



Human Rights and Business Country Guide

# Kenya



THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS

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COMMISSION

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# How to Use this Guide

*This Human Rights and Business Country Guide contains information regarding the potential and actual human rights impacts of businesses. The information in this Guide is gathered from publicly available sources, and is intended to help companies respect human rights and contribute to development in their own operations and those of their suppliers and business partners.*

## About the Human Rights and Business Country Guide

The Human Rights and Business Country Guide provides country-specific guidance to help companies respect human rights and contribute to development.

For companies to manage their potential human rights impacts, they must have comprehensive information about the local human rights context in which they operate. The Country Guide provides a systematic overview of the human rights issues that companies should be particularly aware of. For each issue, it provides guidance for companies on how to ensure respect for human rights in their operations or in collaboration with suppliers and other business partners.

The Country Guide is not only a resource, but a process. This Guide was produced through a systematic survey carried out by the Danish Institute for Human Rights (DIHR) and the Kenya Human Rights Commission (KHRC). The aim of this Guide is to improve the human rights practices of companies, including through facts-based dialogue regarding the issues presented here.

### **How the Human Rights and Business Country Guide can be used by companies**

- Develop company policies and procedures related to human rights issues in the local environment.
- Assess and track the potential human rights impacts of your own operations or in suppliers, business partners and investments.
- Raise awareness among staff, suppliers and other business partners.
- Engage with workers, potentially affected communities, consumers and other stakeholders whose human rights might be affected by your operations.
- Engage with civil society organisations, government bodies or international organisations on human rights-related issues.
- Provide background information for auditors.
- Establish or collaborate with mechanisms for workers, communities and other whose human rights might be affected by your operations.
- Contribute to development initiatives that align with human development needs and priorities in the local context.

### **How the Human Rights and Business Country Guide can be used by governments**

- Review and reform public policy and legislation relevant to the human rights impacts of business, including in the areas of labour, environment, land, equal treatment, anti-corruption, taxation, consumer protection or corporate reporting.
- Ensure respect for human rights in the state's own business affairs such as state-owned companies, sovereign wealth funds and other investments, public procurement, development assistance, export credit and other activities.

- Build awareness and capacity on human rights and business issues within relevant areas of public administration.
- Provide targeted advice to domestic companies.
- Inform the development of trade policy, trade and investment agreements and trade and investment promotion.
- Improve effective access to judicial and non-judicial remedies for victims of business-related human rights abuses.
- Enhance the contribution of the private sector in national and regional development programmes relevant to human rights.

#### **How the Human Rights and Business Country Guide can be used by civil society organisations**

- Inform human rights research and monitoring related to business operations.
- Work with affected workers and communities to define human rights and human development priorities related to the role of business.
- Provide capacity-building to government, business and civil society stakeholders on human rights and business.
- Work with local stakeholders to provide recommendations to business and government.
- Facilitate dialogue and engagement with state agencies and businesses, including through multi-stakeholder forums.

The Country Guide aims to work with all stakeholders to promote, monitor and expand the activities described above. We request that all stakeholders who use the findings of the Country Guide in their work notify the Country Guide team of their activities and lessons learned. These experiences will be included in the Country Guide website, [HRBCountryGuide.org](http://HRBCountryGuide.org).

## Country Guide Process

The Kenyan Country Guide was produced by the Danish Institute for Human Rights (DIHR) and the Kenya Human Rights Commission (KHRC). Kenya is currently at step 2 in the Country Guide process. The initial survey was carried out by DIHR and KHRC from February to July 2016. The draft was shared for validation with the Kenya National Commission on Human Rights (KNCHR) in July 2016.

The Country Guide is a compilation of publicly available information from international institutions, local NGOs, governmental agencies, businesses, media and universities, among others. International and domestic sources are identified on the basis of their expertise and relevance to the Kenyan context, as well as their timeliness and impartiality.

The Kenyan Country Guide aims to provide a comprehensive overview, on the basis of the information available, of the ways in which companies do or may impact human rights in Kenya. The current Country Guide is not meant as an end product, or a final determination of country conditions. It is intended to be the basis, and the beginning, of a process of dissemination, uptake and modification.

## Country Guide Content

*The Country Guide contains the following information:*

### Areas for Attention

Each section of the Country Guide identifies areas for particular attention by businesses. The Country Guide identifies these areas through an analysis of the country's legal framework for human rights

protection; enjoyment of human rights in practice; and the proximity of third-party human rights violations to company operations.

The headline and risk description describe the relevance of each issue for businesses. The text that follows the risk description presents the quantitative and qualitative information upon which this determination was based.

- **Background & Context** gives an overview of economic, political and demographic characteristics.
- **Rights Holders at Risk** identifies groups that may be vulnerable to workplace discrimination or community impacts.
- **Labour Standards** identifies areas for attention related to employees and working conditions. This section includes child labour, forced labour, trade unions, occupational health & safety and working conditions.
- **Community Impacts** identifies areas for attention related to communities whose human rights may be affected by company operations. This section includes impacts related to environment, land & property, revenue transparency & management and security & conflict.
- **Access to Remedy** identifies judicial, state-based and non-state-based non-judicial grievance mechanisms, informal as well as regional and international avenues of redress for victims of corporate human rights abuse. Where possible, this also includes practice information about the effectiveness of such bodies, and the number of cases they have heard and redressed.

## Cases

Each rights issue includes cases from media and law where the rights issue in question has been allegedly violated. These cases are drawn from the Business and Human Rights Resource Centre, international and local NGOs and stakeholder consultations. The cases presented here should not be considered comprehensive.

## Human Rights Guidance for Businesses

This section includes guidance for businesses to prevent and mitigate their adverse human rights impacts. This guidance is drawn from the Danish Institute for Human Rights (DIHR) existing library of human rights due diligence recommendations, as well as international frameworks, principles and guidelines. Where available, this section includes recommendations issued by local NGOs and directed specifically at companies operating in the country.

This section also includes examples of initiatives carried out by companies to mitigate their human rights impacts. These are organized into Due Diligence Initiatives—activities that aim to meet the company's responsibility not to violate human rights—and Beyond Compliance Initiatives—activities that aim to contribute to development beyond this baseline obligation.

## About DIHR

The Danish Institute for Human Rights is a National Human Rights Institution accredited under the UN Paris Principles, and carries out human rights and development programmes in Denmark and around the world. Since 1999, the Danish Institute has worked closely with the business and human rights communities to develop tools and standards for better business practice.

*For more information, see [humanrights.dk](http://humanrights.dk).*

## About KHRC

The Kenya Human Rights Commission (KHRC) was founded in 1991, and registered in Kenya as a national non-governmental organisation (NGO) in 1994. KHRC's mission is to foster human rights, democratic values, human dignity and social justice at all levels in the Kenyan society. KHRC has its office in Nairobi but work across Kenya and links community, national and international human rights concerns. Among many things, the organisation played a key role as a member of the constitutional reference group in the drafting and run up to the referendum and promulgation of the Constitution of Kenya 2010.

*For more information, see [khrc.or.ke](http://khrc.or.ke).*

# Rights Holders at Risk

*Societal groups particularly vulnerable to employment-related discrimination or poor development outcomes*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Ethnic Groups

According to the U.S. Department of State (2014) there are over 40 different ethnic groups in Kenya, however none holds a majority.<sup>1</sup> According to Minority Rights Group International, ethnic groups in Kenya include: Aweer (Boni), Abasuba, Kuria, Wlilwana, Nubi, Samburu, Taita, Taveta, Muslims, Luo, Kamba, Kalenjin (including the Kipsigis, Endorois, Tugen, Pokot and Sabaot), Kisii, Meru, Asians, Europeans and Arabs, Somalis, Ogiek, Maasai and Dahalo.<sup>2</sup>

The constitution of Kenya (2010) prohibits discrimination on a number of grounds, including ethnicity and race.<sup>3</sup> Additionally, the National Cohesion and Integration Act 2008 outlaws discrimination on ethnic grounds,<sup>4</sup> including hate speech.<sup>5</sup> However, according to the Universal Periodic Review performed in 2010, ethnicity remained highly politicised.<sup>6</sup> For instance, Minority Rights Group International reported that Nubians and Somalis were not recognised by the Kenyan government, and therefore had problems accessing citizenship documents.<sup>7</sup>

According to the Peoples under Threat Index (2015), which identified those countries where ethnic communities face the greatest risk of violent repression and mass killing, Kenya ranked 38th out of 70 countries.<sup>8</sup> According to the U.S. Department of State, almost all ethnic groups had been discriminated against, in both private business and the public sector.<sup>9</sup> Minority Rights Group International reported that minorities were more likely to be pushed into employment in the informal economy, where wages were lower and legal protection against discrimination was weaker.<sup>10</sup> Freedom House (2015) accounted that criminal networks and ethnic gangs had frequently impeded the economic activity through extortion and threats.<sup>11</sup>

Minority Rights Group International stated that the resentment against the perceived wealth of some Asian minorities, such as Hindus, Sikhs and Muslims of Indian origin, had led to instances of vandalism, violence and hate speech by other groups.<sup>12</sup>

### Indigenous Peoples

According to the International Work Group for Indigenous Affairs, the peoples who identified with the indigenous movement in Kenya were mainly pastoralists, hunter-gathers and smaller fisher and farming communities. Pastoralists included the Turkana, Rendille, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra, Pokot and Endorois, and comprised approximately 25 percent of the national population. Hunter-gatherers included the Ogiek, Sengwer, Yaaku, Waata, El Molo, Boni, Malakote, Wagoshi and Sanaya and comprised circa 79,000 people.<sup>13</sup>

The Kenyan constitution briefly refers to 'indigenous communities' under descriptions of 'marginalised communities'. In its latter list of descriptions, the constitution states that an indigenous community is: 'a community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy'.<sup>14</sup> Thus, the constitution does not specify, for instance, pastoralists or forest people as indigenous people, and there is no other Kenyan legislation on indigenous peoples' rights as such.

Nevertheless, the constitution states that indigenous peoples must be protected.<sup>15</sup> It stipulates that the languages<sup>16</sup> and technologies<sup>17</sup> of indigenous peoples should be preserved. Their special knowledge on biodiversity<sup>18</sup> and ownership of plant varieties<sup>19</sup> must also be respected. The law further recognises marginalised peoples' right to land. Accordingly, community land includes land that is held, managed or used by specific communities as community forests, grazing areas or shrines,<sup>20</sup> as well as ancestral lands.<sup>21</sup>

According to the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (2006) the principal human rights issues indigenous people faced related to the loss and environmental degradation of land, traditional forests and natural resources.<sup>22</sup> The Thomas Reuter Foundation (2016) reported that the Sengwer people had been evicted from their ancestral land more than 20 times since it had been gazetted as a reserve forest in 1964.<sup>23</sup> Thereto, the violence associated with social and ethnic conflicts, and the lack of transitional justice and redress had affected the human rights of indigenous communities.<sup>24</sup>

According to Minority Rights Group International, many Endorois who moved to urban locations reported that they faced discrimination based on their minority status, and commonly were only offered non-permanent or contract-based jobs, usually in private security or domestic work.<sup>25</sup> According to the same source, many indigenous girls (such as Ogiek) had been forced into early marriage and transactional sex, as a means to support themselves and their families after eviction. Girls that engaged in transactional sex, or married early, were reported to be more vulnerable to high-risk pregnancies and sexually transmitted infections, such as HIV/AIDS and abuse.<sup>26</sup>

## Migrant Workers

According to the International Organisation for Migration, the number of foreign workers resident in Kenya was uncertain. While information on foreign workers in general was available in the Department of Immigration, it remained confidential to the public.<sup>27</sup> The Population Division of the United Nations Department of Economic and Social Affairs estimated that the stock of international migrants residing in Kenya (2010) was approximately 818.000 (around two percent of the population).<sup>28</sup>

The law stipulates that migrant workers enjoy the same legal protections, wages and working conditions as citizens.<sup>29</sup> However, the U.S. Department of State reported that migrant workers often lacked formal organisation and therefore had missed the benefits of collective bargaining.<sup>30</sup>

According to the U.S. Department of State, the Kenyan government had made it increasingly difficult for expatriates to renew or obtain work permits, and the high immigration flow had increased the price of work permits up to 200.000 Kenyan Shillings. Furthermore, the Immigration Department had reportedly cancelled some work permits before the expiration date without giving any reasons.<sup>31</sup> In addition, the law allows the immigration officers that issue entry permits to require a bond of not less than 100.000 shillings for each permit.<sup>32</sup>



## Persons Living with Albinism

According to the United Nations High Commissioner for Human Rights (OHCHR), in 2015, the prevalence of persons with albinism (PWA) in Africa was as high as one in 1000 persons. By comparison, the Americas and Europe had an estimated number of one in every 17,000-20,000 persons.<sup>33</sup>

The Kenyan constitution guarantees every Kenyan economic and socio-cultural rights.<sup>34</sup> However, Isaac Mwaura, a Member of Parliament living with albinism, stated that PWAs were a marginalized minority group, and had yet to be fully recognized in the Kenyan society. He also added, that PWAs in Kenya lacked access to basic amenities, such as education and employment opportunities, within both public and private sectors.<sup>35</sup>

The OHCHR further reported that structural discrimination and social exclusion of persons with albinism was a global phenomenon, including in Kenya. It stated that, PWAs faced more severe forms of discrimination and violence in regions where the majority of the general population were relatively dark-skinned. In Kenya, PWAs were stated to have had difficulties accessing employment, legal protection and redress. The OHCHR report thereto acknowledged that PWA's were in special need of vocational training in order to maximise their chances of indoor work, away from the sun.<sup>36</sup>

The Telegraph (2015) reported that PWAs in Kenya had been evacuated from areas bordering Tanzania for fear that they will be targeted by witch doctors during the election. A national toll-free hotline had also been set up for those in fear of being attacked.<sup>37</sup>

Under the Same Sun (an NGO operating to end discrimination against PWAs), reported that there had been 5 killings of PWAs during 2015. In addition, Kenya was reported to be one of many African countries involved in cross-border trading of PWAs and their body parts.<sup>38</sup> According to the Universal Periodic Review (2015), trafficking and sexual exploitation of PWAs was common.<sup>39</sup>

## Persons with Disabilities

According to the latest available data from the Kenya National Survey for Persons with Disabilities (2008), approximately 4.6 percent of the Kenyan population were living with some form of disability. The 2011 World Health Survey estimated that the prevalence among the working age population were 8.6 percent (11.6 percent in rural areas, and 4.4 percent in urban areas). Based on this data, the Swedish International Development Agency (SIDA) concluded in 2014 that circa 3.8 million individuals were living with disabilities in Kenya.<sup>40</sup>

The Kenyan constitution states that all persons with disabilities should be treated with dignity and respect,<sup>41</sup> prohibits all forms of discrimination against persons with disabilities,<sup>42</sup> and obliges the state to fulfil its citizens' social and economic rights.<sup>43</sup> The Persons with Disability Act 2003,<sup>44</sup> the Employment Act 2007<sup>45</sup> and Labour Relations Act 2007<sup>46</sup> prohibit discrimination against a person with a disability in the workplace. The law also provides that both public and private sectors shall reserve five percent of jobs for disabled persons.<sup>47</sup> An employee with a disability is thereto entitled to exemption from tax on all income accruing from his or her employment.<sup>48</sup>

The UN Committee on the Rights of Persons with Disabilities stated that about one percent of persons with disabilities were employed. In its concluding observations, the CRPD Committee was concerned about the use of derogatory terminology against persons with disabilities in the constitution, and other pieces of legislation. The Committee also noted the absence of information on the definition of reasonable accommodation, and that the denial of such accommodation is not considered discrimination.<sup>49</sup>

In its 2014 report 'From Norm to Practice', the Kenya National Commission for Human Rights stated that persons with disabilities continued to experience discrimination in employment. Some of the barriers

identified were low levels of education, poverty, lack of workplace support, weak implementation of tax exemptions, stigma and economic prejudice. Lack of reasonable accommodation at the workplace was also common. The Commission reported that accessing capital to start a business was experienced as very difficult by persons with disabilities.<sup>50</sup>

According to All Africa, in 2016, the government is planning to launch Kenya's first mental health policy, which is meant to streamline the laws within the neglected area and help drafting of more laws to govern the practice and care offered to patients.<sup>51</sup>

## Persons Living with HIV/AIDS

According to UNAIDS, approximately 1.4 million people had HIV in Kenya in 2014 (latest available data), amounting to 5.3 percent of its adult population. As a result, Kenya has the fourth largest HIV positive population in the world. Out of these, women carried a higher burden of HIV infections than men (700.000 reported cases in women, against 500.000 in men).<sup>52</sup> According to the Centre for Economic and Social Rights, the HIV/AIDS prevalence rate is much higher in rural areas (10 percent) than in urban areas (5.6 percent), where the Nyanza province is particularly affected.<sup>53</sup>

Furthermore, the World Health Organisation reported that the leading cause of death in Kenya was HIV/AIDS, killing 58.000 people in 2013.<sup>54</sup> As a result, Avert reported that there were 1.1 million children orphaned by AIDS in 2013.<sup>55</sup> In 2016, the UN News Service reported that nearly 900.000 people had access to HIV treatment.<sup>56</sup>

The Employment Act 2007 states that no employer shall directly or, indirectly discriminate against an employee on grounds of HIV status,<sup>57</sup> and that HIV/AIDS cannot be the reason for dismissal.<sup>58</sup> In a landmark ruling, the Kenyan labour court decided that an employee or prospective employee may not be considered medically unfit merely based on being infected with HIV.<sup>59</sup> If notified, the employer is also obliged to provide healthcare for his/her employees during serious illness, including HIV/AIDS.<sup>60</sup>

The HIV and AIDS Prevention and Control Act 2006 provides guidance to review HIV/AIDS workplace policies. It states that the employer may not force his staff to undergo HIV/AIDS tests, and must keep such information confidential in order to protect the infected.<sup>61</sup>

According to the U.S. Department of State, 32 percent of women and 21 percent of men had reported discriminatory attitudes towards those with HIV.<sup>62</sup> Based on the PLHIV Stigma Index data 2011 (latest available data), 40 percent of the respondents reported that they had lost their job or source of income, during the preceding 12 months, as a direct result of their HIV status. 27.5 percent said that they had been denied any type of promotion in the workplace because of discrimination and their poor health.<sup>63</sup> Avert reported, in 2013, that the stigma attached to having HIV/AIDS in Kenya had deterred many people from seeking help.<sup>64</sup>

## Religious Minorities

The U.S. Department of State estimated that approximately 82 percent of the population were Christian and 11 percent Muslim. Groups constituting less than one percent of the population included Hindus, Sikhs and Bahais. Of the Christian population, circa 57 percent is Protestant, 29 percent Roman Catholic and 14 percent of other Christian belief.<sup>65</sup>

The Kenyan constitution states that there shall be no state religion and prohibits religious discrimination.<sup>66</sup> However, according to the U.S. Department of State, 'Operation Usalama Watch' (a governmental counter-terrorism initiative) had unfairly targeted Muslims and ethnic minorities in Nairobi and Mombasa. It also reported that the government had raided and banned meetings at Muslim places of worship, and occasionally broken up meetings as part of its security concerns.<sup>67</sup>

According to the U.S. Department of State, Muslims citizens had made complaints as they had faced special difficulties acquiring national identification cards from the National Registration Bureau. In addition, some Muslim communities had been subjected to additional requirements in order to register.<sup>68</sup>

The U.S. Department of State also stated that religious tensions were high in some areas of Kenya. For instance, some Muslim groups had threatened individuals, especially those of ethnic Somali origin who had converted to Christianity. Furthermore, some Muslims had reported that they had perceived instances of discrimination and that the government and business community had deliberately impeded development in predominantly Muslim areas.<sup>69</sup>

## Sexual Minorities

The Kenyan constitution<sup>70</sup> and the Employment Act 2007<sup>71</sup> prohibit discrimination on a wide range of grounds, but do not explicitly mention sexual orientation. Furthermore, the Penal Code of Kenya criminalises same-sex conduct between men with up to 14 years imprisonment.<sup>72</sup> No legislation mentions the sexual conduct between women. The Civil Rights Defenders thereto noted that the Kenyan law did not provide for the legal recognition of intrasexual and transgender persons.<sup>73</sup>

During the latest Universal Period Review process, Kenya rejected the UN recommendations to decriminalise same-sex conduct between consenting adults, but accepted the recommendation to adopt a comprehensive anti-discrimination law, protecting individual, irrespective of their sexual orientation or gender identity.<sup>74</sup>

Amnesty International reported that many LGBTI persons in their late teens and twenties were still economically dependent on their parents, partially because there were fewer job opportunities for LGBTI youth.<sup>75</sup> According to Human Rights Watch, the lack of employment opportunities engaged many gay men and transgender women in occasional or regular sex work. Consequently, these individuals were dually vulnerable since they had been subjected to laws that prohibit sex work, and more general laws prohibiting same-sex conduct.<sup>76</sup>

In 2014, the Pew Research Centre reported that approximately 90 percent of the Kenyan population was against homosexuality.<sup>77</sup> Consequently, Human Rights Watch stated that Kenya's LGBTI community continued to experience intolerance and discrimination from members of the public, religious leaders and politicians.<sup>78</sup> Human Rights Watch also noted that most LGBTI persons, who had been victims of violence, did not report the crimes to the police.<sup>79</sup>

Amnesty International reported that newspapers and tabloids had commonly featured articles advocating hatred and violence against LGBTI persons.<sup>80</sup> According to the Civil Rights Defenders, the exposure of a person's sexual orientation often led to difficulties in the employment sectors.<sup>81</sup> Human Rights Watch also stated that persons working with the LGBTI community, such as health workers, had been subjects to threats and attacks.<sup>82</sup>

According Freedom House, government agencies have denied some organisations representing LGBTI Kenyans the right to register and operate legally, on the ground that they would promote illegal behaviours.<sup>83</sup> However, recent court decisions have compelled authorities to register few organisations.<sup>84</sup>

According to the Independent, in 2016, the Kenyan state prosecuted 595 people for their sexuality between 2010 and 2014.<sup>85</sup>

## Women

The Kenyan constitution prohibits any form of discrimination based on sex.<sup>86</sup> The law, however, does not mandate non-discrimination based on gender in hiring.<sup>87</sup> The Employment Act 2007 prohibits any form of discrimination in the workplace, including sex and pregnancy.<sup>88</sup>

According to the latest Bertelsmann Transformation Index, women continued to be disadvantaged in Kenya. The gender gap remained considerably higher than in Uganda or Tanzania,<sup>89</sup> and Kenya received a low ranking (122 out of 152 countries) in relation to gender equality, in the 2015 Human Development Report.<sup>90</sup>

According to the World Bank Group, 63 percent of the female population (22.8 million in 2016) was participating in the Kenyan labour force.<sup>91</sup> By comparison, UN Data stated that approximately 73 percent of the male population was working.<sup>92</sup> According to the 2015 Bertelsmann Transformation Index, women only accounted for 30 percent of employees in the modern private sector.<sup>93</sup>

The Danish Trade Union Council for International Development and Cooperation reported that, in 2014, 54 percent of workers in the agricultural sector were women. Of these, only 29 percent earned a formal wage, leaving a large percentage of women to work in the informal sector.<sup>94</sup> The 2015 Bertelsmann Transformation Index (2015) reported that a greater number of women in the informal sector were confined to non-paying occupations.<sup>95</sup>

In accordance with the international standard, women are entitled to 90 days of paid maternal leave,<sup>96</sup> while men receive 14 days of paternal leave.<sup>97</sup> It is also prohibited for an employer to dismiss a worker during pregnancy.<sup>98</sup> Nevertheless, the U.S. Department of State reported that, while employees in the public sector had enjoyed the benefits of maternity (and paternity) leave and workplace compensation, those in the private sector had not fully been able to enjoy such benefits.<sup>99</sup>

The International Labour Organisation reported that there was no protection of women workers during pregnancy and after child birth. Furthermore, the Occupational Health and Safety Act 2007 does not provide any additional protection for pregnant workers, especially in respect to pollution or hazardous environments.<sup>100</sup> In 2016, BBC reported that the government had approved a bill that would force companies to set aside special breastfeeding areas for employees with children.<sup>101</sup>

The Employment Act 2007 stipulates that affirmative measures were permitted, and are not considered discriminatory.<sup>102</sup> The World Bank Group reported that there were no quotas for women on corporate boards, but a 33 percent minimum quota for women in parliament.<sup>103</sup>

The Employment Act 2007 provides for equal pay for work of equal value, which is in line with the international standard.<sup>104</sup> Nevertheless, the UN Economic and Social Council stated that women continued to work in low-paid jobs.<sup>105</sup> According to the World Economic Forum, a sample average in Kenya showed that a woman was paid 61 shillings for every 100 shilling paid to a man, for doing the same job.<sup>106</sup> Similarly, the U.S. Department of State reported that average monthly income, in 2014, was approximately two-thirds of men.<sup>107</sup>

According to the U.S. Department of State, women had difficulties entering non-traditional fields and were likely to be dismissed.<sup>108</sup> Focus on Land in Africa (2015) reported that, in rural areas where extractive industries were present, women were working as small-scale miners or casual labourers in the mining companies.<sup>109</sup>

However, according to the Institute for Human Rights and Business (2016), the extractive sector was found to involve fewer women at project-site level, which signified limited economic opportunities for them.<sup>110</sup> For instance, Focus on Land in Africa stated that small-scale women miners lack the requisite capacity to be able to negotiate for better contractual deals. Reportedly, some of these women were subjected to sexual exploitation in order to get better deals or rates.<sup>111</sup>

While the Employment Act 2007 prohibits sexual harassment in the workplace,<sup>112</sup> the U.S. Department of State reported that harassment against women still occurred, and that many had given up looking for jobs because of that reason.<sup>113</sup> According to the Regional Mixed Migration Secretariat, female migrant workers, working in the informal sector in Nairobi, often experienced officially sanctioned marginalisation and discrimination, such as sexual abuse and lack of legal protection.<sup>114</sup>

According to the latest Universal Periodic Review (2015), several treaty bodies had expressed a concern about women's access to justice and encouraged Kenya to enforce free legal aid.<sup>115</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **May 2016, Kenya Human Rights Commission:** A Kenyan court heard a constitutional petition challenging the use of forced anal examinations of men accused of homosexuality.<sup>116</sup> The court ruled that anal swabs are a legitimate method of proving the offence of same sex Acts. Based on this, an appeal was lodged by the National Gay and Lesbian Human Rights Commission, Katiba Institute and the Kenya National Commission on Human Rights. The hearing of this appeal was scheduled for August 2016 but the court requested for more time to review the documents filed.
- **April 2016, The Independent:** the National Gay and Lesbian Human Rights Commission (in petition 216) challenged the Kenyan law which makes 'carnal knowledge...against the order of nature' an offence, along with 'gross indecency with another male'. Additionally, the Gay and Lesbian Coalition of Kenya, Kenya Human Right Commission and others filed petition 234, which seeks the decriminalization of same-sex relations. The commission's legal challenge is due to be heard in October 2016<sup>117</sup> Along with petition 234.
- **May 2015:** Attorney General (AG) Professor Githu Muigai, filed an appeal against a court ruling in April 2015, which allowed the gay and lesbian rights' group to register as an NGO. The AG in his petition maintains that the proposed name is unacceptable and that it contravenes the penal code which criminalizes same sex liaisons. The hearing for this appeal is scheduled for September 2016.
- **May 2015, Kenyans:** Dr. Agnes Nyaga, who was disabled, was allegedly stopped by the Fly540's pilot from boarding the plane as she took too long climbing the stairs to the aircraft. The airline affirmed that it was seeking legal redress on the matter.<sup>118</sup>
- **December 2014, Guardian:** Five HIV-positive women filed a legal action against the Kenyan government, claiming that they were sterilised without their consent.<sup>119</sup>

# Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

## Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

### Discrimination

*Does the company ensure that employment-related decisions are based on relevant and objective criteria?*

- The company identifies different types of discrimination, including those rooted in formal structures and cultural traditions.
- It is company policy to ensure that decisions concerning hiring, wages, promotion, training, discipline, retirement and termination are based only on unbiased criteria, and are not linked to any of the discriminatory characteristics listed in the description for this question.
- Each job category in the company has a written description stating the salary level and the qualifications required for that job category.
- The company ensures that employment advertisements do not reference discriminatory criteria, such as race, gender or age (unless listed as part of a legal equal opportunities promotion).
- The company ensures that job applicants are not asked to give information about their marital status, pregnancy, intent to have children, number of dependents, or similar information that may lead to discriminatory hiring decisions.
- All hiring managers receive training regarding the company's non-discrimination policies.
- The company has established a procedure, accessible and known to all workers, where workers can safely report incidents of workplace discrimination.
- The company takes reasonable steps to enable qualified persons with disabilities or health conditions to gain employment opportunities with the company, for example by providing wheelchair access, flexible working hours, longer breaks etc.

### Fair Treatment

*Does the company protect workers from workplace harassment including physical, verbal, sexual or psychological harassment, abuse, or threats?*

- The company has a commitment to prevent workplace harassment.
- The company actively informs workers of their obligations to refrain from violent, threatening or abusive conduct.
- Managers receive training on how to identify and deal with instances of harassment in the workplace.
- The company investigates all complaints of workplace harassment and takes appropriate preventative and disciplinary action including reporting of criminal actions to the appropriate authorities.

## Privacy

*Does the company respect the privacy of its employees whenever it gathers private information or monitors the workplace?*

- The company has a procedure stating which kinds of workplace monitoring are allowed; what kind of personal worker information is retained; where it is stored; who has access; and why the information is necessary.
- Workers are made aware of all workplace monitoring, including cameras and Internet or e-mail monitoring, and the specific purpose of the monitoring.
- The company obtains the worker's prior written consent before gaining information from an individual with whom the worker has a privileged relationship, including a former employer, doctor or lawyer.
- Workers have access to all personal data collected about them, including data concerning disciplinary decisions and data obtained through monitoring, but excluding confidential management specific information related to performance evaluations, salary negotiations, promotions, rotation and similar employment decisions.

## Community Engagement

*Does the company engage with local communities on the actual or potential human rights impacts of its operations?*

- The company has a commitment to engage openly with communities in and around its area of operations, prior to, during and after commencing activities that may negatively impact their access to resources (e.g. water, food, land) or livelihoods (e.g. fishing or hunting grounds).
- The company communicates and consults with local communities prior to, during and after commencing activities to prevent, reduce and mitigate impacts.
- The company takes steps to remedy the legitimate concerns of local communities regarding any negative impacts of the company's operations on the access to resources or livelihoods.

## Country Risk

*Does the company seek to avoid involvement in human rights abuses owing to government or societal practices?*

- If operating in a country or region with systematic human rights abuses, the company seeks to become aware of and avoid the risk of contributing to, endorsing or benefiting from such abuses.
- Where the company risks involvement in systematic human rights abuses owing to government or societal practices, the company seeks to identify solutions through dialogue with other businesses, civil society organisations, experts and other relevant stakeholders, including where possible with the authorities.
- The company ensures that it does not endorse any state imposed discriminatory limitations on the right to vote, and does not pass along information concerning religious, racial, political affiliations or other characteristics of employees which could be used by the government as a reason to restrict the right to vote.

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- International Labour Organization Core Labour Standards on Non-discrimination and the ILO Bureau for Gender Equality: Non-discrimination comprises one of the four core areas of the ILO Declaration on Fundamental Principles and Rights at Work, which comprises the ILO core labour standards. The ILO integrates gender throughout its work, with the objective of achieving gender equality as an essential feature of decent work. This can include advisory services, research and information dissemination, training and capacity building.
- Oxfam Australia: Women, Communities and Mining: The Gender Impacts of Mining and the Role of Gender Impact Assessment (2009): This Guide is intended to inform mining company staff of potential gender impacts of mining projects and introduces some tools and approaches that can be used to conduct a gender impact assessment.
- Women's Empowerment Principles (2010): Developed in collaboration between UN Women and the UN Global Compact, the Women's Empowerment Principles are a set of principles for businesses offering guidance on how to empower women in the workplace, marketplace and community.
- The Forest Peoples Programme: Established in 1990, the Programme is dedicated to supporting Indigenous Forest Peoples protect their land rights and human rights. The Programme works directly with indigenous communities, assisting them in building their own capacities and exercising their human rights.
- IFC Performance Standard 7: Indigenous Peoples (2012): The IFC PS7 and its accompanying guidance offer directions on how private sector projects can respect the human rights of Indigenous Peoples through following the stated requirements.
- International Council on Mining and Metals Good Practice Guide: Indigenous Peoples and Mining (2010): The ICMM is the industry organisation for the mining and metals sector. The Guidance provides advice to companies on how they can build effective relationships with Indigenous Peoples, as well outlining ways in which companies can effectively engage throughout the lifecycle of a project.
- International Working Group for Indigenous Affairs (est. 1968): IWGIA is an international human rights organization specialising in Indigenous Peoples' rights. IWGIA works to further the understanding, knowledge, and engagement with the rights of Indigenous Peoples through publications, advocacy programmes and support of local projects.
- The Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples (2009): The Declaration is a statement on behalf of Indigenous Peoples and support organisations from 35 countries that calls on different stakeholder groups, such as extractive companies, communities and civil society organisations, to respect and uphold the recognised rights of Indigenous Peoples.
- Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education): The Foundation's main purpose is to work for the respect, protection and fulfilment of Indigenous Peoples' rights and the operationalisation of Indigenous Peoples' self-determined sustainable development. The Foundation offers a number of relevant resources on issues such as traditional knowledge and traditional livelihoods, biodiversity and climate change.
- UN Permanent Forum on Indigenous Issues (est. 2000): The Forum was formed to advise the United Nations Economic and Social Council on a number of Indigenous Peoples' rights issues, such as economic and social development, culture, education, environment, health and human rights.
- UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (est. 2001): The Special Rapporteur mandate is to advise on and monitor the human rights



situation of Indigenous Peoples. This includes country reports, promoting good practice, addressing relevant human rights violations and contributing to thematic study on topics related to Indigenous Peoples.

# Child Labour

*Work that interferes with the health, development, education or family life of persons under 18*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

The Kenyan constitution provides that children<sup>120</sup> must be protected from hazardous or exploitative labour.<sup>121</sup> Section ten of the Children Act 2001 states that all children must be protected from economic exploitation that would have a detrimental effect on their wellbeing or access to education. Furthermore, Part VII of the Employment Act 2007 sets out the standards for the protection of children in the workplace.

No person may employ a child under 13.<sup>122</sup> A person who employs a child commits a criminal offence and is liable to pay a fine.<sup>123</sup> However, children from 13 to 16 may perform light work that is not likely to harm their health, and which does not interfere with attendance to school.<sup>124</sup> A juvenile may not be employed between 6.30 p.m. and 6.30 a.m.<sup>125</sup> A child between 13 and 16 years of age may also participate in an apprenticeship as defined in the Industrial Training Act 1960.<sup>126</sup>

Employers must keep a record of the children they employ,<sup>127</sup> and must accept an authorised officer to medically examine the child at any time during the child's employment.<sup>128</sup> If a child is killed, dies or suffers any bodily injury as a consequence of his or her employment, the employer shall, in addition to any other penalty, be liable to a fine or to imprisonment.<sup>129</sup>

In 2015, the U.S. Department of Labor reported that 32 percent of Kenyan children, from 6 and 14 years old, were working. The main industries where child labour could be found were: agriculture, construction, quarrying, the harvesting of sand, the production of bricks, mining, domestic work, street work, the transportation of goods and people, scavenging and begging. Children who were, for instance, scavenging dumpsites and streets earned as little as US\$1 to US\$2 per day.<sup>130</sup>

The Institute for Human Rights and Business (2016) reported that child labour was especially widespread among small-scale gold miners. Reportedly, the lack of oversight from relevant government officials, in particular from the Mining and Labour Ministries, opened up for the use of child labour within the sector.<sup>131</sup>

In 2013, the Daily Nation reported that, in Busia County more than 29,000 children were engaged in child labour. The County Labour officer said that children who abandoned school were employed as porters at the border points to smuggle goods at a small fee.<sup>132</sup>

In its 2016 observations, the Committee on the Rights of the Child outlined a number of concerns in relation to Kenya.<sup>133</sup> The lack of monitoring made it difficult to track the realisation of children's rights at a national level, and the generally weak regulation of business enterprises resulted in a wide prevalence of child labour.<sup>134</sup> The Committee also noted a high prevalence of child prostitution within the tourist and travelling sector.<sup>135</sup>

The Child Helpline International and the International Labour Organisation reported that 13 percent of migrant girls in child labour did not receive any pay, compared to 5 percent of the non-migrant girls. Among boys in child labour, the proportion of migrants experiencing violence was reportedly higher than among non-migrants. Furthermore, 10 percent of the migrant girls interviewed had been denied

food, compared to 6 percent of the non-migrant girls in child labour. Among migrant boys, 18 percent were denied food, compared to only 2 percent of non-migrant boys.<sup>136</sup>

## Worst Forms of Child Labour

The Employment Act 2007, defines the worst forms of child labour as any child employment, that includes: slavery, sexual acts, illicit activities or, work which harms the health, safety or morals of the child.<sup>137</sup> This is in line with the definition found in ILO Convention No. 182 on the Worst Forms of Child Labour.<sup>138</sup> Furthermore, Part VII of the Employment Act 2007 prohibits any person from employing a child in any act that constitutes the worst form of child labour.<sup>139</sup>

The Counter-Trafficking in Persons Act 2010 describes child labour under the heading of exploitation,<sup>140</sup> and prohibits all forms of trafficking.<sup>141</sup> Additionally, the Sexual Offences Act 2006 prohibits the facilitation of child sex tourism<sup>142</sup>, and child prostitution. According to the U.S. Department of State, the newly established Victim Protection Act 2014 provides improved support for victims of human trafficking, including children, and encourages them to give evidence.<sup>143</sup>

The latest Universal Periodic Review (2015) reported that child trafficking was prevalent and that the government resource allocation had slowed down the implementation of legal frameworks and structural reforms devoted to the protection of children from exploitative labour.<sup>144</sup>

The U.S. Department of Labor, stated that the forms of child labour were mainly found in sectors such as commercial sexual exploitation, illicit activities (e.g. drug trafficking), begging and work on tobacco farms.<sup>145</sup> The commercial sexual exploitation of children was reported to be a widespread problem in the country, especially in the Eldoret, Kisumu, Nairobi and Nyeri areas. The majority of the sexually exploited children were reported to be girls, but boys were also involved.<sup>146</sup> The U.S. Department of State reported that children were often exploited in prostitution by those working in sectors such as khat (a form of narcotic) cultivation areas, near the Nyanza gold mines, along the coast by truck drivers transporting stones, and by fishermen on Lake Victoria. Furthermore, a large number of children from East Africa and South Sudan had reportedly been subjected to forced labour and sex trafficking within Kenya.<sup>147</sup>

The Global Slavery Index stated that tourism, combined with poverty and lack of effective government regulations created informal industries that left children vulnerable to travelling sex offenders, as well as forcing them to work long hours in hotels and resorts. As a result of the weak child protection system and lack of formal employment opportunities for low skilled workers, children were particularly vulnerable to commercial sexual exploitation.<sup>148</sup>

According to the latest U.S. Department of State Trafficking in Persons report, 658 internal child trafficking victims had been identified in Kenya. Of these, 555 had been exploited into forced labour, 39 had been sexually exploited and the circumstances of the remaining 64 were unknown.<sup>149</sup> During the reporting phase, the Department of Child Services' hotline received 46 reports of child trafficking, 26 of which included labour exploitation and, 18 of which included sexual exploitation.<sup>150</sup>

In 2013, the Daily Nation reported that two NGOs, working to put an end to sexual abuse, had received 57 cases of child prostitution during the last five months.<sup>151</sup>

## Education

According to the Kenya National Bureau of Statistics there were a total number of 4000 education institutions in Kenya in 2014. The total number of enrolments in primary schools was 10 million, with over 80 percent of students attending public schools.<sup>152</sup>

According to the U.S. Department of Labor, 75 percent of Kenyan children were attending school, while 32 percent were combining school and work.<sup>153</sup> The Human Development Report found that, with an expected 11 years of schooling, the actual average years of schooling in Kenya was 6 years.<sup>154</sup>

The Kenyan constitution stipulates that every person has a right to education.<sup>155</sup> The law further provides that basic public education shall be free<sup>156</sup> and that there should be equal access to educational institutions.<sup>157</sup> However, according to the U.S. Department of Labor, unofficial school fees, costs for books and uniforms negatively contributed to children's access to school.<sup>158</sup> According to All Africa, in 2016, there had been massive irregularities in procurement of textbooks for public schools, due to fraud and overpricing, which led to the failure to achieve the 1:1 book to pupil ratio.<sup>159</sup>

The UN Committee on the Rights of the Child also noted the rapid increase of informal schools, and how those created sub-standard education and deepening inequalities.<sup>160</sup> In 2015, the Kenya National Bureau of Statistics reported that there were almost 8,000 registered private primary schools, and over 7,000 private secondary schools operating in the country.<sup>161</sup> According to the UN Economic Commission for Africa, children who attended private schools received the equivalent of two months extra teaching per year compared to those who attended public schools.<sup>162</sup> In 2013, the World Bank reported that, compared to public school teachers, private school teachers were one third less likely to be absent from the classroom, and spent 50 percent more time in the classroom.<sup>163</sup>

In addition, All Africa (2016) reported that head teachers and school boards had been misusing the Free Primary Education cash on irregular activities, such as overseas trips. Reportedly, teachers had also been exaggerating the enrolment records in order to attract more money, which they then diverted to their personal needs.<sup>164</sup> According to the Standard Digital (2016), one of the causes related to the fact that more than 30 percent of the resources had never been officially audited.<sup>165</sup>

Kenyan law states that education is compulsory up to 14 years of age.<sup>166</sup> However, the U.S. Department of Labor stated that this standard made children aged 14 to 15 particularly vulnerable to child labour, since they are not required to be in school but are not generally permitted to work.<sup>167</sup> The U.S. Department of State reported that, in 2008, approximately 80,000 children had dropped out of school annually because of child labour.<sup>168</sup>

The U.S. Department of Labor stated that even though newborn children are required to be registered by law (section 9 (2) of the Birth and Deaths Registration Act 1972), only 60 percent of births were officially registered. As a result, many children were unable to prove their citizenships and could not access services, such as education.<sup>169</sup>

The U.S. Department of State reported that rural families were generally reluctant to invest in educating girls at higher levels. In 2014, approximately 47 percent of girls and 52 percent of boys were enrolled in secondary education. Furthermore, 10,000-13,000 girls were reported to have dropped out of school annually due to pregnancy. Economically disadvantaged women, especially those from rural communities or with limited access to education, were more likely to be inherited.<sup>170</sup> The Danish Trade Union Council for International Development Cooperation stated that girls' lower level of education constituted a barrier for women later in life, especially in regard to obtaining better paid jobs in, for instance, commercial farms.<sup>171</sup>

According to the UN Committee on the Rights of the Child, access to affordable menstrual protection, sanitary wear and sanitation facilities created further barriers for girls in obtaining education.<sup>172</sup> According to the U.S. Department of State, some school administrators had reportedly denied pregnant girls admittance to schools. Access was further hindered by the prevalence of sexual abuse within the schools facilities.<sup>173</sup>

The constitution provides that a person with any disability is entitled to education.<sup>174</sup> Nevertheless, according to the UN Committee on the Rights of the Child, many mainstream schools still were not equipped for inclusive education. Some refused admission to children with disabilities, and specialised

schools were not sufficiently available, accessible or affordable.<sup>175</sup> UNESCO reported that most blind and visually impaired students fell behind in schools. While a 12th grade student needed to spend circa 7.000 shillings (US\$70) on text books annually, a blind student in the same grade had to spend approximately 12.000 shillings (US\$610) on school equipment during the same time.<sup>176</sup>

The UN Committee on the Rights of the Child further stated that there had been an increase of attacks on educational institutions by non-state armed groups, leading to teachers leaving and closedowns of schools in affected areas.<sup>177</sup> For instance, in 2015 the militant group, Al-Shabaab, killed 147 individuals inside the Garrissa University College.<sup>178</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **March 2016, The Independent:** A British Airways pilot was charged with sexually abusing a number of children during flight stopovers and charity work in Uganda, Tanzania and Kenya. British Airways agreed to pay an undisclosed sum of money to children who had been sexually abused by the British Airways pilot.<sup>179</sup>

## Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

### Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

- The company does not employ workers under 15 years of age for full-time work, 13 years of age for light work and 18 years of age for hazardous work (please see the question description for exceptions).
- If the company employs minors below the age of 18, the company has a list of job functions that can safely be performed by minors.
- The company is aware of local age-levels for completion of compulsory education and does not employ workers under that age for work that may interfere with such education.
- The company has a reliable procedure to check the age of young job candidates by birth certificate, other official forms of identification, or by alternative means such as physical appearance or knowledge of historic events.
- Company apprenticeship programmes do not constitute the main portion of the workforce, are limited in duration, are performed in conjunction with a school programme (or supervised by Labour Ministers or Labour Organisations), and do not interfere with the child's compulsory education.

- If the company becomes aware that it is employing young workers below minimum age, it ensures that they are enrolled in education programme, and that their dependents are compensated for the resulting loss of income.

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- Business and Human Rights Resource Centre, Business & Children Portal: The Portal is an information hub developed to give practical assistance to people from all business sectors in their work and decision-making, leading to better protection of the rights and welfare of children. The Portal has sections on: issues, positive initiatives, alleged abuses, lawsuits and guidance.
- Children’s Rights and Business Principles (2012): Developed by UNICEF, UN Global Compact and Save the Children, these Principles are the first comprehensive set of principles to guide companies on the full range of actions that they can take in the workplace, marketplace and community to respect and support children’s rights.
- ILO Programme on the Elimination of Child Labour (est. 1992): The Programme has the overall goal of the progressive elimination of child labour, to be achieved through strengthening the capacity of countries to address it and promoting a worldwide movement to combat child labour.
- UN Committee on the Rights of the Child General Comment No.16 on State obligations regarding the impact of the business sector on children’s rights (2013): The Committee is the body of independent experts that monitors the implementation of the Convention on the Rights of the Child and the Optional Protocols. In April 2013, the Committee issued a general comment on business and children’s rights. The objective of General Comment No.16 is to provide States parties with a framework for implementing the CRC, particularly with regard to the business sector.
- Children’s Rights in Impact Assessment – A Tool For Companies (2013): Developed by UNICEF and the Danish Institute for Human Rights, this checklist is a practical tool intended to help companies to identify and manage their impact on children’s rights. The checklist contains a set of questions and indicators covering the 10 Children’s Rights and Business Principles, addressing different aspects of company policies and operations and the impact on children’s rights.
- Better Work (ILO, IFC): Guidance Sheet on Child Labour (2009)

# Forced Labour

*Debt bondage, human trafficking or other coercion that makes workers unable to freely leave employment*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

The Kenyan constitution prohibits the use of forced labour.<sup>180</sup> Similarly, the Employment Act 2007 prohibits forced labour,<sup>181</sup> and defining it as ‘any work or service which is extracted from any person under the threat of any penalty, including the threat of a loss of rights or privileges, which is not offered voluntarily by the person doing the work or performing the service’.

According to the 2014 Global Slavery Index, approximately 65,000 individuals were estimated to be involved in modern slavery within the borders of Kenya.<sup>182</sup> Reportedly, many Indians recruited to work in mujra dance clubs in Nairobi often faced debt bondage, which they were forced to pay off by dancing or performing sexual acts.<sup>183</sup>

## Trafficking

The Counter-Trafficking Act 2010 defines trafficking in persons under section three.<sup>184</sup> A person convicted for trafficking may be imprisoned for a minimum of fifteen years.<sup>185</sup> In addition, part four of the same Act established the Counter-Trafficking in Persons Advisory Committee.<sup>186</sup> The Committee advises the Minister on inter-agency activities aimed at combating trafficking and the implementation of preventive and rehabilitative programmes for trafficked persons.<sup>187</sup> In addition, the Ministry of Public Service, Youth and Gender Affairs oversees anti-trafficking efforts, and works closely with the National Police Service to enforce the 2010 Act.<sup>188</sup>

The Sexual Offences Act 2006 declares a victim of sexual offences a ‘vulnerable witness’ and provides special protective measures.<sup>189</sup> Furthermore, the Victim Protection Act 2014 now makes it easier to ensure convictions for human trafficking by providing better support to victims, including encouraging them to give evidence.<sup>190</sup>

According to the U.S. Department of State, Kenya was a source, transit, and destination country for men, women, and children subjected to forced labour.<sup>191</sup> In the 2015 U.S. Department of State’s Trafficking in Persons Report, Kenya was ranked as a tier two country, i.e. a country that does not fully comply with the Trafficking Victims Protection Act’s minimum standards, but is making significant progress to do so.<sup>192</sup>

In the latest Universal Periodic Review (2015), concerns were raised regarding the persistence of trafficking and sexual exploitation of women and girls. The report noted that the law criminalised prostitutes, while those commissioning them were not sanctioned.<sup>193</sup> According to the UN Economic and Social Council, the problem of trafficking in persons had particularly affected the country as a host of asylum seekers and refugees, as well as a travel hub within the East African region.<sup>194</sup>

The U.S. Department of State stated that while the protection of child trafficking victims had improved, efforts to identify and assist adult victims was minimal.<sup>195</sup> The latest U.S. Department of State report on trafficking noted that, 65 prosecutions of trafficking offences and 33 convictions had been carried out.

Additionally, 17 cases remained pending at the end of the reporting period, while 6 cases were withdrawn.<sup>196</sup> According to The Star, in 2016, children had been stolen from refugee camps for trafficking purposes.<sup>197</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **May 2016, BBC:** a damages action on behalf of 44.00 people, who say that they have been ill-treated and subjected to forced labour in the 1950's, was launched in British High Court.<sup>198</sup>

## Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

### Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

- Workers can give notice and leave employment within a reasonable length of time. This is clearly communicated to workers prior to starting employment.
- The company (or its recruitment agencies) ensures that it does not withhold wages or bonuses and that it pays them in a timely and regular manner.
- The company ensures it does not make deductions from wages for disciplinary measures or other deductions not authorised by national law.
- Within normal working hours workers are able to earn a living wage sufficient to meet the basic needs of themselves and their closest dependents.
- Overtime work is paid, voluntary and not compelled through threat of pay deductions, termination or other sanctions.
- The company (or its recruitment agencies) ensures that it does not retain identity cards, passports, travel documents or other personal items without which workers cannot leave employment. If letters of release or other documents are needed for the worker to leave employment, such letters are issued without delay.
- All workers are allowed to leave company premises during breaks and at the end of their shifts, and workers in company housing may freely enter and exit their accommodation at any time.
- The company (or its recruiting agencies) ensures that it does not require workers to pay recruitment fees or lodge money deposits.
- Loans or salary advancements to workers are based on fair terms that are clearly explained to the worker, are not granted to cover basic living expenses, are limited in size, and do not require the worker to remain with the company until repayment is completed.



- If the company uses prison labour it ensures that all prison workers have been convicted by a court of law, and that the work is voluntary and supervised by a public authority.
- The company ensures that it does not use labour from agencies or firms involved in human trafficking or other forms of bonded labour.

# Occupational Health & Safety

*Unsafe or unhealthy working conditions that expose workers to the risk of accidents or occupational illnesses*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

The constitution does not address occupational health and safety specifically, but provides for the rights of everyone to fair labour practices,<sup>199</sup> reasonable working conditions,<sup>200</sup> and a clean and healthy environment.<sup>201</sup>

The Occupational Health and Safety Act 2007 states that all employers must ensure the safety, health and welfare at work of all persons working in his or her workplace.<sup>202</sup> The 2007 Act thereto stipulates that an employer may not discriminate against an employee who makes a complaint about a health and safety matter, or is a member of a health and safety committee. If employers do not comply, they are liable to a fine or imprisonment.<sup>203</sup> However, according to the U.S. Department of State, prescribed fines were too low to deter unsafe practices.<sup>204</sup> Additionally, the International Labour Organisation noted that the 2007 Act does not provide any additional protection for pregnant workers, especially in respect of pollution or hazardous environments.<sup>205</sup>

Employers are responsible to provide training to ensure health and safety at work for their employees.<sup>206</sup> It is also the responsibility of the employer to provide free protective equipment to his or her employees.<sup>207</sup> Nevertheless, the U.S. Department of State reported that there had been a continuous lack of basic safety equipment in many workplaces.<sup>208</sup>

The Work Injury Benefits Act 2007 stipulates that all employers must obtain and maintain an insurance policy.<sup>209</sup> If an employee is involved in an accident that results in the employee's disability or death, she or her dependents is entitled to compensation.<sup>210</sup> In addition, the employer is obliged to provide and maintain appliances and services for the rendering of first aid to his employees.<sup>211</sup>

According to the International Labour Organisation, the Directorate of Occupational Health and Safety Services has the authority to inspect factories and work sites (apart from Export Processing Zones). The Directorate's inspectors may issue notices against employers for practices that involve a risk of serious personal injury.<sup>212</sup> However, the U.S. Department of State reported that the low salaries and the lack of vehicles, fuel and other resources made it difficult for labour inspectors to do their work, and that the inspectors were vulnerable to bribes and other forms of corruption. Employers in all sectors reportedly bribed labour inspectors to prevent them from reporting infractions in the workplace.<sup>213</sup>

As a result, there continued to be widespread hazards in the formal workplace, and violations of health and safety conditions were commonly found in Export Processing Zones and other sectors.<sup>214</sup> According to the Institute for Human Rights and Business (2016), artisanal and small-scale miners generally did not adhere to occupational health and safety measures, and were reportedly lax on taking even the most basic of precautionary measures. Consequently, there had been serious accidents and fatalities.<sup>215</sup> The Star (2016) reported that there were 100.000 people engaged in artisanal and small-scale mining

activities. Reportedly, harassment from state officials and lack of protective and mining tools were common.<sup>216</sup>

According to the International Labour Organisation, in 2010-2011, a total of 6.023 accidents were reported, and 26 prosecutions took place.<sup>217</sup> The Danish Trade Union Council for International Development Cooperation added that, in 2012, most accidents took place in the agricultural and manufacturing sectors, while the largest number of fatalities (77) was in transport.<sup>218</sup>

The Star reported (2016) that more than 10.000 workers fall sick each year due to unsafe, unhealthy and unsustainable working conditions in the flower industry.<sup>219</sup>

## Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

### Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

*Does the company ensure that its workers are provided safe, suitable and sanitary work facilities?*

- Responsibilities for health and safety tasks are clearly defined.
- The company routinely monitors its production processes, machinery and equipment to ensure that they are safe and in good working order.
- Workers and managers are trained to respond to workplace emergencies; first aid kits and fire extinguishers are readily available; and escape exits are clearly marked and free from obstruction.
- The workplace is maintained to ensure clean and comfortable conditions including a suitable temperature, ventilation and lighting; suitable washing and sanitation areas appropriate for both genders.
- Residential or overnight facilities are safe and sanitary and meet the basic needs of workers including with regard to safety, space, temperature, lighting, ventilation, food, water, sanitary facilities, privacy, and affordability.
- The company provides safe drinking water for workers and facilities for clean and sanitary food storage and eating.
- Where relevant the company has put in place special health and safety precautions for pregnant women, employees with disabilities, night workers, young workers and other vulnerable groups.

*Does the company ensure that workers are provided with the protective equipment and training necessary to perform their tasks safely?*

- The company has a procedure to ensure that all workers are provided, free of charge or deposits, with the protective equipment necessary to safely perform their job functions.
- The company is committed to ensuring that workers use the protective equipment provided and understand why it is necessary to use the equipment.

- The company ensures that all workers have the necessary training to safely perform their job functions and keeps workers fully informed, in a language and form understandable to them, of the health and safety procedures.
- An accurate record is kept of who has been trained and for what tasks.
- On a regular basis and when assigned to new tasks, workers receive training in the safe use of equipment and processes.
- A company function or member of staff is responsible for keeping informed of scientific and technological developments regarding health and safety risks and protective equipment.

*Does the company actively involve workers in health and safety work?*

- The company consults employees on health and safety issues either directly or through a freely elected safety representative(s) for relevant groups of employees.
- A health and safety committee has been established including employee safety representatives and representatives from management.
- Health and safety accidents are reported and investigated including involving the relevant worker(s), and actions are taken to prevent recurrences.
- Health and safety near-misses (accidents not resulting in injury) are reported and investigated to help improve safety.
- Health and safety accidents are monitored including hours lost as a result of injury or illness and e.g. compared to total hours worked (lost time injury frequency).

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- IFC Performance Standard 2: Labour and Working Conditions (2012): FC PS2 is guided by the international labour standards as outlined by the ILO and covers health and safety.
- Portal for Responsible Supply Chain Management: The Portal is designed to support companies in improving the social and environmental conditions within their supply chain. The Portal offers tools and guidance on a number of supply chain issues, such as child labour, corruption and discrimination. In addition, the Portal also details sector specific resource material and pertaining legislation.
- Ethical Trading Initiative Base Code (2012) and ETI Principles of Implementation (2009): The Ethical Trading Initiative is an alliance of business stakeholders promoting the implementation of corporate codes of practice that cover supply chain working conditions. The alliance consists of companies, NGOs and trade union organisations. The ETI Base Code has been developed as a code of labour practice, targeted generally for supply chains, and is in line with the key international labour standards. The accompanying ETI Principles of Implementation outline the requirements needed by corporate members to implement the ETI Base Code in their supply chains, including the necessary commitments, management practices and behaviours.

# Trade Unions

*Restrictions on the right of workers to collectively represent their interests*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

The law stipulates that every person has the right to form, join or participate in the activities of a trade union.<sup>220</sup> Every trade union has the right to determine its own administration, programs and activities, as well as to organise, form and join a federation.<sup>221</sup>

Similarly, the Labour Relations Act 2007 states that every employee has the right to form a trade union,<sup>222</sup> join a trade union<sup>223</sup> and leave a trade union.<sup>224</sup> Importantly, no person may discriminate against an employee, or any person seeking employment, for exercising the right to form, join or participate in trade union activities.<sup>225</sup>

According to the International Labour Organisation, the Industrial Relations Charter remains as a basis for social dialogue and labour relations within Kenya.<sup>226</sup>

The UN Economic and Social Council reported that, since the passage of the constitution of Kenya (2010), trade union activities in the country have flourished.<sup>227</sup> In 2015, Freedom House estimated that there were 40 trade unions in Kenya, representing 2 million workers, or 11 percent of the workforce. The majority of the Kenyan labour unions were sector-based, and most commonly affiliated with the Central Organisation of Trade Unions, the national trade union federation.<sup>228</sup> As a consequence, the informal sector received less attention, though it hosts more than 80 percent of the total labour force.<sup>229</sup>

The U.S. Department of State reported, in 2015, that the government generally respected the right to association.<sup>230</sup> However, according to the International Trade Union Confederation (ITUC), Kenyan government officials sometimes verbally intimidated unions.<sup>231</sup>

Reportedly, in 2016, the Trade Union Congress of Kenya asked teachers, civil servants, university lecturers and dock workers to stay away from the annual Labour Day celebrations in order to highlight the government's failure to address their concerns.<sup>232</sup>

## Barriers to Unionisation

The Labour Relations Act 2007 states that workers can only form a union if they obtain the relevant certificates from the Registrar.<sup>233</sup>

The union should apply to the Registrar for registration within six months after receiving the certificate.<sup>234</sup> The application must be signed by any seven members or more.<sup>235</sup> When the Registrar is satisfied that the union has complied with the statutory requirements, it will issue a certificate of registration.<sup>236</sup> However, if the Registrar deems the application unsatisfactory, it may decline the application and should provide the union with the reasons for doing so.<sup>237</sup>

In 2011 the ITUC reported that the lengthy application process and the excessive minimum requirement of members required to create a union may delay or substantially impair the free establishment of unions.<sup>238</sup>

With regard to extractive operations, the Institute for Human Rights and Business (2016) identified challenges related to short-term contracts and their impact on the right to unionisation.<sup>239</sup>

## Collective Bargaining

The constitution of Kenya stipulates that every trade union has the right to engage in collective bargaining.<sup>240</sup> The Labour Relations Act states that an employer shall recognise a trade union for purposes of collective bargaining, but only if the trade union represents the simple majority of the employees.<sup>241</sup>

A dispute regarding the right to collective bargaining may be referred for conciliation.<sup>242</sup> Conciliation may be performed by: a public officer, a person appointed by the Minister or a conciliator from the Conciliation and Mediation Commission.<sup>243</sup> The conciliator or conciliation committee shall attempt to resolve the dispute within 30 days after the appointment, or any extended period agreed by the parties.<sup>244</sup> If the issue is resolved during the process of conciliation, this must be recorded in writing and shall be signed by the parties, including the conciliator.<sup>245</sup> However, if the issue remains unresolved, parties can refer the matter to the Industrial Court.<sup>246</sup>

The ITUC deems this requirement excessive.<sup>247</sup> Furthermore, the U.S. Department of State reported that employers, and sometimes the government, did not always honour the collective agreements. Those who lacked formal organisation, such as migrant workers, were unable to bargain collectively.<sup>248</sup>

According to the Kenya National Bureau of Statistics, the Industrial Court registered a total number of 328 collective bargaining agreements in 2014. It reported that there was a noticeable increase in the number of agreements in the textile, apparels and leather and, electronics sectors. On the other hand, there had been a notable decline in agreements in electricity, water, retail, restaurants and hotel.<sup>249</sup>

## Right to Strike

The constitution of Kenya stipulates that every worker has the right to strike.<sup>250</sup> More specifically, the Labour Relations Act 2007 stipulates that a person may participate in a strike if the trade dispute, that forms the subject of the strike, concerns terms and conditions of the employment, or the recognition of a trade union.<sup>251</sup>

Before being deemed a 'protected strike', the trade dispute must remain unresolved after the conciliation or as specified in a registered collective agreement that provides for the private conciliation of dispute. Additionally, a seven-day written notice concerning the strike must have been given to the employer.<sup>252</sup> The employer is under a duty to remunerate an employee for services that he or she does not render during a protected strike.<sup>253</sup>

Nevertheless, the employer has an opportunity to apply to the Industrial Court in order to prohibit the strike. This will only be accepted by the court if the strike is prohibited under the 2007 Act,<sup>254</sup> or if the party that issued the notice failed to participate in the conciliation proceedings in good faith.<sup>255</sup> A person who engages in a prohibited strike is deemed to have breached the employee's contract, and is liable to disciplinary action.<sup>256</sup>

In its latest observations, ITUC raised concerns that the compulsory recourse to arbitration and the lengthy mediation procedure may constitute a barrier to lawful strike actions. It also noted that the restrictions, with respect to the objective of a strike, indirectly make 'sympathy strikes' (i.e. when one

union strikes in support for another that is involved in a dispute) illegal.<sup>257</sup> According to the U.S. Department of State, 13 strikes took place in 2013 (the year from which data was available).<sup>258</sup>

## Anti-Union Discrimination

No person may discriminate against an employee, or any person seeking employment, for exercising the right to form, join or participate in trade union activities.<sup>259</sup> However, ITUC reported that, since the establishment of a new constitution, there had been several instances of anti-union discrimination.<sup>260</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **August 2016, Standard Digital:** The Employment and Labour Relations Court stopped Unilever Tea Company from firing employees who participated in a July strike for a 30 percent pay increase they had been awarded by the courts in a case lasting two years.<sup>261</sup>
- **February 2016, Daily Nation:** the Kenya Planters Co-operative Union stated that the Coffee Directorate had barred it from the Nairobi Coffee Auction, and denied it movement permits for farmers seeking to supply it with the beans.<sup>262</sup>
- **June 2015, International Trade Union Confederation:** Seven union officials were sacked in 2014 by the Karuturi Flower Farm in Naivasha, accused of inciting their colleagues over a long-running dispute over unpaid wages.<sup>263</sup>
- **June 2015, International Trade Union Confederation:** The Communication Workers Union's Secretary General reported that there had been discrimination in the payment of staff performance bonuses at Telekom Kenya. The Union also accused management of harassment and intimidation. A strike followed, but was called off in October after the union and Telekom had signed a back-to-work agreement. However, pay was deducted from the worker's salary slips for the days of strike. The Union filed a case in court against the company for doing so.<sup>264</sup>

## Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

### Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

*Does the company recognise the rights of its workers to freedom of association and to bargain collectively?*

- The company has a commitment to recognise the rights of its workers to freedom of association and collective bargaining, including the right to freely form and/or join independent trade unions, and this commitment is clearly communicated to all employees.
- The company recognises workers' organisations for collective bargaining purposes and has procedures in place to ensure regular collective bargaining with authorised worker representatives concerning all workplace related issues.
- The company allows worker representatives access to collective bargaining agreements, company premises, employees and other relevant documentation needed to fulfil their duties.
- The company prohibits discrimination or adverse actions against worker representatives or employees for participating or refraining to participate in lawful trade union activities.
- The company has agreed with workers' representatives about the requirements of a fair hearing to be followed in relation to all disciplinary cases and employee grievances.
- The company has a committee, with participation of employee-elected representatives, which is responsible for hearing, processing, and settling disciplinary cases and employee grievances.

*If independent trade unions are either discouraged or restricted, does the company enable workers to gather independently to discuss work-related problems?*

- The company allows employees to engage in regular employee-only meetings within normal working hours, where employees can discuss concerns regarding working conditions.
- Where allowed by local legislation, and if independent trade unions are not present, the company informs employees of their right to form independent collective representation at the workplace.
- Where allowed by local legislation, the company informs workers of their right to engage in regular collective bargaining concerning all workplace issues.
- Company management meets regularly with worker representatives to discuss work-related problems and any concerns/complaints employees may wish to raise.



# Working Conditions

*Employment status, wages, working hours and social security*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Wages

The constitution of Kenya recognises the right to fair remuneration.<sup>265</sup> Furthermore, by virtue of the Labour Relations Act 2007,<sup>266</sup> and the Interpretation and General Provisions Act,<sup>267</sup> Chapter 229 of the Regulations of Wages and Conditions of Employment Act (General Order) is still in force. Chapter 229 of the General Order should be read together with the Employment Act, which stipulates that no employer may discriminate in remuneration matters.<sup>268</sup>

The State undertakes a review of the minimum wage applicable to different cadre of workers on an annual basis.<sup>269</sup> The Labour Institutions Act 2007 gives the authority to the Minister of Labour to establish wage councils.<sup>270</sup> In issuing wage orders, the wage councils must take into consideration factors affecting both employers and employees.<sup>271</sup> The 'general wages order' applies to general workers and the wage is calculated based on region and occupation.<sup>272</sup> Similarly, the 'agricultural wages order' applies to workers in the agricultural sector and is based on occupation and skill level.<sup>273</sup> In addition, sectoral wage councils set the wages within their own sectors.<sup>274</sup>

The Labour Institutions Act<sup>275</sup> and the Employment Act<sup>276</sup> stipulate that employers who wilfully fail to adhere to the minimum wage guidelines are subject to fines, or imprisonment. The Employment Act also states that the contractual relationship between the employer and employee must include the particulars of the employees' salaries. This includes scale or rate, method of calculation and the intervals of payment.<sup>277</sup>

All employees are entitled to full remuneration during public holidays. A person, who works on public holidays, or a normal rest day, is entitled to payment double their normal wage.<sup>278</sup>

According to the Kenya National Bureau of Statistics, the average minimum wages for Nairobi, Kisumu and Mombasa were higher than in all municipalities, town councils and other towns.<sup>279</sup>

In 2015, the U.S. Department of State reported that the minimum wage for a general worker in Kenya was 9.780 shillings (US\$ 109.50) per month, for machine operators between 11.085 shillings (US\$ 124.15) and 15.064 shillings (US\$ 168.70). Furthermore, the average minimum wage for skilled workers was 13.674 shillings (US\$ 153.15) per month. The lowest agricultural minimum wage for unskilled employees was 4.854 shillings (US\$ 54.35) per month. The Department stated that agricultural workers were most commonly underpaid in comparison to other sectors.<sup>280</sup> Additionally, the Department reported that the increasing cost of living in Kenya often outpaced the wage growth.<sup>281</sup>

### Working Hours

Chapter 229 of the General Order provides that the normal working week shall consist of no more than 52 hours of work, spread over six days a week.<sup>282</sup> A person employed on night work may not work more than 60 hours per week,<sup>283</sup> though the law specifically excludes agricultural workers from such

limitations.<sup>284</sup> A person under the age of 16 shall not be required to work more than 6 hours in any day.<sup>285</sup>

The Employment Act states that an employees are entitled to 21 days of leave, with full pay, every year.<sup>286</sup> The law does not clearly provide for rest intervals during working hours,<sup>287</sup> though the Employment Act<sup>288</sup> and the General Order<sup>289</sup> state that employees are entitled to at least one day of rest during the working week. The Employment Act further stipulates that the number of working hours should be stated in the work contract.<sup>290</sup>

Generally, employers have the right to schedule overtime for their employees. Thus, workers can be asked to work a reasonable amount of overtime to complete a job. Nevertheless, union contracts often times restrict the authority of employers regarding overtime.<sup>291</sup> The Employment Act stipulates that employers are required to pay at least 150 percent of the wage if overtime work is performed during normal working hours.<sup>292</sup>

Nevertheless, the U.S. Department of State reported that workweek and overtime violations commonly took place. In some enterprises, particularly in Export Processing Zones (EPZ) and road construction, workers had been forced to work extra hours without overtime pay in order to meet production targets. Furthermore, many hotel industry workers were reportedly only paid the minimum statutory wages, and employees who worked long hours did not receive any monetary compensation. In addition, employees working late had not been provided any night-time transportation and were therefore left vulnerable to assault, robbery and sexual harassment.<sup>293</sup>

## Social Security

The Kenyan constitution establishes the right to social security as a socio-economic right to be achieved progressively.<sup>294</sup> Moreover, the Employment Act stipulates that an employee shall be employed under a contract of service that includes pensions and pension schemes in which the employee is involved.<sup>295</sup> Furthermore, the National Social Security Fund (NSSF) Act 2013 provides that pension shall be payable to a member who has attained the age of 60, or opted for an early retirement, having attained the age of 50.<sup>296</sup>

Kenya has a tripartite social security system with specific social programs for different sectors. Membership is compulsory for relevant employees. According to the Bertelsmann Transformation Index, the NSSF has been known to be one of the most corrupt institutions in the country.<sup>297</sup>

For a long time, Kenya's social security system was centred around employment, meaning that access to potential benefits was only available to those who were formally employed. The current system does not fully include those working in the informal sector (80 percent of the workforce), nor vulnerable groups, such as refugees and asylum seekers.<sup>298</sup>

The UN Economic and Social Council reported that the National Health Insurance Fund has begun to open up to members from the informal sector<sup>299</sup> as well as those that are self-employed. In addition, there are some private retirement benefit schemes governed by the Retirement Benefits Act 1997, through which private sector employers and employees may make contributions towards their retirement.<sup>300</sup> The Kenyan National Bureau of Statistics reported that the overall membership of the Health Insurance fund was 4.2 million in 2013/14.

The U.S. Department of State reported that the social protections for individuals employed in the informal sector was flawed. However, many of those working in the informal economy were, reportedly, part of associations, cooperatives and, sometimes, unions.<sup>301</sup> The formal sector contributed 66.3 percent of the total membership, while the informal sector registered an increase of 34.3 percent in 2013/14.<sup>302</sup>

## Informal Sector

According to the Kenyan National Bureau of Statistics (2015), the informal sector accounted for 82.7 percent of total jobs, and created 70,000 new jobs in 2014.<sup>303</sup> The main informal sectors were agriculture, principally tea and coffee cultivation (17.4 percent of the informal labour force), forestry and fishing (15.7 percent), manufacturing and wholesale and retail (13.1 percent).<sup>304</sup> Due to the commencement of titanium mining in Kwale County, mining and quarrying industries had a growth of 40.2 percent in 2014.<sup>305</sup>

Nevertheless, according to the U.S. Department of State, the government did not provide efficient social protections for workers employed in the informal sector. However, informal workers had the opportunity to organise themselves into associations, cooperatives and unions. Nevertheless, the law allows employers in some industries to dismiss workers regardless of the provisions in their collective bargaining agreements.<sup>306</sup>

The U.S. Department of State noted that there had been an increase in the elimination of permanent positions in favour of casual or contract labour, especially in Export Processing Zones, and the agricultural and manufacturing sectors. In most cases the job was de facto permanent, but the employer staffed it with rotating contract workers. This also, reportedly, took place at the managerial level, where employers hired persons as trainees and kept them in such position for the maximum permitted period, before replacing them with new trainees.<sup>307</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **June 2016, The Star:** Over 20,000 tea pickers at James Finlay Tea Company held a two-hour protest along the streets of Kericho town over salaries and allowance disputes. The strike started in response to the company rejecting the ruling by the Employment and Labour Relations Court to increase employees' salaries and allowances by 30% and set the retirement age to 60. Protesters allegedly blamed the Kenya Tea Growers Association (KTGA) for influencing the company to reject the court ruling.<sup>308</sup>
- **Samuel G. Momanyi vs The Hon. Attorney General and SDV Transami Kenya Ltd1:** the High Court declared that Section 45(3) of the Employment Act 2007 is inconsistent with the provisions of the Constitution of Kenya.

# Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

## Due Diligence Library

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### Working hours

*Does the company ensure that the workweek is limited to 48 hours; that overtime is infrequent and limited; and that workers are given reasonable breaks and rest periods?*

- Normal company working hours are limited to 48 per week by both company policy and practice, or fewer if provided by national law, collective agreement or industry standards.
- Overtime is infrequent, remunerated at premium rate, and does not exceed 12 hours in any one week, or 36 hours per month.
- The company has a system to plan, record and monitor hours worked by each employee, and regularly evaluates whether the number of workers is sufficient to meet production targets without resorting to overtime.
- Where overtime per worker systematically exceeds 12 hours per week, the company increases its workforce to correspond to production targets, or puts in place measures to increase worker productivity and reduce overtime.
- Workers are allowed at least 24 consecutive hours of rest (or more if provided by national law or industry standards) in every seven day period.
- The company ensures that workers have no less than a 30-minute break for every 4 hours of work (or more if provided by national law or industry standards) and that workers are allowed to use toilet facilities whenever necessary and not just during designated breaks.

### Wages

*Does the company provide a living wage that enables workers to meet the basic needs of themselves and their dependents?*

- It is company policy to provide workers with a living wage sufficient to meet basic food, clothing and housing needs and provide some discretionary income for themselves and their dependents.
- The company is aware of whether the legal minimum wage in the country of operation meets the requirement for a living wage.
- If no national minimum wage is established, or if national minimum wage standards are insufficient to meet the basic needs of workers and their dependents, the company calculates a living wage based on the cost of living in its area of operation.
- Part-time workers receive wages and benefits that are proportionate to those of full-time workers, and receive overtime compensation at a minimum of 1.25 times their hourly salary.
- The company pays wages at regular intervals and does not take deductions from wages for disciplinary measures or other deductions not authorised by national law.

- Bonus and piece-rate payment systems are monitored to ensure that the total salary paid meets living wage requirements without resort to overtime.

## Leave

*Does the company ensure that workers are paid holiday leave, sick leave, and parental leave in accordance with international minimum standards?*

- Workers are granted at least three weeks of paid holiday leave per year or more if required by national law or collective agreements. Part-time and short-term workers are provided with paid holiday leave proportionate to the number of hours worked, at a rate equal to that of permanent full time employees.
- Workers are entitled to paid sick leave in accordance with the applicable national law. If sick leave is not provided for in national law, the company consults with union or worker representatives to establish alternative means of protection in case of illness or injury.
- The company ensures that sick leave is not deducted from workers' vacation time.
- Female workers are entitled to no less than fourteen weeks of paid maternity leave per child.
- The company grants compassionate or parental leave to workers who have recently adopted a child or children, or have taken on the responsibility to care for foster children or other dependent children.

## Employment status

*Does the company ensure that all workers have an official employment status?*

- The company ensures that all employees receive employment contracts prior to starting work for the company, and that contracts are understood by each employee.
- Contracts detail each employee's rights and obligations of employment, including clear job description, bonus and salary systems, and reasonable notice periods.
- Reference to company handbooks or other relevant documents on employment terms are integrated into the contract.
- The company ensures that contractors provide workers operating within company premises with an official employment status in line with company standards.

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- Ethical Trading Initiative Base Code (2012) and ETI Principles of Implementation (2009): The Ethical Trading Initiative is an alliance of different business stakeholders promoting the implementation of corporate codes of practice that cover supply chain working conditions. The alliance consists of companies, NGOs and trade union organisations. The ETI Base Code has been developed as a code of labour practice, targeted generally for supply chains, and is in line with the key international labour standards. The accompanying ETI Principles of Implementation outline the requirements needed by corporate members to implement the ETI Base Code in their supply chains, including the necessary commitments, management practices and behaviours.

- Institute for Human Rights and Business and Global Business Initiative on Human Rights, State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships (2012): The Report examines how the UN Guiding Principles can contribute and guide the complex network of business relationships that now exist in a global economy. It explores how companies of all sizes are now beginning to implement human rights considerations and the UN Guiding Principles into both traditional and contemporary business relationships.
- Portal for Responsible Supply Chain Management (est. 2008): The Portal is designed to support companies in improving the social and environmental conditions within their supply chain. The Portal offers tools and guidance on a number of supply chain issues, such as child labour, corruption and discrimination. In addition, the Portal also details sector specific resource material and pertaining legislation.
- IFC Performance Standard 2: Labour and Working Conditions (2012): IFC PS2 is guided by the international labour standards as outlined by the ILO and covers a range of aspects, including: terms and conditions of employment, non-discrimination, health and safety, and forced labour. The Standard addresses employees, contracted workers and supply chain workers.
- International Labour Organization: The International Labour Organization (ILO) is the UN agency responsible for preparing and overseeing international labour standards. The mission and objectives of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.
- OECD Guidelines for Multinational Enterprises (2011): The OECD Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. Chapter 5 is on employment and industrial relations, aligning with the international labour standards of the ILO.

# Environment

*Company impacts on the environment that affect the health or livelihoods of local communities*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

The Kenyan constitution provides that every person has the right to a clean and healthy environment.<sup>309</sup> The government also has an obligation to ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources.<sup>310</sup> It must also establish environmental impact assessments, audits and monitoring systems,<sup>311</sup> as well as eliminate any activity that might harm the environment.<sup>312</sup>

In addition, the second Medium Term Plan (part of Vision 2030) recognises that it is important to ensure the sustainable exploitation, utilisation and management of its natural resources, as the country is adjusting to the devolution of powers.<sup>313</sup>

However, on the 2016 Environmental Performance Index, Kenya ranked 123 out of 180 countries, indicating that the country's performance, in relation to the environment, was relatively poor.<sup>314</sup> The Bertelsmann Transformation Index reported that policies on water management, air pollution and waste management were urgently required. The lack of political will was cited as the main obstacle to obtaining a clean and healthy environment in Kenya. Environmental protection was, reportedly, only a reality in areas that were significant for tourism.<sup>315</sup>

In addition, the Swedish International Development Cooperation Agency (SIDA) stated that there was a strong linkage between poverty and the sustainability of the Kenyan environment. A large proportion of Kenya's rural poor were, reportedly, living on marginal lands or in areas that were vulnerable to environmental degradation.<sup>316</sup>

## Participation & Access to Information

Chapter 11 of the constitution introduces a new devolved governance structure in Kenya. This aims at enhancing the participation of the people, in the exercise of the powers of the state, and in making decisions affecting them. Additionally, it recognises the right of communities to manage their own affairs and to further their development.<sup>317</sup>

The Environmental Management and Coordination Act 1999 (EMCA 1999) outlines the main legal provisions relating to the environment in Kenya. First, it establishes a National Environment Council that formulates policies and priorities for the protection of the environment in Kenya.<sup>318</sup> Among its representatives, three persons are set to represent the business community in Kenya.<sup>319</sup> Second, the Act establishes a National Environment Management Authority (NEMA), to supervise and coordinate all matters relating to the environment, as well as oversee the implementation of all policies relating to the environment.<sup>320</sup>

Nonetheless, according to the Bertelsmann Transformation Index, NEMA was hampered by lack of capacity, persistent conflict between its mandate and previously existing laws, insufficient funds for environmental plans and corruption.<sup>321</sup> In addition, SIDA stated that transparency and public

participation in environmental governance, as well as the development of climate adaptation and environmental sector policies were dominated by state sectors. Civil society organisations and local communities had, so far, only played a minimal role in key environmental issues.<sup>322</sup>

The EMCA 1999 further provides that certain projects require an Environmental Impact Assessment License from NEMA before it can proceed.<sup>323</sup> The goal of the EIA is to ensure that the proposed activity/project is environmentally sustainable.<sup>324</sup> Projects that must be subjected to environmental impact assessments are outlined in Schedule two of the Act. NEMA thereafter is required to publish the report for two successive weeks in the Gazette and in the local newspaper. Thereby, the community is then invited to submit comments on the assessment.<sup>325</sup> However, the Institute for Human Rights and Business (2016) reported that communities had criticised the EIA processes for the superficial involvement of affected communities.<sup>326</sup>

NEMA is responsible for carrying out environmental audits of all activities that are likely to have a significant effect on the environment in Kenya.<sup>327</sup> What constitutes a significant effect is, however, not explained in the Act. A 2016 Institute for Human Rights and Business report found that negative environmental impacts caused by artisanal and small-scale mining operations went unchecked.<sup>328</sup>

The same report noted that access to the published notices for comments had been a challenge. Publishing notices online and in the newspaper might exclude those populations that live in remote regions of Kenya, who have limited access to such sources. The technical language used in these notices might also pose a barrier for potential stakeholders to participate in the process. There are thereto no community assistance requirement for companies and the NEMA, in its current form, lacks the capacity to provide such support.<sup>329</sup>

## Food & Livelihoods

The Kenyan constitution states that every person has the right to be free from hunger and to have adequate food of an acceptable quality.<sup>330</sup> The Kenyan Government has made efforts to address the realisation of food security in the country by, for instance, issuing a National Food and Nutrition Security Policy (2011).

However, according to the latest Universal Period Review (2015), on average 1.9 million Kenyans were chronically in need of food aid assistance, of which 65 percent of that population were women and children.<sup>331</sup> In addition, Kenya ranked 83, out of 109 countries, in the 2015 Global Food Security Index, proving that the country had increasing difficulties making food affordable and accessible for all Kenyans.<sup>332</sup> Furthermore, the 2015 Global Hunger Index showed that circa 21 percent of the total Kenyan population were malnourished.<sup>333</sup>

For instance, Human Rights Watch reported that many of the indigenous people living in Turkana County relied on natural resources for food. Consequently, since their two main livelihoods were livestock herding and fishing, the indigenous people living in Turkana were extremely susceptible to changes in the environment. Therefore, dam projects, such as those taking place at the border of Ethiopia, could reduce the water-flow and therefore hinder the people from maintaining their livelihoods.<sup>334</sup>

In 2014, the UN Economic and Social Council (ECOSOC) estimated that circa 80 percent of the Kenyan population relied on agriculture for their livelihoods.<sup>335</sup>

It further reported that poverty was one of the main reasons contributing to the large proportion of Kenyans facing food shortages.<sup>336</sup> In its National Food and Nutrition Security Policy, the Kenyan government stated that about half of the country's population was poor, and that at least ten million people suffered from chronic food insecurity and poor nutrition.<sup>337</sup>



## Water

Article 43 of constitution recognises that every person has the right to clean and safe water in adequate quantities. It thereto provides that Kenya should put in place affirmative action programmes designed to ensure that minorities and marginalised peoples have reasonable access to water.<sup>338</sup> Nevertheless, according to the Special Rapporteur on the human right to safe drinking water and sanitation (from now on ‘Special Rapporteur’), the constitution made no explicit reference to the human rights to water and sanitation.<sup>339</sup>

Compared to other countries, Kenya was not investing its maximum available resources to progressively realise the human rights to water and sanitation. For example, for the fiscal year 2013/2014, only three counties had adequate funding available to implement planned sanitation activities, and 18 counties had no budget line for sanitation at all.<sup>340</sup>

Vision 2030 states that the water and sanitation sector should ‘ensure that improved water and sanitation are available and accessible to all’.<sup>341</sup> However, in its second Medium Term Plan (2013-2018), Kenya admits that the development of water supplies and water distribution networks had not yet been matched with the corresponding increase in facilities for sanitary disposal of wastewater.<sup>342</sup>

The UN Economic and Social Council (ECOSOC) also reported that Kenya is limited by an annual renewable fresh water supply of only 647 cubic metres against a global benchmark of 1000 cubic metres, and is therefore classified as a water scarce country.<sup>343</sup> According to the World Health Organisation (WHO) and the UN Children’s Fund (UNICEF), circa 62 percent of the Kenyan population enjoyed access to improved water sources in 2012.<sup>344</sup> Approximately 35 percent of the population rely on water from springs, wells and boreholes, while another 30 percent have access to piped water.<sup>345</sup>

The National Water Service Strategy (2007-2015) aimed at ensuring a minimum of 20 litres per day for everyone at an affordable price. The Special Rapporteur stated that 57 percent of low-income households still consume less than 20 litres per person per day.<sup>346</sup> In addition, the Special Rapporteur noted that significant inequalities existed between formal and informal settlements, as well as across wealth quintiles and rural and urban areas. Reportedly, while 82 percent of people in urban areas had access to improved water sources, only 55 of people in rural areas had access to improved water sources.<sup>347</sup>

However, even though access to water has gradually improved over time, people had to make seven to 28 trips, on average, to the water source per week.<sup>348</sup> According to the latest Universal Periodic Review (2015), in Turkana County, the distance to fetch water could be as long as 25 kilometres. Reportedly, mostly women and children were used for fetching water.<sup>349</sup>

Human Rights Watch thereto reported that industrial and agricultural developments across Turkana County’s northern border with Ethiopia posed a threat that could affect the realisation of rights for Turkana people. This is because Ethiopia has embarked on a large-scale plan for dams, water-intensive irrigated cotton and other infrastructure in Ethiopia’s Omo River Basin, which provides circa 90 percent of the water in Lake Turkana. Human Rights Watch predicted that these developments would dramatically reduce the water supply of the lake, where the irrigation projects alone could reduce the water-flow by up to 50 percent.<sup>350</sup>

According to the Bertelsmann Transformation Index, one of Kenya’s most pressing environmental issues included water mismanagement and degraded water quality. Reportedly, the main barrier to resource degradation was population growth, inadequately designed and managed settlement programs and a lack of political will to fix the issue.<sup>351</sup> Nevertheless, according to ECOSOC some attempts had been made in order to improve the situation within certain arid and semi-arid land regions. These regions had

been provided with funds to construct water pans that provide the communities with water to supplement irrigation. Since its inception in 2006, more than 306 community water pans and earth dams have been constructed.<sup>352</sup>

Since the establishment of the new constitution and the devolution of powers, the responsibility for providing water and sanitation is decentralised and devolved from national level to county level. The competence over water resources stays at national level.<sup>353</sup> However, ECOSOC underlined that Kenya cannot exempt itself from its human rights obligations by devolving the competence of service provisions.<sup>354</sup>

However, by issuing a license, the Water Services Regulatory Board (acting under the Ministry of Water and Irrigation) may allocate some, or all of its powers, and functions to one, or more agents (i.e. water service providers).<sup>355</sup> Two private companies, Runda Water Ltd. and Kiamumbi, participated in the provision of piped water in Nairobi, operating water supply systems.<sup>356</sup>

According to the Special Rapporteur, unregulated small-scale water providers were the main suppliers for low-income households in Kenya.<sup>357</sup> On the one hand, the ECOSOC acknowledged that public-private partnership in water management had made water increasingly accessible, especially for those residing in informal settlements and in rural areas. On the other hand, the Rapporteur noted that many smaller-scale water providers were charging very high water tariffs, especially in more impoverished areas of Kenya.<sup>358</sup>

According to the Special Rapporteur, the prices charged by small-scale water providers were unaffordable for many people in the country. Reportedly, approximately 63 percent of the Kenyan households spent much more than three percent of their household income just on water. As a consequence, many people must limit their water consumption to a level that might threaten their health and hygiene practices, or compromise their access to other human rights (e.g. sanitation, medicine and food).<sup>359</sup> In 2016, The Star reported that water-related diseases, such as cholera and typhoid, had affected communities in Nairobi since 2015.<sup>360</sup>

The Special Rapporteur stated that the water quality standards generally followed the guidelines provided by the World Health Organisation. However, water provisions by vendors and tanker trucks introduced additional risks of contamination, and the water monitoring for informal and small-scale provision, either by government actors or by users, was not routine or was insufficient.<sup>361</sup>

In settlements that were not connected to sewerage systems, households often had to rely on tankers and other informal services to empty their pit latrines and septic tanks. Left unregulated, the informal service providers often charged prices that was determined by what the market would bear, or by so called price-fixing between providers.<sup>362</sup>

According to the latest Economic Survey (2015), NEMA handled 79 water pollution related crimes in 2014.<sup>363</sup>

## Air Pollution

The constitution states that County Governments shall be in charge of controlling air pollution.<sup>364</sup> The Enforcement Review Committee shall advise the Authority on how to establish criteria and procedures for the measurement of air quality. Furthermore, any person who pollutes the air in contravention of emission standards shall be liable to imprisonment for a term no longer than two year and/or a fine not exceeding 500.000 shillings. The company is responsible for paying the costs to remove the pollution, and the restoration of the affected environment. Third parties also have a right to receive monetary compensation.<sup>365</sup>

According to All Africa, in 2016, the transport sector was believed to be the biggest source of outdoor pollution, and the rise of number of vehicles in Kenya poses a threat to the environment.<sup>366</sup> The Star

(2016) further reported that, in Nairobi vehicular emissions contributed to approximately 40 per cent of the urban air pollution. Reportedly, in 2016, the economic loss arising from vehicle emissions arising from vehicle emission-related illnesses and deaths was estimated at 115 billion Kenyan shillings per year.<sup>367</sup>

In the latest Economic Survey (2015), 72 offences of illegal air pollution had been reported by NEMA in 2014.<sup>368</sup> In its previous report (2014), respiratory diseases were on the rise, and were one of the leading causes for morbidity. In 2013, 14,823,864 cases of respiratory incidents were reported by the Ministry of Health.<sup>369</sup>

Moreover, EMCA 1999 states that any owner or operator of a trade must apply for an emissions license before being able to emit substance or energy into the air.<sup>370</sup> The Authority may cancel the license if the owner or operator contravenes any provision in the EMCA 1999 or the license.<sup>371</sup>

However, according to a report produced by the Institute for Business and Human Rights (2016), most large-scale oil and gas, and mining operations in Kenya were at the exploration stage, and the discussions around their environmental impacts were thus mainly concerned with potential future harm.<sup>372</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **April 2016, Daily Nation:** the Nairobi governor ordered the immediate closure of Prosoya Ltd., a pet food processing factory, which had been emitting a foul smell.<sup>373</sup>
- **November 2015, Standard Digital:** a pipeline managed by the Kenya Pipeline Company (KPC) burst and leaked its content for months undetected in 2015, thus polluting the Riber Thange and the surrounding environment. Independent assessors were commissioned to investigate the leak, and Senator Wamatangi called on the company to compensate those who had been adversely affected.<sup>374</sup>
- **August 2015, Standard Digital:** residents of Owino Uhuru, in the Changamwe Constituency, who were affected by lead poisoning caused by a smelting plant resolved to sue national government and factory directors for compensation.<sup>375</sup>
- **July 2015, UN Human Rights Council:** Complaints had been made against Runda Water Limited, alleging that it buys water from the Nairobi Water and Sewage Company and sells it to customers at a much higher rate. The Water Services Regulatory Board, in its performance review report, states that Runda Water Limited is maintaining its good performance, although the assessment does not include the price of water and affordability.<sup>376</sup>
- **December 2013, Standard Digital:** ARM Cement dismissed reports alleging that the Kilfi County factory was polluting the air.<sup>377</sup>

# Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

## Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

### Precautionary Approach

*Does the company support a precautionary approach to environmental issues?*

- The company provides information to stakeholders about uncertainties and potential risks to workers, consumers, the public and the environment of the company's products and processes.
- The company identifies any soil and water contamination at its site or sites, assesses the environmental impacts and remedies any significant contamination.
- The company tries to avoid environmental damage by regular maintenance of production processes and environmental protection systems (air pollution control, waste water treatment systems etc.).
- The company conducts systematic risk assessments of materials used, products and processes to apply the precautionary approach.
- The company ensures transparency and engages in regular stakeholder dialogue with neighbours, civil society organisations and others with an interest in the company on critical environmental issues.
- If relevant, the company supports scientific research on environmental issues relating to the company's products and processes.

### Emergency Response

*Does the company have emergency procedures in place to prevent and address accidents affecting the environment and human health?*

- The company has identified the hazardous operations and the potential consequences on human health and the environment if an accident occurs.
- The company has detailed procedures, plans, equipment and training programmes to prevent accidents and emergencies.
- The company has detailed procedures, plans and equipment to effectively respond to accidents and emergencies if they occur.
- The company trains workers to respond to accidents and emergencies, including carrying out emergency drills at least once a year involving all workers.
- Where there is significant risk of impacts on local communities, the company has a procedure that enables it to immediately notify affected local communities about industrial emergencies, and informs about emergency response, evacuation plans and medical response.

### Energy Consumption and Climate Change

*Does the company take measures to reduce energy consumption and emissions of greenhouse gasses?*

- The company complies with regulation regarding use of energy resources and emissions of greenhouse gases.

- The company has a climate strategy that identifies opportunities to reduce the company's energy consumption and/or emissions of greenhouse gases.
- The company has initiated practical activities to reduce energy consumption and/or greenhouse gas emissions.
- The company provides information and trains employees to implement energy reduction measures.
- The company monitors its energy consumption and/or emissions of greenhouse gases.
- The company has defined a baseline for its greenhouse gas emissions, which includes a definition of the business operations and activities, and the greenhouse gases that are accounted for e.g. as described in the Greenhouse Gas Protocol.
- The company has targets for reducing its energy consumption and/or emissions of greenhouse gases.
- The company engages with the government and civil society organisations to develop policies and measures that provide a framework for the business sector to contribute to building a low carbon economy.

## Water and Waste Water

*Does the company take measures to reduce water consumption and treat waste water?*

- The company has the necessary permits to extract water or obtain water from the public water supply and for any waste water discharges.
- The company treats waste water before discharge to reduce adverse environmental impacts. If waste water treatment takes place outside the company's premises, the company is aware of the effectiveness of the treatment.
- The company monitors waste water discharges, including types, limit values and quantities of pollutants in the waste water.
- The company has targets for reducing water consumption and/or increasing the amount of water reused or recycled in different business operations and activities.
- The company provides information and trains workers to implement measures to reduce water consumption and reduce the need for waste water treatment.
- The company's use of water and its waste water discharges do not negatively affect the sustainability of water resources, the natural environment or the availability of water for drinking and sanitation purposes.
- The company engages with national, regional and local public authorities, and civil society organisations to address water sustainability issues related to affected water resources.

## Waste Management

*Does the company take measures to prevent and reduce the production of waste and ensure responsible waste management?*

- The company has the necessary permits for the handling, storage, recycling and disposal of waste, and, if relevant, complies with requirements for transporting hazardous waste across borders.
- The company has a strategy to manage waste responsibly and continuously attempts to prevent and reduce the production of waste.
- The company ensures that waste relevant for recycling is sorted and handed over to a recycling company.
- The company monitors the types and quantities of waste produced, including where and how waste is recycled, treated or disposed of.

- The company has targets for reducing waste production and/or increasing waste reused/recycled and measures its progress against these targets.
- The company provides information and trains workers on the safe handling, storage, transport and disposal of hazardous and special waste types.
- The company marks areas used for storage of waste, and properly labels all containers for storing waste, including a relevant symbol of danger for hazardous waste.
- The company requests recycling/treatment/disposal receipts from transport contractors.
- The company uses licensed contractors for the transport, recycling, treatment and disposal of hazardous waste.

## Air Emissions

*Does the company prevent, reduce and treat air emissions?*

- The company has the necessary permits for emissions to air, and complies with legal requirements (e.g. air pollution standards and limit values).
- The company provides information and trains workers on how to manage air emissions.
- The company monitors the types and quantities of relevant emissions to air.
- The company treats relevant pollutants before they are emitted to the atmosphere (e.g. by using filters).
- The company continuously attempts to prevent and reduce air emissions.

## Noise, Odour, Light and Vibrations

*Does the company prevent and reduce impacts on the surrounding environment from noise, odour, light and vibrations?*

- The company has the necessary permits for levels of noise, odour, light and vibrations, and complies with legal requirements (e.g. standards or procedures).
- The company provides information and trains workers to manage noise, odour, light and vibrations.
- The company monitors levels of noise, odour, light and vibrations on the surrounding environment.
- The company treats/minimises impacts to ensure that there are no significant levels of noise, odour, light and vibrations.
- The company continuously attempts to prevent and minimise the levels of noise, odour and light (e.g. enclosed production, shielding, etc.).
- Chemicals and Other Dangerous Substances
- Does the company minimise the use and ensure safe handling and storage of chemicals and other dangerous substances?
- The company has the necessary permits and complies with legal requirements for the handling, use and storage of chemicals and other dangerous substances.
- The company does not manufacture, trade and/or use chemicals and other dangerous substances subject to national or international bans or phase-outs.
- The company provides information and trains workers on the safe handling and use of chemicals and other dangerous substances.
- The company monitors the quantities of all chemicals and other dangerous substances used in production and maintenance.
- The company marks areas used for storage of chemical substances and products.
- The company properly labels all chemical substances and products including name of the chemical and a relevant symbol of danger.

- The company considers substitution important and continuously tries to use less harmful chemicals and substances.

## Biodiversity

*Does the company prevent, minimise and remedy significant impacts on biodiversity?*

- The company has the necessary permits to operate in or alter the natural environment, and complies with legal requirements.
- The company is committed to operating within the framework of international conventions addressing biodiversity (e.g. the Convention on Biological Diversity, Cartagena Protocol on Bio-safety and the CITES Convention).
- The company has assessed important positive and negative impacts of its operations and activities on the natural environment and biodiversity (e.g. IUCN's Red List of Threatened Species and no alien invasive species).
- The company has previously and/or is currently taking measures to prevent and reduce the impacts of its operations and activities on biodiversity.
- The company clearly labels products containing GMOs and indicates if GMOs have been used in the production process.
- The company ensures that it has not had any unintended releases of GMOs.
- The company documents that workers have been adequately trained to handle GMOs.

## Natural Resources

*Does the company ensure that natural resources are used in a sustainable manner?*

- The company has the necessary permits and complies with legal requirements regarding the cultivation, harvest, extraction and/or use of natural resources (e.g. wood, fish, metals, oil, coal etc).
- The company complies with legal requirements regarding the cultivation, harvest, extraction and/or use of natural resources (e.g. wood, fish, metals, oil, coal etc.).
- The company ensures that workers are trained in the sustainable cultivation, harvesting, extraction and/or use of natural resources.
- The company continuously attempts to prevent, minimise and remedy significant impacts on natural resources through environmentally friendly methods and alternative resource use.
- The company ensures that its use of renewable resources does not negatively affect the sustainability of the resource (i.e. the resource's ability to regenerate).
- The company demonstrates efforts to substitute non-renewable resources used in production with renewable resources.
- The company works with local and national public authorities as well as with international institutions to address sustainability issues related to natural resources (e.g. wood, water, fish, metals, oil etc.).

## Environmentally Friendly Technologies

*Does the company encourage the development and use of environmentally friendly technologies?*

- The company uses environmentally friendly technology.
- The company regularly evaluates its processes and technologies to see if there are more environmentally friendly alternatives.
- When developing new technologies and products, the company focuses on developing environmentally friendly technology e.g. by using life cycle assessments (LCA), design for sustainability or a cradle-to-cradle approach.

- When planning new investments in technology, the company considers the best available technology and stipulates minimum environmental criteria.
- When investing in new buildings, the company implements environmentally responsible and resource-efficient materials and/or technologies.
- The company makes information describing the environmental performance and benefits of using environmentally friendly technologies available to stakeholders.

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- CEO Water Mandate (2011): Launched as a collaborative initiative of the UN, UN Global Compact, the Government of Sweden and a dedicated group of companies, the CEO Water Mandate is a public-private initiative designed to assist companies with the development, implementation and disclosure of policies and practices relating to water sustainability. It covers six core elements: direct operations, supply chain and watershed management, collective action, public policy, community engagement and transparency.
- IFC Performance Standards on Environmental and Social Sustainability (2012): The IFC Performance Standards provide directions to businesses on due diligence on environmental and social matters. Several of the standards are pertinent to environment, including: Assessment and Management of Environmental and Social Risks and Impacts (PS1), Resource Efficiency and Pollution Prevention (PS3), Community Health, Safety, and Security (PS4), and Biodiversity Conservation and Sustainable Management of Living Natural Resources (PS6).
- Institute for Human Rights and Business, Business, Human Rights & the Right to Water—Challenges, Dilemmas and Opportunities: This report summarises the views of various stakeholders on issues pertaining to the right to water, including consideration of the scope of a company’s responsibility to respect the human right to water; the applicability of the human rights-based approach to management of water-related issues; and the business case for engaging with water-related issues.
- ISO 14000 Standards on Environmental Management Systems: Developed by the International Organisation for Standardisation, the ISO 14000 Standards provide businesses and organisations with a number of tools to assist in their environmental management systems. The key objective of the standards is to encourage different actors to reduce the negative impact that their activities may have on natural resources such as air, water or land.
- United Nations Special Rapporteur on the Human Right To Safe Drinking Water and Sanitation (est. 2008): Amongst a range of issues, the mandate of the Special Rapporteur includes consideration of the regulation of the private sector in the context of private provision of safe drinking water and sanitation.
- Global Water Tool (2007): Developed by the World Business Council for Sustainable Development, this tool is designed for companies and organisations to map their water use, including risks associated with water use in global supply chains.



# Land & Property

*Human rights impacts related to company acquisition, use and management of land*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

Kenya has an area of approximately 583 square kilometres, comprising 98 percent land and 2 percent water surface.<sup>378</sup> Since the approval and publication of the National Land Policy (NLP) in 2009, Kenya has enacted and harmonised several acts relating to the administration of land.<sup>379</sup> However, the Institute for Human Rights and Business (2016) reported that there were still gaps in the legal structure, and that those gaps posed a challenge for companies, communities and individuals situated in the region.<sup>380</sup>

The U.S. Department of State (2014) reported that Kenya continues to have difficulties determining what constitutes ‘community land’ in practice. As a consequence, land disputes have led to numerous private and communal clashes.<sup>381</sup> Minority Rights International (2015) also reported that the speedy urbanisation in Kenya has created a large number of urban slums, with Nairobi hosting more than 200 informal settlements.<sup>382</sup> According to All Africa (2016), in Nairobi the poor make up 60 percent of the population, yet they occupy 5 percent of the residential space. Reportedly, the population in most these areas can be higher than 1000 people per hectare.<sup>383</sup>

Amnesty International (2015) reported that many of these people live with the threat of forced evictions from both the government and private entities. In the absence of domestic law prohibiting forced evictions, the only effective option for those without legal title to seek judicial intervention based on Kenya’s constitutional recognition of the right to adequate housing.<sup>384</sup>

## Land Administration

The Kenyan constitution stipulates that land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.<sup>385</sup> All land belongs to the people of Kenya collectively as a nation, as communities and as individuals.<sup>386</sup> A body corporate may hold land on the basis of a leasehold tenure, if it is wholly owned by one or more citizens.<sup>387</sup> Nevertheless, Kenya may regulate the use of any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.<sup>388</sup>

The Ministry of Land is responsible for ensuring the efficient administration and sustainable management of land in Kenya. The National Land Commission (NLC) has the authority to manage public land on behalf of the national and county government.<sup>389</sup> The NLC operates under the National Land Commission Act 2012, and the Land Act 2012. Nevertheless, according to the U.S. Department of State, the continuing disputes between the Ministry and NLC hinder the establishment of a legal framework for adjudicating land disputes.<sup>390</sup>

The 2014 East African Bribery Index showed that corruption took place within the land administration. In its 2014 survey, 19.4 percent of the respondents reported that they had encountered bribery when dealing with the Kenyan land services. In 2014, the average size of a bribe, for land services, was estimated to be 7.000 Kenyan shillings.<sup>391</sup> Similarly, the Business Anti-Corruption Portal noted that the

current law did not address the common use of facilitation payments.<sup>392</sup> The administrative land institutions were reportedly the second most corrupt public bodies in the country.<sup>393</sup>

In 2011, the Centre for International Private Enterprise (CIPE) reported that the lack of reliable title registries was a major hurdle for secure property ownership and for Kenyan businesses in general.<sup>394</sup>

However, in 2014 Transparency International Kenya reported that reforms were being made.

Reportedly, the Lands Cabinet Secretary had made efforts to re-organise the land registry, to resolve the problem of 'missing' files that had long been used as baits in the demand for bribes.<sup>395</sup> Nevertheless, CIPE warned that the digitalisation of registries might create opportunities for corruption. Officials reportedly claimed that records could not be accessed because they were being digitalised, but that they could help for an additional fee.<sup>396</sup>

## Land Acquisition

The constitution stipulates that acquisition of land can only be done if it is necessary in the interest of defence, public safety, public morality, public health, town and country planning or the development or utilisation of any property that is for the benefit of the public. The necessity of the acquisition must be proven reasonable for the causing of any hardship, which may result from any person interested in the land.<sup>397</sup> The Land Acquisition Act 2010 stipulates that, when a decision has been made, as to the acquisition of land, the Minister must publish a notice in the Gazette and deliver a copy of the notice to each person concerned.<sup>398</sup>

In case of compulsory acquisition, full compensation shall be paid.<sup>399</sup> An inquiry of compensation can be heard no earlier than 30 days and no later than twelve months after the publication of the notice.<sup>400</sup> The Commissioner shall, upon the conclusion of the inquiry, prepare a written statement regarding the awards for those concerned.<sup>401</sup>

Acquisition of land can also be done on a temporary basis, and is subject to similar requirements and compensation policies as for the permanent acquisition of land.<sup>402</sup> When the expiration period for which the possession has passed, the land shall be restored, by the Commissioner, to the condition it was in before it was occupied or used. Those with an interest in the land shall be compensated for any damage that might have occurred to the land.<sup>403</sup>

According to Minority Rights Group International, in 2014, circa 2.7 million Kenyan citizens were in danger of eviction because they lack titles to the land upon which they lived.<sup>404</sup> The Thomas Reuter Foundation (2016) reported that the Sengwer had been evicted from their land more than 20 times since it became a forest reserve. Reportedly, the United Nations and the World Bank had criticised the Kenya Forest Services in 2014 for forcibly evicting thousands of Sengwer from the forest by burning their homes, and leaving many camped out by the roadside.<sup>405</sup>

According to The Star (2016), in some areas, artisanal and small-scale miners who prospected for minerals had been violently evicted from the mines by larger prospectors, miners and traders who claimed legal ownership of the land as soon as the locals discovered mineral deposits.<sup>406</sup>

## Free, Prior & Informed Consent

According to Conservation International's Indigenous Advisory Group, the legal and administrative structures for making free, prior and informed consent (FPIC) operational are vague. Consequently, there is no clear distinction between FPIC and other decision-making processes in Kenya.<sup>407</sup>

In 2016, the Institute for Human Rights and Business (IHRB) reported that the relationship between extractive companies and communities had been challenging, and that some companies had failed to consult the surrounding communities completely. IHRB reported that Kenyan civil society remained suspicious to extractive companies because of the existing information asymmetry. Companies, on the

other hand, stated that one of their main challenges in ensuring effective engagement strategies was the multiple layers of stakeholder interests.<sup>408</sup> The IHRB also found that the voice of women was almost inaudible during the consultation processes performed by extractive companies. Consequently, women lacked involvement in decision-making.<sup>409</sup>

The same source noted that some extractive operations took place on community land for which there is no governing law on acquisition or compensation. Companies have to negotiate access with the county government and then with the community which is directly impacted. However, no monetary compensation is payable to community members for the land because there is currently no law to guide companies how this can be done. Reportedly, companies normally undertake projects identified by community members in addition to some ceremonies, such as slaughtering an animal to signify consent to the transaction.<sup>410</sup>

According to a study made by the Egerton University (Tegemeo of Agricultural Policy and Development), the privatisation and mismanagement of community land is posing grave economic and environmental risks to the pastoralist communities in Kenya.<sup>411</sup> According to a UN REDD report (2013), Kenyan land planning could be in danger of abuse, by organisations, which may seek to convince local communities to sign over carbon rights in ways that could be exploitative, and without satisfying the principles of FPIC.<sup>412</sup>

Kenya's first coal-power plant is being built in Lamu, which is the best-preserved Swahili settlement in East Africa and a UNESCO world heritage site.<sup>413</sup> The UNESCO monitoring mission recommended, among other things, that the voice of the local communities must not be lost within the overall demographic changes.<sup>414</sup> Thus, in its latest periodic report, the UN Economic and Social Council urged Kenya to explain what steps it took to ensure the free, prior and informed consent of the indigenous peoples living in the Lamu area.<sup>415</sup> Similarly, the Special Rapporteur on the rights of Indigenous Peoples have previously urged Kenya to not relocate any indigenous peoples without FPIC.<sup>416</sup>

Moreover, the constitution recognises marginalised people's right to land.<sup>417</sup> However, Minority Rights International reported that many minority communities continued to be discriminated against in regard to their land rights. For instance, Kenya's indigenous coastal communities were reportedly only able to access land as squatters or through the informal market as tenants.<sup>418</sup> Similarly, thousands of Sengwer were forcibly removed from the Embobut forest, and their houses burnt down by the Kenyan Forest Service. According to the U.S. Department of State, this was a direct violation of the 2013 High Court injunction prohibiting evictions in the community.<sup>419</sup>

The Prevention, Protection and Assistance to Internally Displaced persons and Affected Communities Act 2012 stipulates that the Kenyan government, and any other organization, body or individual has a duty to guard against factors and prevent conditions that can potentially result in the displacement of persons.<sup>420</sup> In 2015, the Internal Displacement Monitoring Centre (IDMC) estimated that there were 309.200 IDPs in Kenya. However, IDMC also noted that the country lacks up-to-date national data on displacement and have no centralised system for the collection of IDP-data, and the numbers may be even higher.<sup>421</sup>

However, the IDMC noted that the adoption of the Evictions and Resettlement Procedures Bill and Community Land Bill might further ensure that IDPs' rights are properly protected and future displacement is prevented.<sup>422</sup> However, according to Minority Rights Group International, the bills have remained stalled because of their controversial nature and lack of effective public participation.<sup>423</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **June 2016, Standard Digital:** after a 34 year legal battle over ownership of a parcel of land in Kiambu County, the Kenyan Court of Appeal ruled that if a squatter occupies your land for 12 years, they will own it even without a title deed.<sup>424</sup>
- **May 2016, Business Daily:** salt firms in the Marereni area of Kilifi County was ordered to put on hold their expansion plans until the National Land Commission gives its verdict on the local community's protest against encroachment of surrounding parcels of land.<sup>425</sup>
- **April 2016, Standard Digital:** the National Land Commission approved a wind power project, putting to rest a standoff between squatters and the investors. Because of stringent compensation demands from the locals, the commission and the investor agreed to pay 100 million shillings as compensation.<sup>426</sup>
- **November 2015, Business Daily:** the World Bank faulted KenGen over the resettlement of communities displaced from a geothermal power development site in Olkaria County.<sup>427</sup>
- **July 2015, Minority Rights Group International:** thousands of Sengwer were forcibly removed from the Embobut forest, and their houses torched by armed members of the Kenyan Forest Service. This was a direct violation of the 2013 High Court injunction prohibiting evictions of the community. Following complaints made by the Sengwer community, the World Bank Inspection panel launched an investigation, and concluded that the NRMP had failed to follow basic safeguards, and neglected to involve the indigenous community. Nevertheless, the World Bank concluded that despite these issues the NRMP was not linked to the evictions.<sup>428</sup>
- **December 2011, Standard Media:** Ms. Deka Jele's home in Garissa County was demolished by the local County Council 2010. In 2011, the High Court in Embu ordered that Ms. Jele, and 1.122 other residents in the area be restored to their land, and receive 200.000 KES each as compensation.<sup>429</sup>
- **2009, African Commission on Human and People's Rights:** complaint made against the Kenyan government alleging violations under the African Charter on Human and People's Rights, the Constitution of Kenya and international law, for the forced removal of the Endorois peoples from their ancestral lands. The Commission found that the Kenyan government had violated the Endorois' rights to religious practice, to property, to culture, to free disposition of natural resources, and to development, under the African Charter.<sup>430</sup>

## Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

### Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

*Before buying, renting, acquiring or otherwise accessing land or property, does the company ensure that all affected owners and users of the land or property, have been adequately consulted and compensated?*

- Prior to buying, renting, acquiring or otherwise accessing land or property, whether directly or through a third party, the company identifies all existing owners and users of the land or property, including information land users and customary owners.
- The company investigates the past usage and ownership of the land or property to ensure that past users and owners have not been wrongfully removed, and that any expropriations by the authorities have been conducted in accordance with international law.
- The company consults with affected users and owners of the land or property (including women, tenants, settlers, minorities and other vulnerable groups including indigenous peoples) and seeks their free, prior and informed consent before continuing to acquire or access the land or property.
- The company ensures that its lease or purchase of residential property and sourcing of food commodities does not considerably make housing and food scarce or too expensive for the local people.
- The company ensures that affected owners and users of the land or property are adequately compensated to help them restore their standards of living or livelihoods to the same or higher than before, and that the compensation standards are transparent and applied consistently to all communities and persons affected.

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- **FAO Voluntary Guidelines on the Responsible Governance of Tenure (2012):** Developed by the Food and Agriculture Organisation of the UN (FAO), the Guidelines promote responsible governance of tenure of land, fisheries and forests by outlining the principles and internationally accepted standards for the responsible governance of tenure. The Guidelines inform States and non-government actors on relevant policies, strategies and activities.
- **IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement, and IFC Handbook for Preparing a Resettlement Action Plan (2002):** The IFC Performance Standards are contractually binding on certain projects receiving IFC finance. PS5 is accompanied by a Guidance Note and a Resettlement Handbook that gives detailed guidance on managing resettlement and associated impacts.
- **Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources (2010):** A joint initiative of UNCTAD, FAO, IFAD and the World Bank, these seven principles cover all types of investment in agriculture, including between principal investors and contract farmers. The Principles provide a framework for national regulations, international investment agreements, global corporate social responsibility initiatives, and individual investor contracts.

# Revenue Transparency & Management

*Human rights impacts related to transparency of government revenues received from business and the distribution of such revenues*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Corruption

The Kenyan constitution endorses national values such as good governance, transparency and accountability.<sup>431</sup> It has thereto established an Ethics and Anti-Corruption Commission (EACC),<sup>432</sup> which now operates under the Ethics and Anti-Corruption Act 2011.<sup>433</sup> The constitution stipulates that the Commission is a body corporate that is capable of suing and being sued in its corporate name.<sup>434</sup> The Anti-Corruption and Economic Crimes Act 2012 establishes an Advisory Board to advise the Commission on the exercise of its powers and the performance of its functions.<sup>435</sup>

According to Freedom House, the EACC lacks prosecutorial authority and can only pass on the results of its investigations to the office of the Attorney General.<sup>436</sup> The U.S. Department of State reported that Kenya was one of the most corrupt countries in the world. The Department stated that some of the causes for this was the lack of political will, little progress in prosecuting past corruption cases and the slow pace of the reform process in key sectors.<sup>437</sup>

Even though steps have been taken to curb some of the corruption, the 2014 East African Bribery Index showed that corruption continued to feature in most key sectors in Kenya, but that incidents of bribery were generally not reported.<sup>438</sup> Similarly, Transparency International's latest Corruption Perception Index (2015), which ranks states based on how corrupt a country's public sector is perceived to be, Kenya ranked 139 out of 168 countries.<sup>439</sup>

According to The Star, in 2016, Kenya was losing a third of its state budget (approximately 608 billion shillings) to corruption every year. Reportedly, 300 cases were being prosecuted in court, which is still a small fraction of the 55,000 cases reported to the Ethics and Anti-Corruption Commission in recent years.<sup>440</sup> The Standard Digital (2016) reported that some of the money, siphoned out through corruption practices, had been traced to offshore accounts.<sup>441</sup>

According to the BBC (2016), Willy Mutunga (former president of the Kenyan Supreme Court) had stated that the influence of cartels had been 'overwhelming', and admitted that the legal system was ill equipped to tackle the problem.<sup>442</sup>

According to the 2014 Index, the National Police Service was ranked as the institution that had been mostly affected by bribery in Kenya.<sup>443</sup> Similarly, the 2015 Business and Anti-Corruption Index reported that the Kenyan police had extorted millions of shillings in bribes from truck drivers that were crossing the border to Uganda. This had, indirectly, contributed to the increase of costs for doing business and forced companies to include bribes as part of their budget.<sup>444</sup> Besides, the U.S. Department of State

thereto reported that the low salaries of labour inspectors had made them extra vulnerable to bribes and other forms of corruption.<sup>445</sup>

There are currently no legal instruments regulating corruption in the private sector. However, the Anti-Bribery Bill was proposed by the private sector in 2015 and outlines legal measures to check graft between the public and private sectors. The Standard Media reported that the private sector had relied on self-regulation in the past, and it had been up to individual business-owners to put in place mechanisms to fight corruption.<sup>446</sup> It further reports that the Bill focuses on both the giver and the receiver of the bribe, and proposes that all companies will have to set up a code of conduct to guard against bribery. The Bill also includes radical proposals on the penalties for those caught in the corruption web, including fines of five times the loot, a jail term up to ten years and a mandatory ban of ten years from doing business with the government.<sup>447</sup> Nevertheless, the government has yet to discuss the Bill in the National Assembly.

According to a report produced by the African Development Bank Group (2013), there had been a widespread perception of corruption in business, which had hindered the prosperity of smaller business in particular.<sup>448</sup> Similarly, Kenya Private Sector Alliance (KEPSA) reported that the main challenge hindering competitiveness of business in Kenya was corruption.<sup>449</sup> In 2016, All Africa reported that the private sector was the 'supply-side of most corruption in Kenya', mostly through public procurement, which accounts for at least 70 percent of corruption in the public sector.<sup>450</sup>

Additionally, the Centre for International Private Enterprise (CIPE) reports that it, together with the Kenyan Association of Manufacturers (KAM) and the Global Compact Network Kenya (GCNK), has created a joint training program for Kenyan companies on anti-corruption compliance.<sup>451</sup>

## Public Procurement

The Public Procurement and Asset Disposal Act 2015 applies to all State organs and public entities, in relation to procurement planning, procurement processing, inventory and asset management, disposal of assets and contract management. The 2015 Act establishes a Public Procurement Regulatory Authority (PPRA), to ensure that all the procurement procedures established under the Act are complied with.<sup>452</sup>

The Act stipulates that no person (agent or employee) shall be involved in any corrupt practice in any procurement proceeding.<sup>453</sup> If a person acts contrary, they shall be disqualified from entering into a procurement contract, or if the contract has already been entered into, the contract may be ruled as voidable by the procuring entity.<sup>454</sup>

Nevertheless, according to the 2015 Business Anti-Corruption Portal, Kenyan public procurement was subject to corruption and bribery.<sup>455</sup> The U.S. Department of State also reported that corruption often influenced the outcome of public tenders. Reportedly, of every 10 Kenyan CEOs had been asked to pay bribes in order to win a tender to get business.<sup>456</sup>

The Business and Anti-Corruption Portal reported that, even though all major transactions required competitive bidding, foreign companies had experienced discrimination in the tendering process. Favouritism also influenced the outcome of many of the bidding processes that were launched by the government.<sup>457</sup>

Freedom House reported that the weak institutional capacity has undermined attempts to increase transparency in procurement activities.<sup>458</sup> However, in an attempt to increase efficiency and transparency, the Kenyan government developed the Integrated Financial Management Information System (IFMIS), which is now a functioning website that documents the procurement process (including tender announcements, bids received and contracts awarded).<sup>459</sup>

## Revenue Sharing

The constitution stipulates that the public finance system shall promote an equitable society, where the revenue raised nationally shall be divided fairly among national and county governments. Thus, the expenditure shall promote the equitable development of Kenya. This also includes the creation of special provisions for marginalised groups and areas. The burdens and benefits of the use of resources and public borrowing shall be shared fairly between present and future generations.<sup>460</sup>

The constitution provides that only the national government can collect taxes. County governments are entitled to collect certain kinds of taxes, such as property tax and entertainment taxes.<sup>461</sup> Importantly, no tax may be avoided unless provided for by any Act of Parliament. If provided for, public records must be maintained, together with the reasons for the waiver.<sup>462</sup>

Furthermore, the constitution established the Commission on Revenue Allocation, which is an independent commission that has as its core mandate to recommend the basis for equitable sharing of revenues raised nationally between the national and county governments, and between county governments.<sup>463</sup> Among many things, the Commission shall encourage fiscal responsibility.<sup>464</sup> The Commission shall operate and divide equitable revenues in accordance with the Commission on Revenue Allocation Act 2011.

In determining the equitable sharing of revenues, the Commission shall invite the public to make submissions to the matter.<sup>465</sup> According to the constitution, every financial year, no less than 15 percent of the revenue raised nationally shall be allocated to county governments.<sup>466</sup> Nevertheless, according to the Working Group on the Universal Periodic Review, the revenue allocation has been proven to be a difficult issue due to the, reportedly, vague grounds for its distribution.<sup>467</sup>

In 2016, the Daily Nation reported that the Media Council of Kenya had warned of local conflicts with local communities if the government did not open up for sharing profits from minerals. Reportedly, officials had accused the government and mining companies of cloaking the deals in secrecy.<sup>468</sup> According to All Africa, in 2016, Kenya could lose billions of shillings in tax revenue from its oil production, because 85 percent of the firms awarded licenses had subsidiaries registered in tax havens. Reportedly, 30 multinational holding stakes in the 41 petroleum blocks given by the government had a presence in tax havens.<sup>469</sup>

## Revenue Transparency

The Kenyan constitution provides that every citizen have the right of access to information held by the state; and information held by another person and required for the exercise or protection of any rights or fundamental freedom. The state is obliged to publish any important information affecting the nation.<sup>470</sup> Accordingly, there needs to be openness and accountability, including public participation in financial matters.<sup>471</sup>

However, the right to access information only reserved to Kenyan 'citizens', and is thus not applicable to corporations or other entities. Furthermore, in practice, access to information is somewhat restricted. For instance, Section 52 of the Kenyan Penal Code allows for the government to prohibit the publication of any document. There is thereto no access to information legislation per se in Kenya, and according to the Organisation for Economic Cooperation and Development (OECD), there are no statutory provisions in Kenyan law that impede the effective exchange of information in tax matters.<sup>472</sup>

Moreover, the Kenya Revenue Authority Act established the Kenya Revenue Authority (KRA).<sup>473</sup> The Authority has as its main function to administer and enforce written laws and provisions on revenue, as well as collect and assess revenues collected under those laws.<sup>474</sup> Thereto, the Authority shall keep accounts and records of its transactions and affairs in order to ensure that all money received are



properly brought to account.<sup>475</sup> The Authority may reward any person providing information that leads to the identification or recovery of unassessed taxes or duties.<sup>476</sup>

However, the OECD noted that KRA's monitoring only covered those entities with income subject to tax in Kenya. In its 2016 report, the OECD therefore recommended Kenya to implement additional monitoring mechanisms in order to ensure that accounting records for all relevant entities are available and in place.<sup>477</sup>

The recently passed Tax Procedures Act now allows the KRA to prevent foreign companies from using transfer pricing to avoid taxes, a process which has been popular in the region. In finding a pricing agreement, the KRA may reverse any that appear to be structured for the purpose of avoiding taxation.<sup>478</sup> Bloomberg reported that the new law will buttress the government's efforts to increase tax collections as it is facing an increasing fiscal deficit. Reportedly, the KRA had missed its latest half-year revenue-collection target by 47.6 billion shillings.<sup>479</sup>

The Income Tax Act 1974 (ITA 1974) stipulates that a company is tax resident in Kenya when it is incorporated under the laws of Kenya, or when it is managed and controlled in Kenya.<sup>480</sup> Companies are taxed on all income that is accrued in or is derived from Kenya, and certain income that are deemed to derive from Kenya (such as income from foreign pensions and foreign exchange gains).<sup>481</sup> Where a resident company carries out business partly within, and partly outside Kenya, all of that income will be deemed to have accrued in Kenya.<sup>482</sup> The income tax for resident companies is 30 percent, and 37.5 percent for non-resident companies. Partnerships are considered tax transparent and tax is levied on the partners directly.<sup>483</sup>

All companies are required to file income tax returns without exception,<sup>484</sup> and if one fails to do so, it attracts a penalty of 5 percent of the outstanding tax amount.<sup>485</sup> In 2015, the calculated compliance rate, with the annual filing requirements for companies, was 65-70 percent. According to the OECD, the KRA segments taxpayers according to size. Large taxpayers are supervised by the Large Taxpayers Office (LTO), medium taxpayers by the Medium Taxpayers Office (MTO), and the remainder (mainly smaller entities and sole traders) are segregated into smaller categories based on their turnovers.<sup>486</sup> The OECD reported that the LTO carried out 72 audits in 2014, leading to fines amounting to 83.3 million US dollars. The MTO carried out 88 audits in 2014, amounting to 79.3 million US dollars in fines and recovered tax. Lastly, in 2014, 232 audits were performed covering smaller entities, which amounted 83.6 million US dollars.<sup>487</sup>

The Institute for Human Rights and Business (2016) reported that, with respect to transparency of revenue intake from the extractive sector, there is no clear route for citizens to understand what companies report as payments to the government, and what revenue the government reports receiving.<sup>488</sup>

Business Daily Africa reported that numerous stakeholders had tried to push the Kenyan government to develop laws on revenue sharing for extracting companies.<sup>489</sup> Similarly, in 2014, the UK High Commissioner called on Kenya to develop transparent oil revenue management in order to maximise benefits to locals.<sup>490</sup> To date, Kenya is not a member of the Extractive Industries Transparency Initiative.

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **February 2016, Amnesty International:** In April 2015, the Kenya Revenue Authority raided the offices of MUHURI and Haki Africa, confiscating data in order to determine whether the two organisations were tax compliant. The Mombasa High Court ruled that the organisations had no

links to terrorism, but fell short of giving an explicit order to unfreeze their bank accounts. The two organisations appealed the ruling, and the High Court found that the actions to freeze their accounts had been unconstitutional, and thus null and void.<sup>491</sup>

- **February 2015, Business Daily:** the National Bank of Kenya successfully challenged the award of a multimillion-shilling contract to supply an electronic payment system for public services. The Public Procurement Administrative Review Board nullified Equity Bank's contract and ordered a fresh round of bidding. The review board came to the conclusion after it looked into a litany of complaints by the losing bidders.<sup>492</sup>
- **May, 2015, Business Daily:** President Uhuru Kenyatta cancelled tenders worth 288 billion shillings, and threatened to sack 11 principal secretaries whose ministries and departments failed to use government e-procurement system.<sup>493</sup>
- **2013, U.S. Department of State:** Mumo Matemu was reinstated as the EACC's chairman, replacing Abdi Ahmed Muhammed, after the Court of Appeals decision which nullified Matemu's appointment as chairman in 2012 due to allegations of financial impropriety during his time at the Kenya Revenue Authority, and the Agricultural Finance Corporation.<sup>494</sup>

## Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

### Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

#### Signalling a Non-Corrupt Environment

*Does the company take a clear stand against corruption?*

- The company's CEO, director or president has declared that the company will not engage in corruption at any time or in any form.
- The company has a policy rejecting corruption and requiring all directors, managers and workers worldwide to behave ethically and in conformity with the law.
- The company anti-corruption policy includes how to handle requests for facilitation payments, giving and receiving gifts, engaging in sponsorships, giving political contributions, and how to conduct responsible lobbying.
- The company has defined benchmarks and indicators regarding its anti-corruption initiatives and reports these to the public (e.g. in its annual CSR report)

#### Anti-Corruption Risk Assessment

*Does the company assess the risk of corruption when doing business?*

- The company evaluates the potential areas of corruption including factors such as type of transaction, countries of operation, industries, and customers or business partners involved.
- The company evaluates the risk of corruption when workers, agents, intermediaries or consultants deal with public officials (including workers of state owned companies).

- The company evaluates the risk of internal and external conflicts of interest in relation to business partners.
- The company has developed an action plan to address the risk of corruption, and has defined responsibilities for each task, as a minimum for high-risk areas.
- The company has identified internal functions with the highest risk of corruption within the company and seeks to address these weaknesses.

### Awareness Raising

*Does the company ensure that relevant workers are properly trained?*

- The company informs all workers about its anti-corruption commitment.
- The company provides regular anti-corruption training for all relevant workers within the organisation e.g. procurement and sales staff.
- Information on disciplinary procedures for violations of company anti-corruption policies is available to workers.
- The company actively seeks worker feedback and dialogue on its anti-corruption initiatives.
- The company has and promotes a function by which workers can safely report suspicion of corruption related cases (e.g. hotline or mailbox) and allocates resources to systematically address the issues that are identified.

### Anti-Corruption Procedures

*Do the company's internal procedures support its anti-corruption commitment?*

- The company has assigned different individuals or departments to be responsible for handling contracts, placing orders, receiving goods, processing invoices and making payments.
- The company mentions 'anti-corruption' and/or 'ethical behaviour' in its contracts with business partners.
- The company prohibits informal employment and any 'off the books' record-keeping
- The company performs internal audits and has checks in place in connection with all anti-corruption commitments.
- The company's procurement, financial and internal audit personnel have clear instructions to look for and to identify alarms, report them to management, and follow-up counter measures.
- The company requests external auditors to maintain a critical eye and follow all alarms and irregularities.
- Any alarm or irregularity reported by external auditors is systematically addressed by management.
- The company monitors compliance and continuously identifies strengths and weaknesses in the anti-corruption initiatives to remain effective and up-to-date in addressing changing risks.

### Agents and Other Associates

*Does the company's anti-corruption initiative cover agents, intermediaries and consultants?*

- The company conducts an inquiry and/or attentiveness (e.g. financial, legal, labour, tax, IT, environment, market/commercial) on all agents, intermediaries and consultants.
- All agreements with agents, intermediaries and consultants are fully documented in written, signed contracts.

- The selection and terms of reference of agents, intermediaries or consultants are approved at the senior management level or at a level above that of the management involved in the operations for which the intermediary is hired.
- Contracts with agents, intermediaries and consultants include a section on anti-corruption and that the contract-holder must comply with all applicable laws and regulations.
- Agents, intermediaries and consultants are provided with information on the company's anti-corruption commitment, anti-corruption policies, training material on anti-corrupt behaviour and information on disciplinary procedures for violations of company anti-corruption policies.
- The company ensures that payment to agents, intermediaries and consultants are in line with standard payments for other service providers of similar ranking.
- The company only makes payments by bank transfer or check – never in cash – in the country of the agent, intermediary and consultant and never to a third party without prior examination.

## Communicate

*Does the company communicate progress on the Global Compact principles with stakeholders?*

- The company identifies stakeholders who affect or can be affected by the company's activities, products and services e.g. a person, group, organisation, authority.
- The company communicates progress openly about how issues covered by the Global Compact principles are managed, including performance results as well as forward-looking information on strategy and management approach, challenges, and dilemmas.
- The company regularly engages in dialogue with stakeholders to keep up-to-date with stakeholder expectations.
- The company communicates openly about how issues covered by the Global Compact principles are managed including challenges, dilemmas, success and failures.
- The company's communication on progress and other performance reporting on issues covered by the Global Compact principles is publically available and communicated to external stakeholders e.g. via the company's and Global Compact website.

## Joint Actions

*Does the company take joint actions with others to engage in and promote anti-corruption initiatives?*

- The company shares experience, procedures and challenges of corruption with other organizations i.e. the local business community, sector initiatives, networks etc.
- The company has initiated or joined initiatives with other companies in the same sector for the purpose of promoting a fair business environment.
- The company stimulates multi-stakeholder dialogue on challenges of corruption.
- The company encourages the local business community and business partners to initiate cooperation to fight corruption.

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- Transparency International Business Principles for Countering Bribery provide a checklist for companies to identify and reduce bribes and facilitation payments in their operations.
- The OECD Guidelines for Multinational Enterprises, applicable to enterprises in OECD Member States (and some others), require companies to respect human rights, including through due diligence. The OECD Guidelines constitute recommendations by OECD member states to multinational enterprises operating in or from adhering countries. The OECD Guidelines include competition, fiscal systems and anti-corruption.

# Security & Conflict

*Human rights impacts related to company interaction with public and private security providers and related to the impact of business on societal conflict*

## Country Context

*Human rights issues of relevance to businesses. The information in this section is gathered from publicly available sources and stakeholder consultations.*

### Public Security Forces

According to the constitution, every person has the right to freedom and security of the person.<sup>495</sup> In addition, Article 238 stipulates that ‘national security shall be pursued in compliance with the law and with the outmost respect for the rule of law, democracy, human rights and fundamental freedoms.’

The Kenya National Human Rights and Equality Commission has the authority to monitor, investigate and report on the observance of human rights in all spheres, including observance by the national security organisations.<sup>496</sup> However, according to the U.S. Department of State (2015), civilian authorities had at times not been able to maintain effective control over the security forces. Reportedly, serious human rights violations took place, including unlawful killings, forced disappearances, torture, and use of excessive force, interethnic violence and widespread corruption.<sup>497</sup>

In his follow-up report (2011), the Special Rapporteur on extra-judicial, summary or arbitrary executions stated that Kenya had implemented a number of legislative reforms since the last country visit (2009). However, at the time, no concrete actions had been taken to implement many of the recommendations made by the Special Rapporteur.<sup>498</sup>

According to Human Rights Watch (HRW), in 2014, the Kenyan security forces had conducted several abusive counter-terrorism operations in Nairobi, on the coast and in the North Eastern region following attacks and inter-communal clashes. Reportedly, these operations had mainly been targeting ethnic Somali and Muslim communities.<sup>499</sup> During the Usalama Watch operation, in Nairobi and Mombasa, security officers had raided homes, buildings and shops, carting away money and other goods. HRW reported that thousands of individuals had been harassed and detained without charge and in poor conditions for periods beyond the legal limit.<sup>500</sup>

Furthermore, HRW stated that Kenya’s public security forces had been long criticised for their human rights violations. It mentioned the Anti-Terrorism Police Unit (ATPU) as especially abusive in its operations aimed at Al-Shabaab.<sup>501</sup> According to Al-Jazeera (2014), officers from the ATPU had told reporters that they had assassinated terrorist suspects on government orders. However, the government and the National Security Council have denied these allegations.<sup>502</sup>

In its preliminary report ‘The Error of Fighting Terror with Terror’ (2015), the Kenya National Commission on Human Rights (KNCHR) documented over 120 cases of egregious human rights violations, including 25 extra-judicial killings and 81 enforced disappearances. Consequently, KNCHR alleged that the Kenyan government have violated numerous human rights - including the right to liberty and security of person, the right to freedom of torture, the right to non-discrimination and the right to life.<sup>503</sup>

HRW reported that the accountability mechanisms remained weak and have not been adequately supported by the executive part of the government. For instance, although the Independent Policing Oversight Authority (IPOA) had issued a public report about the Usalama Watch operation, describing 29 complaints of police abuse, those responsible were never disciplined or prosecuted.<sup>504</sup> The Special Rapporteur on extra-judicial, summary or arbitrary executions also noted a lack of investigations, into killings perpetrated by the police in both 2009 and 2011.<sup>505</sup>

In 2016, the Standard Digital reported that Rupert Colville (spokesperson for the UN High Commissioner for Human Rights) had expressed concern with the increasing violence surrounding the weekly anti-Independent Electoral and Boundaries Commission protests, and had condemned the police brutality meted against the unarmed protesters.<sup>506</sup> The BBC reported that police had killed at least three people during the protests.<sup>507</sup>

According to The Star, in 2016, the government had stated that police officers that had been involved in torture and violations of human rights would be investigated and prosecuted. Chief state counsel Emily Chweya stated that the government intended to put in place legal reforms to ensure prevention of torture.<sup>508</sup>

Furthermore, in 2015, the Telegraph reported that Kenya's military had been accused of taking a cut in the illegal sugar and charcoal trade in Somalia, that allegedly provides the bulk of funding for al-Shabaab, which they are meant to be fighting. Reportedly, the Kenyan Defence Forces earned around 50 million US dollars a year from taxing the goods travelling through the port of Kismayo, close to the Kenyan border, where it had its base.<sup>509</sup>

## Private Security Forces

Whilst the 2014 Private Security Service Bill is still pending in Parliament, there is currently a limited legal framework regulating the activities of private security forces in Kenya. Private security guards are not allowed to carry firearms in public. However, The Star reported that some ministers are lobbying for them to do so.<sup>510</sup> Others are opposed to the idea of arming guards since it might be exploited and thus contribute to more instability.<sup>511</sup>

The Institute for Human Rights and Business (IHRB) has identified several gaps in the 2014 Bill. Notably, the Bill does not contain any reference to the protection or promotion of human rights. In addition, the Bill allows private security providers to operate in humanitarian crisis zones, and in countries of war. It also allows foreign companies to register as private security providers in Kenya. IHRB thus stated that the Bill, in its current form, needs to include appropriate references to international humanitarian law. In so doing, private security providers could be held accountable for their actions, not only under local regulations, but also under international humanitarian law.<sup>512</sup> In a similar vein, Human Rights Watch stated that Kenyan law-makers should reject these new security amendments on the basis that some of its provisions would infringe fundamental human rights.<sup>513</sup>

The ISS estimated that 2.000 to 4.000 private security companies were operating in Kenya in 2015, and employed approximately 300.000 security guards.<sup>514</sup> According to Bloomberg, in 2016, 110 private security companies were regulated by either the Kenya Security Industry Association, or the Kenya Private Security Association.<sup>515</sup>

Due to the lack of regulation, stiff competition existed between different security providers. The ISS reported that the offering of reduced rates had many times led to security guards being exploited. Reportedly, many employees had to work for long hours, earning wages far below the basic minimum wage, and without any overtime bonuses.<sup>516</sup>

All Africa thereto reported that private security companies had been retaining original certificates and national identity cards of employees without their consent.<sup>517</sup> According to The Star, the security guards had been unable to register as voters as well as do financial transactions in banks and mobile money services as a consequence of the confiscation of their IDs.<sup>518</sup>

Since 2007, the Kenya National Private Security Workers Union (KNPSWU) has been operating in the country, with the mandate of representing matters of private security workers. The Union has currently got 36,267 members (14 companies). The KNPSWU states that the main challenges for private security workers are: the lack of regulatory authority within the sector, the lack of enforcement of the minimum wage by the government and lack of standardised training and equipment for private guards.<sup>519</sup>

Notably, one of Kenya's private security company KK Security is a member to the International Code of Conduct Association (ICoCA).<sup>520</sup> The ICoCA is a Swiss multi-stakeholder initiative (for states and private security companies) that has set up an international standard for the operation of security companies.<sup>521</sup> Among many things, the Code of Conduct states that its signatories shall operate in a manner that recognises and supports the rule of law and respects human rights.<sup>522</sup> In 2014, the Institute for Human Rights and Business (IHRB) referred to the ICoCA as a significant initiative that is grounded in fundamental international human rights and humanitarian law, which clearly correlates with the UN Guiding Principles on Business and Human Rights.<sup>523</sup>

According to Al Jazeera (2014), private security guards were 'everywhere in Nairobi' – outside banks and office blocks, searching bags before people entered malls and hotels and guarding ATM machines.<sup>524</sup>

The Institute for Security Studies (ISS) reported that the expanding extractives sector reportedly attracted both national and foreign private security companies.<sup>525</sup>

## Social Conflict

The Institute for Human Rights and Business (IHRB) stated that the Kenyan government is not a participant of the Voluntary Principles on Security and Human Rights, an international multi-stakeholder initiative designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights. However, some companies operating in Kenya are members, but not all. This means that there had been disparate responses to security incidents.<sup>526</sup>

The same source reported that many oil companies had treated protests as security issues, and thus focused on increasing the presence of security forces around the installations, rather than addressing the root of the problem. Consequently, the IHRB stated that there was a need for companies to be mindful of diverse social pressures, including inter and intra-communal conflicts and that companies should invest in genuine community engagement.<sup>527</sup>

There have been incidents of violence against foreign workers, due to people from surrounding communities being angry over the lack of local jobs created by international investments.<sup>528</sup>

## Armed Conflict

According to the latest Universal Periodic Review (2015), the enjoyment of the right to life, liberty and security of the person had continued to be curtailed in Kenya. Reportedly, this was because of the existing security threats in the country, including armed criminal gangs, terrorist attacks, violent conflicts in the northern regions, intercommunal clashes, land disputes and politically instigated administrative boundary conflicts.<sup>529</sup>



The same source noted that there had been a lack of legal framework setting out the human rights that must be respected in the fight against terrorism.<sup>530</sup> In addition, Operation Usalama Watch had been criticised for its negation of human rights and its dramatic physical and psychological impact on those affected by the arrests.<sup>531</sup>

According to a report (2012) produced by the Small Arms Survey and Kenya National Focus Point, stated that Kenya had struggled with insecurity for a long time, largely because of the proliferation of small arms and light weapons. The weak and corrupt security architecture had created a favourable environment for illicit small arms trafficking, possession and use. The effects of small arms availability and misuse could be seen throughout the Kenyan society as a whole. Reportedly, pastoralist communities, with little police presence and with numerous ongoing conflicts over land had been especially affected.<sup>532</sup>

Similarly, Amnesty International (2015) reported that armed violence had been responsible for thousands of deaths in Kenya in recent years. Small arms and ammunition in Kenya were mostly made in Europe, China and elsewhere. Thereto, many unregistered weapons had made it into the country, and were often diverted to unauthorised users, including criminal gangs and other armed groups. Amnesty stated that this was largely due to the relaxed controls, particularly with regard to civilian possession, state possession, stockpile management and manufacture.<sup>533</sup>

## Cases

*Reports of business-related human rights issues from NGOs, multilateral institutions and the media.*

- **August 2016, Daily Nation:** More than 200 angry youth attacked and injured 14 Chinese nationals at the Duka Moja railway construction site in Narok County, demanding a share of the standard gauge railway construction jobs in the area. A similar incident saw more than 300 youth protest against a Chinese contractor at the Duka Moja trading centre demanding jobs, but police dispersed them after they attempted to block the road.<sup>534</sup>
- **March 2016, Kenya Human Rights Commission:** in 2015, the children of Langata Road Primary School and members from civil society peacefully demonstrated against the seizure of their playground by private developers. The use of tear gas exposure by the police led to injuries on five children. The incident was investigated by the Commission on Administrative Justice, which found that the county police commander had failed to perform his duty of care. The Commission recommended the police to take disciplinary actions.<sup>535</sup>
- **February 2016, Daily Nation:** During a dispute over a wind power project in Nyandarua, a man was shot dead in a confrontation with police.<sup>536</sup>
- **2015, Human Rights Watch:** Since its establishment, IPOA has charged a police officer in Nairobi for the extrajudicial killing of two brothers who allegedly engaged in criminal activities, and successfully went to court to nullify a nationwide police recruitment exercise over widespread and systematic corruption.<sup>537</sup>

# Human Rights Guidance for Businesses

*Actions and priorities suggested by local and international stakeholders as well as company initiatives to ensure company respect for human rights and contribute to human development in the local context*

## Due Diligence Library

*The following recommendations have been developed by The Danish Institute for Human Rights through research and engagement with companies*

*Does the company take steps to ensure that company security arrangements are in accordance with international principles for law enforcement and the use of force?*

- The company regularly conducts security risk assessments, and ensures that company security arrangements, including the deployment of private guards or public security personnel, are proportionate to the security risk.
- Company security risk assessments include the risk of human rights abuses by private and public security personnel.
- The company selects private security firms based on information about professional ability, level of staff training, quality of equipment, past involvement in human rights abuses, links with political factions or organisations and other relevant criteria.
- Contracts with private security firms include requirements related to international human rights standards for law enforcement and use of force; require the investigation and discipline of any unlawful or abusive conduct by security guards; and allow for termination of the contract in case of such conduct.
- There is a manual defining the duties of security personnel, and all security personnel receive training on rules of conduct based on international human rights standards for law enforcement and the use of force.
- Where public security personnel are assigned to company facilities, the company seeks to ensure transparency concerning its interactions with public security agencies, and the company communicates to the relevant public security agencies its desire that security functions be conducted in accordance with international human rights standards for law enforcement and the use of force.
- The company has a procedure for recording security-related incidents, including a mechanism for handling complaints from staff or local communities related to the conduct of security personnel, and forwards credible allegations of human rights abuses to the relevant authorities.
- The company has a procedure for monitoring and evaluating its security arrangements, including the proportionality of the security arrangement; impact on local communities; impact on existing local tensions or conflicts; security incidents recorded; and credible allegations of human rights abuses by company security personnel. Representatives from the local community are consulted as part of the monitoring.

## Standards & Guidance

*NGO and institutional resources to enhance human rights due diligence efforts by businesses. These resources are drawn from the Business & Human Rights Resource Centre*

- International Alert, *Conflict Sensitive Business Practices: Guidance for Extractive Industries (2005)*: International Alert is a peace-building NGO working with civilians and other affected stakeholders in conflict areas. This Guidance is intended for companies in the extractive industries sector, providing advice on conflict-sensitive business practices and the ways in which they can contribute to peace-building.
- International Alert and Fafo Institute, *Red Flags: Liability Risks for Companies Operating in High-Risk Zones (2008)*: The Red Flags address illicit business activities under international and national law. The initiative's objective is to clearly define what types of activities, when committed or aided by businesses, represent breaches of international humanitarian law and international criminal law.
- International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes (2008)*: This three volume report outlines the ICJ Expert Legal Panel's findings and recommendations with regard to corporate legal responsibility for complicity in international crimes, under both civil and criminal law.
- The Dodd-Frank Wall Street Reform and Consumer Protection Act (2010): Section 1502 of the Act requires public and private companies to disclose the use of any conflict minerals in their products. This promotes greater transparency and dissuades companies from engaging in trade that may support regional conflicts.
- International Committee of the Red Cross, *Business and International Humanitarian Law (2006)*: The Guidance explains the obligations of businesses under international humanitarian law, including noting relevant distinctions between international human rights law and international humanitarian law.

# Access to Remedy

*Bodies to which victims of corporate human rights abuses can file grievances and seek redress.*

Article 48 of the constitution stipulates that the state shall ensure access to justice for all persons. Furthermore, Article 159 states that the judiciary, in exercising judicial authority, shall be guided by the following principles: justice shall be done to all, justice shall not be delayed, and alternative dispute resolution mechanisms shall be protected and promoted.

Article 22 proclaims that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed. The High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom in the Bill of Rights.<sup>538</sup> In any proceeding brought under Article 22, a court may grant an appropriate relief, including the following: a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights, an order for compensation, and an order for judicial review.

Article 49 of the constitution stipulates that an arrested person has the right to communicate with a lawyer, and other persons whose assistance is necessary. Article 50 thereto provides that a court may allow an intermediary to assist a complainant or an accused person to communicate with the court. However, the latest Universal Periodic Review (2015) expressed concern that most suspects do not have access to a lawyer during the initial stages of detention.<sup>539</sup> According to the U.S. Department of State (2015), the formal legal aid system had seriously hampered the ability of many poor defendants to mount an adequate defence. Reportedly, legal aid was available in bigger cities where some human rights organisations and international NGOs provided it.<sup>540</sup>

According to The Star (2015), Kenyan lawyers are few, with most of them being located in urban centres. For instance, Mfangano Island, in Homa Bay county, has no court and people have to make a two hour boat journey for the cost of 50 shillings to manage their cases in Mbita. The Star reports that a large part of the Kenyan population cannot access legal services, nor effectively manage their court cases due to high legal and court costs.<sup>541</sup>

The UPR (2015) stressed that the judiciary was widely considered to lack independence. It also noted the slow administration of justice, owing primarily to the lack of human and material resources. Concerns of corruption had limited access to domestic courts and judicial remedies. Reportedly, the government had frequently failed to enforce court orders.<sup>542</sup> Similarly, Freedom House (2015) reported that, even though the constitution includes measures for increased accountability, official prosecutions of corruption had yielded meagre results, and no top official had yet been successfully prosecuted.<sup>543</sup>

The World Bank Group is currently funding the Judicial Performance Improvement Project (JPPI), which aims to improve the performance of the Kenyan Judiciary. The project spans over 6 years, and ends in 2018. According to the Kenyan Judiciary, JPPI is currently focusing on increasing access to courts and legal information, speeding up judicial services and enhancing the quality of decision-making.<sup>544</sup>

## Judicial Mechanisms

Article 162 stipulates that the superior courts (Supreme Court, Court of appeal, High Court) shall hear and determine disputes relating to: employment and labour relations, the environment and land.

Moreover, Article 169 states that the subordinate courts are: the Magistrates courts, the Kadhis' courts, the Courts Martial and any other court or local tribunal as may be established by an Act of Parliament. According to the 2015 Economic Survey, there had been 503.144 cases filed to the above mentioned judicial instances in 2014.<sup>545</sup>

Article 171 established the Judicial Service Commission, which shall promote the independence and accountability of the judiciary, and ensure the effective and transparent administration of justice. Thereto, the National Council on Administration of Justice (NCAJ) was established under Section 34 of the Judicial Service Act 2011, and is a policy-making, implementation and oversight coordinating mechanism for the justice sector. Its mandate is to ensure a coordinated, efficient and consultative approach in the administration of justice.<sup>546</sup>

## Labour Courts

The Industrial Court was established in 2010 for the purpose of settling employment and industrial relations disputes. The Court consists of a Principal Judge, and such number of judges as the President considers fit. In 2014, the Industrial Court was renamed the Employment and Labour Relations Court.<sup>547</sup>

According to the U.S. Department of State (2015), there were 3.540 cases filed with the Industrial Court during 2014, and 1.800 awards and rulings executed by the Employment and Labour Relations Court in the same year.<sup>548</sup> Reportedly, the government had not enforced the decisions of the Court consistently.<sup>549</sup>

## Environment and Land Courts

The Environment and Land Court was established in 2011, and has jurisdiction to hear any other dispute relating to environment and land. The Court has powers to hear and determine disputes relating to: environmental planning and protection, climate issues, land use planning, and any other dispute relating to the environment and land.<sup>550</sup> According to the 2015 Economic Survey, there was a total number of 268 environmental crime cases in 2014.<sup>551</sup>

In addition, the Court exercises appellate jurisdiction over the decisions of Subordinate Courts, or local tribunals in respect of matters falling within the jurisdiction of the Court.<sup>552</sup> Thus, parties to a community land dispute should first seek to resolve the issue with the assistance of a registrar of group representatives. However, if the parties are dissatisfied with the outcome they may appeal to the Magistrates Court, and thereafter to the High Court.<sup>553</sup>

According to the Institute for Human Rights and Business (2016), the judiciary had embarked on a process of recruiting additional judges for the Environment and Land Courts, which reportedly would improve access by the citizenry, and the capacity of the courts to resolve land complaints.<sup>554</sup>

The Special Rapporteur on the human right to safe drinking water and sanitation (2015) reported that access to justice, in cases of alleged violations of the rights to water and sanitation in Kenya, is crucial in order to hold authorities accountable. The Rapporteur welcomed that there had already been a few cases related to these rights before national courts.<sup>555</sup>

## Civil and Criminal Courts

According to Freedom House (2015), the rule of law did not prevail in many civil and criminal matters in Kenyan courts.<sup>556</sup> The U.S. Department of State (2015) stated that individuals may use the civil court system to seek damages for violations of human rights, and may appeal decisions to the Supreme Court and the African Court of Justice and Human Rights. However, corruption and political influence over the

civil court system limited access to remedy. Thereto, the government, in some cases, had ignored judicial decisions and failed to honour civil damage awards.<sup>557</sup>

The constitution stipulates that if any fee is required, it shall be reasonable and shall not impeded access to justice.<sup>558</sup> However, the U.S. Department of State reported that court fees for filing and hearing civil cases had sometimes barred individuals from accessing the courts.<sup>559</sup> According to Redress, the use of 'P3 forms' (a legal document which is produced in court as evidence in cases which involve bodily harm) inhibits effective measures to ensure all victims of torture and ill-treatment have access to complaint mechanisms. Reportedly, the police had often asked victims for money to fill in the form, and if the victim had refused to do so, the police declined to undertake any investigations.<sup>560</sup>

According to Human Rights Watch (2015), the Prevention of Terrorism Act 2012 terrorist groups does not provide for any appealing mechanism. Reportedly, this may violate both domestic and international law, which prohibits the imposition of government sanctions without adequate due process.<sup>561</sup>

According to the Special Rapporteur on extrajudicial, summary or arbitrary executions (2011), Kenya had a weak criminal system, which reportedly contributed towards impunity and allowed extrajudicial executions to go unchecked.<sup>562</sup>

Freedom House (2015) stated that customary law trumps statutory law, leaving women with few remedies for customary practices.<sup>563</sup>

## Kadhi's Courts

Article 170 of the constitution states that the jurisdiction of Kadhi's courts shall be limited to the determination of Muslim law relating to personal status, marriage, divorce or inheritance proceedings in which the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts. Kadhi's courts now operate under the Kadhi Courts Act 1967.

According to the U.S. Department of State, there are no other traditional courts.<sup>564</sup>

## Non-Judicial Mechanisms

Article 159 of the constitution endorse the use of alternative dispute resolution mechanisms. Similarly, Article 189 states that national laws shall provide procedures for settling intergovernmental disputes by ADR mechanisms, including negotiation, mediation and arbitration.

## National Human Rights Institution

The Kenya National Commission on Human Rights (KNCHR) is an autonomous national human rights institution (NHRI), and was established under the Kenya National Commission on Human Rights Act 2011, pursuant to Article 59 of the constitution. Its main goal is to investigate and provide redress for human rights violations. The Commission have adopted the following redress mechanisms: human rights litigation, coordinating the Commission's Public Inquiries on specific human rights themes, and conducting alternative dispute resolution in appropriate circumstances. In addition, the Redress department undertakes legal services, such as providing general legal counsel, drawing contracts and handling court matters on behalf of the Commission to ensure it meets its objectives as an efficient and effective institution.<sup>565</sup>

*National Land Commission:*

The National Land Commission (NLC) has a constitutional mandate to initiate investigations, on its own initiative or on a complainant, and recommend appropriate redress.<sup>566</sup> The NLC Task Force conduct stakeholder and expert consultations to receive input on the issues under review, and has the power to hold both public and private hearings.<sup>567</sup>

## Conciliation-based initiatives

According to the U.S. Department of State (2015), the Ministry of Labour, Social Security and Services had often referred disputes to mediation, fact-finding or binding arbitration at the Employment and Labour Relations Court.<sup>568</sup> For instance, a dispute regarding the right to collective bargaining may be referred for conciliation.<sup>569</sup>

Conciliation may be performed by: a public officer, any person appointed by the Minister or a conciliator from the Conciliation and Mediation Commission.<sup>570</sup> The conciliator or conciliation committee shall attempt to resolve the dispute within 30 days after the appointment, or any extended period agreed by the parties.<sup>571</sup> If the issue is resolved during the process of conciliation, this must be recorder in writing and shall be signed by the parties, including the conciliator.<sup>572</sup> However, if the issue remains unresolved, parties can refer the matter to the Industrial Court.<sup>573</sup>

## Office of the Ombudsman

The Commission on Administrative Justice, or the Office of the Ombudsman, is mandated to enforce administrative justice and promote constitutional values by addressing maladministration through effective complaints handling, and dispute resolution.<sup>574</sup> In its 2014 report, the Ombudsman had received 86.905 complaints, out of which 70.806 were resolved.<sup>575</sup>

## Police-based initiatives

The National Police Service Commission (NPSC) is established under Chapter 15 of the constitution, and has the authority to observe due process, exercise disciplinary control over persons holding or acting in offices within the police service.<sup>576</sup>

## Civil society mechanism

According to the Open Society Foundations (2014), projects in Kenya have developed low-cost, community based paralegal schemes in order to secure identity documents essential for citizenship, education and health care.<sup>577</sup>

The Federation of Women Lawyers (FIDA) was established in 1985 and is a women's right organisation in Kenya that offers direct legal aid. The organisation take up deserving cases and provide legal aid services in the form of advice, preparation of court documents and court representation. FIDA stated that, between July 2014 and June 2015 it provided legal advice to 8504 clients, out of which 170 were taken to court. In addition, FIDA engages in various litigation and Alternative Dispute Resolution work.<sup>578</sup>

## Informal Justice Mechanisms

The U.S. Department of State reported that Kenyan courts had used the traditional law of an ethnic group as a guide in personal matters, as long as it did not conflict with statutory law.<sup>579</sup>

## Elders

The National Council of Elders is a non-political and non-partisan association, which brings together all the councils of Elders of the communities in Kenya. One of its objectives is to provide a platform for affiliate councils to interact, negotiate and resolve conflicts and offer alternative dispute resolution.<sup>580</sup> However, The Star reported that some decisions reached by the Elders had been oppressive, and sometimes worsened the situation of trafficked children.<sup>581</sup>

## International Mechanisms

### African Court of Human and Peoples' Rights

The Court is a continental court established by African Countries to ensure protection of human and peoples' rights in Africa. The Court was established under the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol). Kenya has ratified the Protocol, but not recognised the competence of the court to receive cases from NGOs and individuals.<sup>582</sup> At the present time, African Commission v The Republic of Kenya (Appl. No 006/2012) is pending in court, which concerns the forced evictions of Ogiek from the Mau forest. The applicants alleges there has been a violation of Articles 1, 2, 4 and 17 of the African Charter.<sup>583</sup>

### World Bank Inspection Panel

The Inspection Panel is an independent complaint mechanism for people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank project. The Inspection panel process aims to promote accountability at the World Bank.<sup>584</sup> The Panel has reviewed numerous projects taking place in Kenya, where the latest case concerned an electricity expansion project in 2014.<sup>585</sup>

### Compliance Advisor Ombudsman

The Compliance Advisor Ombudsman is the independent recourse mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA). The Ombudsman aims to address the concerns of individuals or communities affected by IFC/MIGA projects, as well as foster greater public accountability of IFC and MIGA.<sup>586</sup> In 2008, the Ombudsman dealt with a case concerning an IFC project in the pulp and paper sector in Kenya.<sup>587</sup>

### OECD Watch

The OECD Watch is a global network with a commitment to ensure that business activity contributes to sustainable development and poverty eradication, and that corporations are held accountable for their actions around the globe.<sup>588</sup> In 2016 a case was filed on behalf of a number of tribal people living near Lake Turkana, concerning alleged human rights violations associated with the ongoing dam projects in the area.<sup>589</sup>

### International Labour Organization's Committee on Freedom of Association

The ILO set up the Committee on Freedom of Association in 1951 for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions. Complaints can be brought against a member state by employers' and



workers' organisations.<sup>590</sup> The Committee has reviewed six cases in total deriving from Kenya. The latest case took place in 2002, and concerned the unlawful arrest and detention of a national chairman, which resulted from his legitimate activities as an employers' representative.<sup>591</sup>

## African Development Bank

The Independent Review Mechanism (IRM) provides people, which have been adversely affected by an African Development Bank financed project, with an independent mechanism through which they can request the Bank to comply with its own policies and procedures. The IRM operates through a compliance review (i.e. investigation), and problem solving (i.e. mediation).<sup>592</sup> In its latest annual report (2014), the Compliance Review and Mediation Unit was handling a complaint regarding the Outer Ring Road project in Nairobi.<sup>593</sup>

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