and feedback channels with development finance institutions can be difficult for communities to access, owing to physical distances, lack of dedicated personnel and liaisons at the local level, as well as limited community awareness and information about these frameworks.

## PART I: SUMMARY POINTS

- Kenya aims to achieve universal access to electricity by 2022.
- Kenya has prioritised the development of renewable energy resources to meet the gaps in local energy production and supply, including through

the development of geothermal and wind energy plants as well as solar-fed mini-grids for rural electrification.

- Whereas the public sector has taken the lead in developing renewable energy resources in Kenya, there is a deliberate trend to promote IPPs and other private sector actors to play a more significant role.
- Kenya has attracted loans from development finance institutions for renewable energy projects.
- Government agencies and institutions perform a range of functions in the energy sector, including: policy development (Ministry of Energy); power generation (Ken-Gen and the Geothermal Development Company); development of power infrastructure (Kenya Electricity Transmission Company Limited); power distribution (Kenya Power & Lighting Company); environmental management (National Environmental Management Authority); and renewable energy development (Energy and Petroleum Regulatory Authority).
- While the government has been aiming to transition to 100% green energy, it has simultaneously promoted non-renewable energy sources.

## 2. PART II: THE HUMAN RIGHTS CONTEXT OF THE ENERGY TRANSITION

### 2.1 RIGHTS-HOLDERS AT RISK

Different rights-holders are impacted differently by renewable energy projects and the energy transition. According to the interviewees and workshop participants, those who are most vulnerable to adverse human rights impacts in renewable energy projects include women, children, pastoralists and smallholder farmers. In addition, people living with HIV&AIDS are frequently marginalised and may therefore be vulnerable.<sup>63</sup> Workshop participants also noted a gap between actions taken in Nairobi and impacts that are felt in rural communities.

#### 2.1.1 WOMEN AND GIRLS

Interviewees and workshop participants, speaking in the context of renewable energy projects, stated that women in rural areas of Kenya frequently experience vulnerability due to their lack of access to land and credit, combined with a large reliance on rainfed agriculture for their livelihoods. Stakeholders also noted that women are often marginalised throughout various stages of project planning and implementation, including during engagement, sensitisation and land-related decision-making. Pastoralist women may face hardship due to lack of resources and access to information on the energy transition and related processes, as well as limited decision-making power due to gender-prescribed norms and behaviours. Furthermore, Kenya's Indigenous women are often confronted by multifaceted social, cultural, economic and political constraints and challenges, belonging to minority and marginalised peoples nationally and through internal social cultural prejudices. In some communities, such prejudices continue to deny Indigenous women equal opportunities, often leaving them illiterate and in poverty. It can also prevent them from having a voice to inform and influence cultural and political governance and development policies and processes, due to unequal power relations at both local and national levels.<sup>64</sup> One interviewee reported, for instance, that in some communities, the title to land is held by male members of the family. Thus, compensation for expropriated land earmarked for renewable energy development could be paid to the male head of the household, to his male heir(s) or even male relatives. Unmarried women and widows are frequently particularly vulnerable as compensation

for expropriated land initially belonging to the deceased husband or father is made out to a male relative, in their place.

### **2.1.2 ETHNIC MINORITIES**

The interviews conducted indicated that ethnic minorities also face vulnerability in relation to sharing the benefits generated by renewable energy projects. Geothermal, wind and solar energy plants are mainly found in areas inhabited by ethnic minorities. It was reported that they can face discrimination in the allocation of quotas for jobs to community members, for instance. Interviewees and workshop participants also observed that, in some cases, where sensitive underlying issues that relate to apparent or actual ethnic hostilities are not appropriately addressed, energy projects have the potential to escalate inter-ethnic and inter-community hostilities.

### **2.1.3 INDIGENOUS PEOPLES**

Renewable energy projects are frequently located in areas inhabited by Indigenous Peoples. Indigenous Peoples in Kenya are mainly pastoralists and hunter-gatherers, as well as some fisher-peoples and small farming communities. Pastoralists (Turkana, Rendille, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra, Pokot, Endorois and others), who are estimated to comprise 25% of the national population, occupy parts of northern Kenya and towards the border with Tanzania in the south. Hunter-gatherers (the Ogiek, Sengwer, Yiaku, Waata and Aweer), the largest individual community, numbers approximately 79,000.<sup>65</sup> Both groups face land and resource tenure insecurity, poor service delivery, poor political representation, discrimination and exclusion. Their situation seems to get worse each year, with increasing competition for resources in their areas.<sup>66</sup>

### **2.1.4 PASTORALISTS**

Pastoralists, some of which also identify as Indigenous Peoples, often experience numerous and intersecting sources of vulnerability, including in the transition to renewable energy. For them, traditional adaptation mechanisms have frequently been disrupted, sometimes resulting in pastoralism being stigmatised as connected to chronic food insecurity. Their traditional dependence on natural resources for food and livelihood, the absence of infrastructure and the historic marginalisation of the region makes them highly vulnerable to any changes in the environment. Many pastoralist communities, including the Turkana communities, have experienced a long history of chronic malnutrition and some of the poorest health indicators



in Kenya.<sup>67</sup> The particular vulnerabilities of children of Kenyan pastoralists, related to decreased availability of food resulting in malnutrition and dropping out of primary school, has also been noted.<sup>68</sup> Furthermore, in the pastoral zones, there might be a lack of milk during drought periods since the cattle are moved to remote locations.

## **2.2 CHALLENGES TO HUMAN RIGHTS PROTECTION AND RESPECT IN THE ENERGY TRANSITION**

The United Nations Guiding Principles on Business and Human Rights (UNGPs) provide a universal framework guiding states and businesses in protecting and respecting human rights in the context of business activities (see box below). In April 2021, the Kenyan Cabinet adopted the Kenya National Action Plan on Business and Human Rights (NAP)<sup>69</sup> which provides a framework for domesticating the UNGPs. The Kenya NAP prioritises the development of regulatory frameworks aimed at safeguarding, among other things, human rights abuses in energy projects. It emphasises protection of human rights in relation to: land and natural resources; environmental protection; labour rights; and access to remedies. It specifically makes the recommendation that the Kenya Climate NAP be 'disseminated to promote dialogue among businesses on climate change so that they can adopt practices that reduce climate change and ensure resilience.'<sup>70</sup>

### **UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS**

Unanimously endorsed by the Human Rights Council in 2011, the UNGPs present the authoritative international framework for government duties and business responsibilities vis-à-vis human rights along three inter-related pillars:

- Pillar 1: The state duty to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation and adjudication.
- Pillar 2: The corporate responsibility to respect human rights, which means that companies are expected to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved.
- Pillar 3: Access to remedy, which requires both states and businesses to ensure greater access by victims of business-related human rights abuses to effective remedy, both judicial and non-judicial.

## 2.2.1 STATE DUTY TO PROTECT

Whereas the Constitution of Kenya 2010 provides a progressive basis for anchoring human rights protection in the context of business operations, as illustrated by the Kenya NAP and other analysis, ample opportunity exists for strengthening legislation and regulation to more effectively safeguard human rights. The following paragraphs provide a few illustrative examples of areas for further development, that came to light through the desktop research, interviews and workshop conducted for this scoping paper.

**Registration of community land:** Under the Community Land Act, land held as community land must be registered for interest in the said land to be enforceable.<sup>71</sup> Interviewees noted that where historical injustices relating to land ownership and use by communities have not yet been resolved, it can be challenging to protect their land by registering it under the regime of community land. Some also observed that the acquisition and use of land for renewable energy production without addressing historical land-based community grievances contributes to the vulnerability of local communities, and noted that historical land injustices are critical and must be addressed.

**Resettlement frameworks:** Interviewees and workshop participants pointed out that there is no common resettlement policy offering guidelines on due process provisions and laying threshold considerations on how resettlement may be undertaken by state and business actors, including in the development of renewable energy projects. Forced evictions and involuntary resettlement are critical issues in the context of energy projects, indicating that the absence of clear and human rights-based governance frameworks may contribute to significant human rights protection gaps.

**Protection of Indigenous Peoples rights:** While more than 25 ethnic communities in Kenya identify as Indigenous,<sup>72</sup> the concept of 'Indigenous Peoples' as under the UN Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention 169, is not recognised under Kenyan law. Lack of legal recognition may contribute to gaps in consultation, recognition of traditional authorities and representation in the development and operation of renewable energy projects. While regional human rights bodies have emphasised the right to consultation irrespective of formal legal recognition of Indigenous status, in practice protection gaps frequently arise,<sup>73</sup> including regarding the right to be consulted according to free, prior and informed consent (FPIC) where land and land-based resources are at stake, in the development and production of renewable energy. Furthermore, in addition to the community land issue mentioned above, for Indigenous Peoples, there are some serious issues around lack of recognition of the forms of land use that Indigenous Peoples practice. For example, pastoralism or other forms of land use that involve large areas of

land which are often used seasonally, can effectively mean that they have little or no security of tenure. This is especially the case for communities that are not sedentary. Because pastoralists in particular use vast areas of land, the measures needed to protect their land tenure rights in all their different forms are in need of further legal protection.<sup>74</sup> They have been squeezed into smaller and smaller spaces over decades with the establishment of conservation areas, land acquisition for business, tourism, ranches, etc., resulting in significant impoverishment and limitation of their movement, access to grazing grounds and so forth.<sup>75</sup>

**Human rights due diligence frameworks:** The development of renewable energy projects relies on environmental and social impact assessments (ESIAs) as part of the legally required due diligence measures by developers. Interviewees and workshop participants stated that, in practice, ESIAs place a disproportionately large emphasis on direct environmental impacts relative to social impacts, including human rights impacts. The Environmental Management and Coordination Act and regulations requiring ESIAs do not establish clear obligations of state institutions and private sector actors to address human rights considerations.

**Company reporting on human rights impacts:** Kenyan law does not provide for regulations or guidelines for reporting by companies, including those in the renewable energy sector, on their non-financial impacts and on how they have addressed the said impacts.<sup>76</sup> Even in cases where companies report on their human rights impacts, there is no common guiding framework for ensuring the comprehensive coverage of material human rights impacts of companies.<sup>77</sup>

## NEW CLIMATE LAWS

Various UN human rights bodies and experts have recognised climate change as presenting specific risks to the rights to life, food, water and health;<sup>78</sup> underlined its consequences on the full realisation of human rights<sup>79</sup> and stressed that the response must respect, protect, promote and fulfil human rights.<sup>80</sup>

In the last years, Kenya has set up two transformative laws that directly affect its transition to a low-carbon economy.

The Climate Change Act 2016 set forth a regulatory framework that encourages an improved response to climate change and provides measures and mechanisms to enhance resilience to climate change and encourage low-carbon development.<sup>81</sup> It also develops a method for citizens to hold

government and business actors responsible for decreasing greenhouse gas emissions.<sup>82</sup> Citizens are entitled to challenge private and public entities that disturb efforts to decrease the impacts of climate change.<sup>83</sup> Furthermore, the Climate Change Act contains provisions to promote incentives to pursue low-carbon development and advancement of research and development on clean technologies.<sup>84</sup>

The Energy Act 2019 has established a regulatory framework to ensure that Kenya meets its goal of universal energy by 2030 while reducing its greenhouse gas emissions.<sup>85</sup> It provides a framework for the decentralisation of the supply of energy services to the grassroots level: energy plans will be created and executed at the county level, with the national government only coordinating these plans into a national plan.<sup>86</sup> The Energy Act regulates production, supply and use of electricity. The government has maintained a stable investment climate for private sector participation in energy, establishing expanded transmission and distribution networks to deliver power to customers, sustaining cost-reflective tariffs, sustaining a creditworthy off-taker, and decreasing inefficiency in the sector to aid more affordable end-user tariffs. The government has established a Least Cost Development Plan with the objective of prioritising resources that allow the power sector to grow efficiently.<sup>87</sup> A feed-in tariff, a policy tool to encourage investment in renewable energy sources by offering long-term contracts to renewable energy producers, has been developed while a net metering regulation is under development.<sup>88</sup>

### 2.2.2 CORPORATE RESPONSIBILITY TO RESPECT

Business entities developing or operating renewable energy projects can contribute to adverse human rights impacts. Some of the illustrative human rights impacts identified through the desktop research, interviews and workshop discussion are outlined in brief below.

**Land-based claims:** Interviewees and workshop participants stressed the prevalence and significance of land-related matters in the context of renewable energy projects. It was noted that the Lake Turkana Wind Power project, Olkaria, and Akiira, for example, all have disputes emerging from complaints by local communities on matters relating to land ownership and use, forced eviction and inadequate compensation for land.

**Environmental harms:** The activities of companies and project developers reportedly result in damage to the environment, leading to: exposure of local communities to health hazards; and the decimation of local ecosystems which sustain livelihoods, including fishing, pastoralism and farming.

**Intimidation of rights-holders and human rights defenders:** Interviewees and workshop participants noted that rights-holders advocating for their rights are sometimes intimidated from holding positions which contradict the positions advanced by project developers and the state.

**Meaningful participation of local communities:** According to interviewees and workshop participants, local communities have historically not been adequately and meaningfully consulted in decisions relating to awarding concessions, development and operation of renewable energy projects. It was also noted that in certain instances where local leaders are relied on as 'brokers' between communities and companies, there is a risk of abuse of power and corruption. Workshop participants also observed that while there has been a lot of discussion about FPIC, serious gaps exist in terms of implementation in practice.

**Human rights due diligence processes:** Interviewees and workshop participants shared that ESIA's frequently prioritise the identification of environmental impacts over social or human rights impacts, contributing to significant gaps in the assessments and subsequent management of environmental and social issues.

**Labour rights:** According to interviewees and workshop participants, many workers have alleged labour rights abuses, including inadequate protective gear, poor wages, and occupational health and safety challenges, among others.

### 2.2.3 ACCESS TO REMEDY

Kenya has a well-developed judicial system with growing jurisprudence on human rights, backed up by a progressive Constitution. Non-judicial remedy frameworks are also in place. Despite this, research indicates that challenges remain in terms of rights-holders accessing effective remedies, which has implications for the consideration of the role of remedies in the development of the energy transition. The following paragraphs provide illustrative examples.

**Judicial remedies:** There are a number of instances where judicial remedies have been utilised effectively to protect human rights. Most notably, the decision of the National Environmental Tribunal in the Lamu Coal Power Plant case restated the need for effective consultation with rights-holders and stakeholders in the development of energy projects and the need to address environmental impacts of such projects.<sup>89</sup> Judicial mechanisms have, however, been faulted, most notably for the high costs involved. Interviewees and workshop participants also observed that frequently, companies dedicate significantly larger amounts of resources for court processes compared to

the corresponding resources available to impacted communities. In some instances, communities have gained positive decisions from non-judicial frameworks – which are relatively cheaper to engage – only for these decisions to be overturned by the courts, at the instigation of companies. They are beset with case backlog resulting in cases dragging on for inordinately long durations;<sup>90</sup> undue emphasis on legal technicalities as the basis for determining disputes;<sup>91</sup> a court or tribunal often sitting at a physical distance of the local communities (where they are a party to a matter) thereby making it difficult for communities to participate and follow proceedings effectively. They are also fragmented, with many courts and jurisdictions addressing different components which also overlap on broader legal questions (see box below).

**State-based non-judicial remedies:** It was observed by interviewees and workshop participants that while non-judicial remedy mechanisms are in place, their decisions are not always enforced. For instance, the decisions of non-judicial mechanisms are often not directly enforceable as they are often recommendatory or advisory only. Non-judicial remedy frameworks tied to independent state institutions may also address human rights questions in a compartmentalised manner. For instance, interviewees and workshop participants noted that the National Environmental Management Authority, in its role of approving ESIA's, does not directly assess aspects of human rights, instead deferring to the input of the Kenya National Commission on Human Rights. While this may be a progressive inter-institutional collaboration, the lack of legal frameworks directly assigning institutional roles and obligations relating to human rights in ESIA's can be identified as limiting the scope and sustainability of the current arrangement.

**Operational-level grievance mechanisms:** In assessing the responsiveness of operational-level grievance redress mechanisms, interviewees observed that while most energy development companies have internal operational-level grievance mechanisms, these mechanisms are often developed through a top-down approach. Furthermore, little information is available about the effectiveness of such mechanisms in terms of preventing and remediating grievances associated with renewable energy projects.

## EXAMPLES OF REMEDY AVENUES

- The **Environment and Land Court** is established under the Environment and Land Court Act<sup>92</sup> with jurisdiction to hear any disputes relating to: environment and land, including disputes relating to land administration and management; public, private and community land and contracts; and other instruments granting any enforceable interests in land.
- The **Energy and Petroleum Tribunal** is established under Section 108 of

the Energy Act<sup>93</sup> with the mandate to hear and determine appeals from decisions of the Energy and Petroleum Regulatory Authority.

- The **National Environmental Tribunal** is established under the Environment Management and Coordination Act.<sup>94</sup> Its mandate is to hear disputes arising from decisions of the National Environmental Management Authority on issuance, denial or revocation of licenses and offences from the Kenya Wildlife Management Act and the Kenya Forests Act.
- The **National Land Commission** is established by the Constitution of Kenya<sup>95</sup> and the National Land Commission Act.<sup>96</sup> Its mandate empowers it to: manage public land on behalf of the national and county governments; recommend a National Land Policy to the national government; conduct research related to land and the use of natural resources and make recommendations to appropriate authorities; and initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.<sup>97</sup>
- The **Kenya National Commission on Human Rights** can hear human rights complaints as well as undertake investigation and public inquiries, including on business-related matters.<sup>98</sup>

## PART II: SUMMARY POINTS

- The Constitution of Kenya 2010, through the Bill of Rights and other provisions which establish state watch-dog institutions,<sup>99</sup> provides a legal basis for protecting human rights in renewable energy projects, with legislation elaborating on institutional and administrative frameworks.<sup>100</sup> However, many of these legislative provisions define the subject matter mandates of the respective institutions narrowly and the extent to which they engage with human rights varies.
- Unresolved historical injustices relating to land ownership and use and historical marginalisation of communities in renewable energy project areas have on occasion, compounded human rights abuses against these marginalised communities.
- There is no standard national resettlement policy to guide development of resettlement decision-making and processes by companies and state institutions.
- Protection gaps exist in terms of Indigenous Peoples rights, including with regard to land rights and consultation.
- According to interviewees and workshop participants, the main human rights challenges in relation to the state duty to protect human rights include: land-based injustices, including displacement from land, forced eviction and inadequate compensation; inadequate engagement and consultation of affected communities in decision-making; lack of human

rights due diligence frameworks; land ownership disputes between companies and local communities; environmental harms associated with renewable energy projects; and labour rights abuses.

- Kenyan law establishes a system of judicial and non-judicial remedy frameworks for redressing human rights abuses. However, judicial remedy frameworks have been faulted for: the fragmented approach to determining specific human rights issues; being costly, therefore out of reach for the most vulnerable rights-holders; and long and protracted processes.
- Non-judicial frameworks have been faulted for: overreliance on the state or on judicial frameworks for the enforcement of some decisions; and fragmentation in approaches to addressing specific issues. Operational-level grievance mechanisms, have been noted to insufficiently address the root causes of human rights abuses and not being sufficiently community oriented.
- Interviewees observed that while many development finance institutions have established progressive standards and guidelines on human rights to complement national laws and regulations in the development of renewable energy projects, the enforcement of these standards has in some instances been inadequate in providing effective protection of human rights.

### **CASE STUDY: LAKE TURKANA WIND FARM**

In 2019, the Lake Turkana Wind Power Project, Africa's largest wind energy project and the biggest public-private investment in Kenyan history, was launched.<sup>101</sup> The project, developed by Lake Turkana Wind Power,<sup>102</sup> consists of 365 wind turbine generators, each with a capacity of 850 kW and with a total wind farm capacity of 310 MW. The project is located 600km from Nairobi in the Loiyangalani District, Marsabit County, and is aimed at providing reliable, low-cost energy to Kenya's national grid.<sup>103</sup> Construction of the facility started in October 2014 and it began full commercial operations in March 2019.<sup>104</sup>

The project occupies a vast concession of over 607 square kilometres<sup>105</sup> neighbouring with Lake Turkana, a UNESCO heritage site and the largest desert lake in the world. The land is inhabited by four pastoralist communities – the Rendilles, Turkanas, Samburus and El Molos – who have used it for livelihoods, cultural, ceremonial and spiritual purposes for centuries.<sup>106</sup> The local Indigenous Peoples claim to have customary rights to the land and that the company failed to properly consult them before their land was requisitioned.<sup>107</sup> The communities allege that the construction runs counter to the principles of the UN Declaration on the Rights of Indigenous People, which holds that Indigenous Peoples concerned shall be consulted according



to the principle of FPIC before the process of land acquisition begins.<sup>108</sup> No consultations took place prior to 2007, even though the developers submitted their application for the land lease in 2006, which marks a period of over a year during which the UN requirements were allegedly not fulfilled.<sup>109</sup> In response, the company claimed that it recognised FPIC but believed that the groups affected by the project are not Indigenous and therefore that FPIC was not necessary.<sup>110</sup> Moreover, the consortium challenged the original ownership of the land in the Resettlement Action Plan in which they state these peoples have no legal right to the land and are thus not eligible for compensation.<sup>111</sup>

In 2014, residents from Laisamis Constituency and Karare Ward (the impacted communities) filed a lawsuit against the project, the county government, the national government and the National Land Commission for illegal land acquisition.<sup>112</sup> The plaintiffs contested the process of how the land was given away, arguing that there was no prior public consultation, no notice given of the proposal, and no compensation for lost land or any alternative settlement was offered.<sup>113</sup> The lawsuit was resumed in January 2020 after pending for five years,<sup>114</sup> and according to some sources is 'slowing down' the project while the conflict between the local communities and government 'continues to threaten stability in the area.'<sup>115</sup>

Since 2014, the project has employed more than 2,500 people, about 75% of whom came from Marsabit County.<sup>116</sup> As of 31 March 2017, when all the 365 wind turbines were installed, the project employed 911 people, of whom 81% were local.<sup>117</sup> There are, however, grievances between the Turkana and Samburu, over fairness in distribution of jobs.<sup>118</sup> Moreover, the influx from other communities into the region has reportedly led to increased incidences of diseases, including sexually transmitted diseases,<sup>119</sup> as well as alcoholism and prostitution.<sup>120</sup>

# 3. PART III: OPPORTUNITIES TO STRENGTHEN HUMAN RIGHTS PROTECTION IN THE ENERGY TRANSITION

As guided by the UNGPs, governments have duties and businesses responsibilities to ensure that the energy transition in Kenya effectively accounts for human rights. The Constitution requires that the state and other actors, including corporate and natural persons should observe human rights.<sup>121</sup> Ultimately, the energy transition should benefit workers, Indigenous Peoples and communities. To that end, principles such as transparency, stakeholder participation and accountability are important for an energy sector that protects and respects human rights.

To contribute to engagement and discussion in working towards a sustainable energy transition this section of the scoping paper outlines possible state, business and investor pathways to prevent or mitigate risks of human rights abuse in the context of renewable energy projects, as well as opportunities for contributing towards an energy transition that is respectful and supportive of human rights.

## 3.1 CONSIDERATIONS FOR GOVERNMENT

### **Effective and responsive legal and policy framework for promoting human rights**

In line with the existing Constitutional provisions, international standards and good practices, the NAP on Business and Human Rights recommends that Kenya could enact and implement legislation that provides a strong regulatory and institutional framework for protecting and promoting human rights in the management of natural resources. Such provisions could address core substantive protections relating to business and human rights, such as labour rights, land rights, equality and non-discrimination, protection of the environment and access to information.<sup>122</sup>

### **Setting human rights reporting requirements**

Kenya can introduce obligatory reporting<sup>123</sup> and due diligence requirements for companies on human rights and reinforce national initiatives to monitor the human rights practices of companies operating in the renewable energy sector.<sup>124</sup>

### **Enhancing transparency and accountability in energy governance**

Kenya can enhance transparency and accountability<sup>125</sup> in energy governance, including through: proactively addressing corruption risks associated with the energy transition in accordance with the law; enhancing rights-holder participation and voice in the different stages of planning and development of energy transition initiatives; and facilitating a strong role for state institutions and state-based remedy frameworks in monitoring and addressing corruption risks. The Kenya NAP on Business and Human Rights further urges that the government develop regulations on the Access to Information Act to facilitate disclosure of contracts,<sup>126</sup> including those in renewable energy.

### **Reporting on human rights in climate protection**

Kenya can report on the steps it has taken to address climate change in Kenya, including actions taken to prevent or address human rights impacts, for example, through submission of Nationally Determined Contributions under the Paris Climate Agreement.

### **Human rights in environmental and social impact assessment**

Through legislation and regulation, the government can ensure that the mandated ESIA process effectively addresses human rights issues associated with the approval and development processes of renewable energy projects.

### **Protecting workers' rights**

As recommended under the Kenya NAP on Business and Human Rights, the government can enforce existing labour laws to ensure that they are effectively implemented to protect workers and their rights, including by enhancing the space and capacity of trade unions for effectively representing workers within renewable energy ventures. In addition, the government could increase the capacity of the labour inspection department to handle labour-related grievances.<sup>127</sup>

### **Government role in capacity building for the private sector**

The government can engage with financial institutions on human rights issues by providing policy space and support for financing programmes which address human rights in the energy transition, including programmes on capacity building for IPPs, to prompt the inclusion of human rights and human rights due diligence in their screening processes, particularly as related to vulnerable groups.

### **Strengthening rights-holder and stakeholder participation**

The government can develop a concrete framework for resettlement relating to communities impacted by renewable energy projects and enact a public participation framework that accords with human rights standards and principles. Importantly, such frameworks should be guided by meaningful participation expectations articulated in regional and international human

rights law, to avoid participation becoming a tick-box exercise for renewable energy projects. This includes clearly reflecting that participation is an ongoing process throughout the life cycle of projects, rather than a one-off exercise.

### **Recognising Indigenous Peoples' rights**

Kenya could formally acknowledge the rights of Indigenous Peoples to customary land and corroborate ILO Convention 169 on Indigenous Peoples and secure respect for FPIC for impacted Indigenous Peoples, including in the context of renewable energy development. As part of this, Kenya could reconsider its approach to land rights, in order to ensure that ancestral occupation is recognised as a basis for accruing land rights. The Kenya NAP on Business and Human Rights specifically recommends that the government ensures that grievance mechanisms are responsive to the needs and rights of vulnerable groups such as women, persons with disabilities, children and Indigenous Peoples.<sup>128</sup>

### **Strengthening access to remedy**

The government could improve access to the Human Rights Division of the High Court, Employment and Labour Relations Court and the Environment and Land Court, to ensure that they are accessible avenues for remedying business-related human rights abuses related to renewable energy.<sup>129</sup> In addition, as recommended in the Kenya NAP on Business and Human Rights,<sup>130</sup> Kenya can consider putting in place legislation and regulations which mandate companies to develop operational-level grievance mechanisms to address their human rights impacts on their workers and on affected communities, in line with the effectiveness criteria of UNGP 31. Such regulations could also provide guidance to companies on how to develop and implement effective and responsive grievance redress frameworks, including threshold considerations, including in the context of the energy transition. Kenya could additionally improve access to its numerous judicial and non-judicial mechanisms for communities impacted by renewable energy projects. Finally, the government could improve access to information on available judicial and non-judicial mechanisms involved in the resolution of business-related abuses to promote easy access to justice.<sup>131</sup>

## **3.2 CONSIDERATIONS FOR BUSINESSES**

### **Increased awareness and adherence to international standards and benchmarks**

Renewable energy companies operating in Kenya should embrace and adopt responsive human rights policies and due diligence practices in accordance with the UNGPs. This should include specific provisions for meaningful community consultation processes, training for managers and

regular dialogues with workers and communities. In doing so, they may collaborate with peers within and across industries, as well as with workers and communities, to quickly take on and lift human rights standards across the renewable energy sector.

### **Consultations, consent and Indigenous Peoples' rights**

As guided by ILO Convention 169<sup>132</sup> and the UN Declaration on the Rights of Indigenous Peoples,<sup>133</sup> Indigenous Peoples should be consulted with a view to obtaining their agreement or consent to the development of projects, including renewable energy projects affecting their rights. Corporate actors in renewable energy should respect land tenure rights of Indigenous Peoples in a manner to prevent and mitigate adverse human rights impacts and enable equitable sharing of benefits generated by renewable energy projects. Companies should commit to respecting Indigenous Peoples' rights and ensure FPIC in a manner that respects all individual and collective rights of Indigenous Peoples. The UN Working Group on Business and Human Rights has stated that, 'Companies should respect the rights of local communities and indigenous peoples to be consulted and to give or withhold free, prior and informed consent, in all their operations, and should protect these rights in the conduct of due diligence. This applies irrespective of a national legislative framework.'<sup>134</sup>

### **Corporate respect for human rights**

Renewable energy companies in Kenya can adopt strong labour rights policies in line with ILO Core Labour Conventions, including on child and forced labour, freedom of association, non-discrimination and collective bargaining, and should operate in accordance with Kenya's labour laws. Companies should additionally adopt strong protections for human rights defenders in operations and incorporate human rights throughout security provisions as per the Voluntary Principles on Security and Human Rights.<sup>135</sup>

### **Strengthening access to remedy**

Renewable energy companies in Kenya should have in place operational-level grievance mechanisms in line with the effectiveness criteria outlined in UNGP 31, designed and monitored with communities and workers.

## **3.3 CONSIDERATIONS FOR PUBLIC AND PRIVATE INVESTORS**

### **Embedding respect for human rights**

Prior to investing in renewable energy projects in Kenya, public and private investors should make sure that human rights policies and commitments are in place and that human rights due diligence is performed<sup>136</sup> as per the UNGPs as a condition for investing. They can also structure investments to increase their ability to influence respect for human rights.

**Monitoring respect for human rights**

During the investment, investors should observe human rights performance of investments and engage with companies to ensure respect for the rights of workers, individuals and communities as per the UNGPs, for instance by monitoring allegations of abuse and their resolutions. If the company is not responsive, investors can seek to maximise pressure, for example through collaboration with peers, or divest.

**Meaningful stakeholder engagement**

At all times, investors should engage with companies and asset managers with particular questions on human rights applicable to the sector and country-specific context and take action to verify information; engage with governments, trade unions, civil society, communities and others to prioritise community-led good practices and develop renewable energy projects that respect human rights.

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