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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development****Visit to Kenya****Report of the Working Group on the issue of human rights and  
transnational corporations and other business enterprises\*<sup>\*</sup>, \*\****Summary*

The Working Group on the issue of human rights and transnational corporations and other business enterprises conducted a visit to Kenya from 2 to 11 July 2018.

Kenya has adopted and initiated important regulatory initiatives to implement the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, including the development of a national action plan on business and human rights. However, additional efforts should be made in order to translate the policy commitment into reality, including by establishing enforcement mechanisms for the effective implementation of State obligations and business responsibilities to prevent, mitigate and remedy adverse business-related human rights impacts.

The Government should also take additional steps to systematically embed respect for human rights in all its activities as an economic actor, and set clear expectations for companies to respect human rights by conducting proper human rights due diligence processes. Obstacles remain for victims of human rights abuses to gain access to an effective remedy, and mechanisms should be aimed at strengthening accountability, including through the creation of grievance mechanisms at the operational level.

Equal and meaningful participation of all stakeholders, particularly affected community members and human rights defenders, remains a challenge. More efforts should be made to ensure access to information and technical assistance for rights holders in relation to all business-related questions that may have an impact on them. This includes measures to build trust and remove barriers such as power asymmetry between actors, which hamper inclusive negotiation and collaboration.

\* The summary of the report is being circulated in all official languages. The report itself, which is annexed to the summary, is being circulated in the language of submission only.

\*\* Agreement was reached to publish the present report after the standard publication date owing to circumstances beyond the submitter’s control.



## Annex

# Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to Kenya

## I. Introduction

1. Pursuant to Human Rights Council resolutions 17/4, 26/22 and 35/7, the Working Group on the issue of human rights and transnational corporations and other business enterprises, represented by two of its members, Michael Addo and Anita Ramasastry, conducted a country visit to Kenya from 2 to 11 July 2018, at the invitation of the Government. The purpose of the visit was to assess the efforts made to prevent and address adverse business-related human rights impacts, in accordance with the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework.

2. During their visit, the experts met with the Attorney General and with representatives of the following Government ministries and departments: Ministry of Foreign Affairs; Office of the Attorney General and Department of Justice; Ministry of Public Service, Youth and Gender Affairs; Ministry of Industry, Trade and Cooperatives; Export Processing Zones Authority; and Ministry of Energy and Petroleum.<sup>1</sup> They also met with officials from the county governments in Mombasa, Nakuru and Turkana. In addition, they held meetings with parliamentarians of the Senate Committees of Justice, Legal Affairs and Human Rights and of Tourism, Trade and Industrialization; the Parliamentary Caucuses on Human Rights and on Sustainable Development Goals and Business; the Chairperson of the Kenya National Commission on Human Rights and her team; officials of the National Gender and Equality Commission; and the Director and staff of the Kenya Judiciary Training Institute.

3. During their meetings held in various towns and cities, including Lodwar, Mombasa, Nairobi, Naivasha, Nakuru and Thika, the Working Group met with more than 400 representatives of civil society organizations and affected communities, including indigenous peoples, workers and trade unions, as well as with members of the United Nations country team and representatives of companies and business associations covering a wide range of sectors, including Global Compact Network Kenya, the Federation of Kenya Employers, the Kenya Private Sector Alliance and the Kenya Association of Manufacturers.

4. The Working Group thanks the Government for its support and facilitation of the visit. It also thanks the individuals and the representatives of civil society organizations, communities and business enterprises with whom it met for their openness and willingness to engage in dialogue.

## II. General context

5. Kenya has one of the fastest growing economies in sub-Saharan Africa, with approximately 4.9 per cent growth in gross domestic product (GDP).<sup>2</sup> The main industries are agriculture, small-scale consumer goods, oil refining, tourism, services, transport, information technology and mining.<sup>3</sup> Micro-, small and medium-sized enterprises play a

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<sup>1</sup> The Ministry of Energy and Petroleum and the Ministry of Mining have since been replaced by the Ministry of Energy and the Ministry of Petroleum and Mining.

<sup>2</sup> 2017 figure. World Bank, “GDP growth (annual %)”. Available at <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2017&locations=KE&start=1961&view=chart> (accessed 20 May 2019).

<sup>3</sup> See [www.cia.gov/library/publications/the-world-factbook/geos/ke.html](http://www.cia.gov/library/publications/the-world-factbook/geos/ke.html).

critical role in the domestic economy, generating approximately 85 per cent of employment and 30 per cent of GDP.<sup>4</sup> The economy remains highly dualistic, with a formal private sector employing 2.2 million persons operating alongside an informal sector of more than 14.1 million persons.

6. Economic growth in Kenya has been triggered by the national blueprint agenda, Kenya Vision 2030,<sup>5</sup> which aims to transform the country into a newly industrializing, middle-income country providing a high quality of life to all citizens by 2030 in a clean and secure environment, and in accordance with national priorities, outlined in the Big Four agenda.<sup>6</sup> The Big Four agenda comprises four pillars: manufacturing, food security and nutrition, universal health coverage and affordable housing. The country's economic advancement has also been accompanied with progress towards implementation of the Sustainable Development Goals, including reducing child and maternal mortality, securing universal primary education and closing the education gender gap.<sup>7</sup> However, despite a decline in the poverty rate from 46.6 per cent in 2005–2006 to 36.1 per cent in 2015–2016, poverty and economic inequality remain a critical challenge.<sup>8</sup> People living in rural areas are even more exposed to extreme levels of poverty and exclusion from human and economic growth.<sup>9</sup> In response to these continuing challenges, Kenya should continue its human rights-based approach to sustainable development, with the aim of leaving no one behind.

### III. Legislative and policy framework

7. Kenya is a presidential representative democratic republic. The 2010 Constitution introduced a multiparty bicameral Parliament and a devolved county government system, with the creation of 47 semi-autonomous devolved counties to enhance peoples' participation in the decision-making sphere. After the annulment of the presidential election of August 2017, Uhuru Muigai Kenyatta was elected President of the Republic for a second term in October 2017.

8. The Constitution protects several rights and freedoms, in accordance with international human rights law.<sup>10</sup> Furthermore, it enshrines the responsibility of business enterprises to respect human rights and the right to a clean and healthy environment.<sup>11</sup> The Kenya National Commission on Human Rights, which was reconstituted in 2011, complies with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).<sup>12</sup>

9. Kenya is party to the eight fundamental conventions of the International Labour Organization (ILO) and has ratified a number of international and regional human rights conventions and treaties. Kenya issued a standing invitation to the special procedures of the Human Rights Council in January 2015 and was a member of the Human Rights Council from January 2013 to December 2018. Kenya is also a State party to the African Charter on

<sup>4</sup> Kenya, Kenya National Bureau of Statistics, *Micro, Small and Medium Establishments: Basic Report 2016* (Nairobi, 2016).

<sup>5</sup> See [www.vision2030.go.ke/about-vision-2030](http://www.vision2030.go.ke/about-vision-2030).

<sup>6</sup> See [www.big4.president.go.ke](http://www.big4.president.go.ke).

<sup>7</sup> The human development index was 0.473 in 1990 and 0.555 in 2015. *Human Development Report 2016: Human Development for Everyone* (United Nations Publication, Sales No. E.16.III.B.1).

<sup>8</sup> World Bank, "Poverty and equity brief: sub-Saharan Africa – Kenya", April 2019. Available from [http://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global\\_POVEQ\\_KEN.pdf](http://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_KEN.pdf). The Gini coefficient for Kenya (47.7) is above the sub-Saharan Africa average for 2013 (43.8).

<sup>9</sup> United Nations Development Programme (UNDP), *UNDP Kenya: 2017 Annual Report* (Nairobi, 2018).

<sup>10</sup> See articles 26–58 of the Constitution in the light of article 2, which recognizes that any treaty or convention ratified by Kenya and the general rules of international law form part of the law of Kenya.

<sup>11</sup> *Ibid.*, art. 20, 42 and 260.

<sup>12</sup> *Ibid.*, art. 59; Kenya National Commission on Human Rights Act, No. 14 of 2011; and General Assembly resolution 48/134.

Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. In October 2016, a National Policy and Action Plan on Human Rights was launched.<sup>13</sup>

#### **IV. Awareness of business and human rights**

10. Following its acceptance of the recommendation from the second cycle of the universal periodic review, in 2015, to develop a national action plan for the implementation of the Guiding Principles on Business and Human Rights (A/HRC/29/10, para. 142.27), Kenya initiated the process of developing a national action plan on business and human rights under the lead of the Office of the Attorney General and Department of Justice and the Kenya National Commission on Human Rights.<sup>14</sup> This process has increased awareness of issues related to business and human rights within the Government, civil society and the business sector. The experts noted that several stakeholders with whom they met were not fully aware of the process of preparing the national action plan. The experts therefore encouraged the Government and the steering committee responsible for preparing the national action plan to extend efforts to raise awareness of this process and involve more actors, including other governmental departments, business associations and their members and other stakeholders, in order also to benefit from the multiplier effect that this initiative could produce, as well as to strengthen policy coherence.

11. Among the business community, the Working Group observed that awareness of the corporate responsibility to respect human rights varied depending on the size of business enterprises. Some of the larger business enterprises demonstrated good practices in implementing the Guiding Principles, such as conducting human rights due diligence processes and establishing independent grievance mechanisms within business associations, while others, including micro-, small and medium-sized enterprises, seemed unaware of the business and human rights agenda. However, the Working Group also met with smaller enterprises that seemed committed to responsible business and respect for human rights as part of their business operations. The Working Group acknowledges the important role played by business associations in raising the level of awareness among their members and promoting good practices of human rights due diligence and community engagement.

#### **V. The State as an economic actor**

12. Kenya is a critical economic actor, not only for the enterprises that it controls or owns, but also when acting as a purchaser or promoter of trade and investment. In this context, some measures have been taken to address critical issues. For example, the Export Promotion Council, under the Ministry of Industry, Trade and Cooperatives, has an anti-corruption policy (2011) that includes enhanced due diligence of its potential local export partners. The Working Group encourages the Government to extend the anti-corruption policy for export promotion to include an expectation that businesses respect human rights as a precondition for receiving government support for export activities, as further explained in its report on economic diplomacy (A/HRC/38/48).

##### **A. State-owned enterprises**

13. There are currently 220 State-owned enterprises in Kenya, which contribute to 11 per cent of GDP.<sup>15</sup> These enterprises are governed by the State Corporations Act (Chap.

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<sup>13</sup> Kenya, Office of the Attorney General and Department of Justice, *Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights* (Nairobi, 2014).

<sup>14</sup> See <http://nap.knchr.org/>.

<sup>15</sup> Kenya, Executive Office of the President, *Report of the Presidential Taskforce on Parastatal Reforms* (Nairobi, 2013).

446, 2016) and the Code of Governance for State Corporations.<sup>16</sup> The Working Group welcomes the fact that existing regulations seek to foster transparency and accountability in State-owned enterprises, including through reporting on corporate governance. It also highlights that some regulations and guidelines for such enterprises provide for gender sensitivity in terms of board representation.<sup>17</sup>

14. The experts encourage the Government to specify that State-owned enterprises have the obligation to respect human rights and to lead by example, including by adopting explicit human rights targets and monitoring achievement of them, with mechanisms for accountability and follow-up. The Government should also develop specific guidelines on how to report on human rights performance, and adopt clear criteria to determine when State-owned enterprises should conduct human rights due diligence. In addition, such enterprises should provide remediation for adverse human rights impacts that they have caused or contributed to, as further developed in the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/HRC/32/45).

## **B. Public procurement**

15. Article 227 of the Constitution requires public procurement to be conducted in a manner that is fair, equitable, transparent, competitive and cost-effective. Under the Public Procurement and Asset Disposal Act, 30 per cent of the budgetary allocation in procurement and asset disposal planning must be reserved for enterprises owned by women, youth, persons with disabilities and other economically disadvantaged groups.<sup>18</sup> The Working Group observed with appreciation that these measures had opened up new business opportunities for women-owned companies. The Access to Government Procurement Opportunities programme, which aims at facilitating participation by enterprises in public contracts, should be extended to population groups in rural and indigenous areas in particular, to ensure that they fully benefit.<sup>19</sup>

16. The experts learned that the conditions set by the Government might not always include respect for human rights as a prerequisite and that the conditions set for award of public contracts prevented those who receive public tenders from respecting human rights. It is noted, for example, that the amount provided in contracts for government cleaning or security services may not be sufficient to allow the contractor to pay a minimum wage. The State should therefore explicitly include respect for human rights as a condition underpinning tender process and the whole procurement cycle, and implement effective monitoring systems for the verification and enforcement of human rights requirements. It should also require that suppliers and contractors conduct human rights due diligence. The preparation of guidelines for public buyers to integrate the Guiding Principles and human rights into the procurement process would be useful.

## **VI. Micro-, small and medium-sized enterprises and the informal economy**

17. Micro-, small and medium-sized enterprises occupy as much as 85 per cent of the market. Microenterprises account for 81.1 per cent of employment in micro-, small and medium-sized enterprises.<sup>20</sup> These enterprises play an important role in generating economic opportunities. As they are often embedded in the community context, they have a good understanding of local context and maintain links with civil society. The Working

<sup>16</sup> Kenya, Public Service Commission and State Corporations Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* (January 2015).

<sup>17</sup> Kenya, Capital Markets Authority, *Code of Corporate Governance Practices for Issuers of Securities to the Public 2015*, para. 2.1.5.

<sup>18</sup> Public Procurement and Asset Disposal Act, No. 33 of 2015, art. 53 (6).

<sup>19</sup> See <https://agpo.go.ke/pages/about-agpo>.

<sup>20</sup> Kenya National Bureau of Statistics, *Micro, Small and Medium Establishments: Basic Report 2016*.

Group was heard with appreciation that some micro-, small and medium-sized enterprises were pioneering innovative approaches to worker welfare in sectors such as cleaning, agriculture and landscaping. Despite these encouraging practices, the Working Group heard on many occasions that micro-, small and medium-sized enterprises tended to believe that the responsibility to respect human rights rested with bigger enterprises, which had the resources to fulfil that responsibility. The Working Group report on small and medium-sized enterprises sets out some of the challenges for such enterprises in terms of respect for human rights, as well as recommendations to address them (A/HRC/35/32).

18. The Working Group calls on business associations to ensure that micro-, small and medium-sized enterprises are invited to become members of their association. Such action could strengthen capacity and skills to help these businesses to respect human rights, including with respect to how to conduct proper human rights due diligence. Moreover, as part of their own human rights due diligence, larger enterprises are expected to support their smaller suppliers in respecting human rights, including in terms of guidance and capacity-building.

19. The Working Group noted that the dedicated Micro and Small Enterprises Authority, under the Ministry of Industry, Trade and Cooperatives,<sup>21</sup> disseminated tools and oversaw the implementation of government policies and the Guiding Principles. The exchange of good practice among micro-, small and medium-sized enterprises as a trigger for expansion and peer-learning exercises should be encouraged by the Government.

20. The informal sector is still growing, and reached 83.4 per cent of the total employment in 2018.<sup>22</sup> Because the informal economy operates outside of legal framework, it poses specific challenges for the implementation of the Guiding Principles and increases the risk of adverse impacts on human rights. The exclusion of the workforce employed in the informal sector makes the implementation of a labour-related framework even more complex.

21. Kenya has taken measures to regularize enterprises, including through the creation of Micro and Small Enterprises Authority and of economic processing zones.<sup>23</sup> Reducing the number of licences required for each individual business and cutting the cost of acquiring the licences would allow for more results. The Government, through its trade and investment promotion, could provide incentives in the form of certification schemes for informal businesses that respected human rights. A database of existing companies could be created as an additional lever for regularization.

## VII. Recurring issues and governance gaps

22. In their meetings with different stakeholders across the country, the experts found a number of recurrent themes concerning gaps and shortcomings in current practices. They were able to explore a few cases in more detail, which illustrate some general findings.

### A. Access to land and eviction

23. The Working Group notes that Kenya has a progressive framework regarding the administration and management of land. Articles 40 and 60 of the Constitution guarantee the right to property and lay down key principles for the management of land. Land is classified as public, private or community land, and these different categories are regulated

<sup>21</sup> See [www.industrialization.go.ke/index.php/state-corporations/142-micro-and-small-enterprises-authority-msea](http://www.industrialization.go.ke/index.php/state-corporations/142-micro-and-small-enterprises-authority-msea).

<sup>22</sup> Kenya, Kenya National Bureau of Statics, *Economic Survey 2018* (Nairobi, 2018).

<sup>23</sup> The Authority is mandated to formulate and coordinate policies that facilitate the integration and harmonization of public and private sector initiatives. There are currently 40 gazetted economic processing zones, and they are managed and promoted by the Export Processing Zones Authority.

through the Land Act and the Community Land Act, along with the National Land Policy and the National Land Use Policy.<sup>24</sup>

24. Many business-related human rights concerns reported to the Working Group were linked to access to land and natural resources, in particular in the extractive and agriculture sectors. Root causes of abuses include slow processes of registration of land, lack of specific guidelines for the registration of community land, and flawed security of tenure. The absence of a comprehensive normative framework on eviction, resettlement and compensation calculations has caused repeated situations of social tension and unrest.<sup>25</sup> The alleged lack of participation of affected people in these processes has placed them in an even more vulnerable situation. The Government should develop a clear legal framework on eviction, resettlement and compensation, based on the rights of affected individuals and communities, in line with general comment No. 7 of the Committee on Economic Social and Cultural Rights on forced evictions and the basic principles and guidelines on development-based evictions and displacement (A/HRC/4/18, annex I). The Working Group calls on the State to incorporate these standards into the 2012 bill on evictions and resettlement procedures and to subsequently adopt it.

25. Concerns were also raised regarding the specific situation of indigenous peoples and the absence of specific protection measures vis-à-vis their distinctive relationship with land and natural resources.<sup>26</sup> The heightened situation of vulnerability of indigenous peoples in the context of economic development projects have led the African Commission on Human and Peoples' Rights in 2009 and the African Court on Human and Peoples' Rights in 2017 to condemn Kenya for having violated the rights of indigenous peoples by displacing them in the pursuit of development projects.<sup>27</sup> The African Court on Human and Peoples' Rights found that Kenya had failed to recognize an indigenous group as a distinct tribe, leading to the consequential violation of rights.<sup>28</sup> When adopting and implementing measures and tools for eviction, resettlement and compensation, specific attention should be paid to the rights of indigenous peoples and their specific protection needs.

26. The Community Land Act requires communities to register to apply for titles on community lands in order for them to have security of title and control over their land. The Act provides that an agreement related to investment in community land can be made between the investor and the community only after a free, open and consultative process. The agreement should contain provisions on continuous monitoring and evaluation of the investment impact on the community and the adoption of preventive and mitigation measures. However, no community titles have been issued so far. In the interim, therefore, unregistered community land is held in trust by county governments.

27. The National Land Commission is the public entity in charge of managing public land, including allocating public land for private investment; initiating investigations into land injustices and recommending appropriate redress; and monitoring the registration of all rights to land.<sup>29</sup> The Working Group heard concerns regarding the failure of the National

<sup>24</sup> Land Act, No. 6 of 2012; Community Land Act, No. 27 of 2016; Kenya, Ministry of Lands, *Sessional Paper No. 3 of 2009 on National Land Policy* (Nairobi, 2009); and Kenya, Ministry of Lands and Physical Planning, *Sessional Paper No. 1 of 2017 on National Land Use Policy* (Nairobi, 2017).

<sup>25</sup> The Land Act provides for the procedure for the compulsory acquisition of all categories of land. The Mining Act, No. 12 of 2016, allows for compulsory acquisition if consent is unreasonably withheld or the withholding of consent is considered to be contrary to the national interest. The Petroleum Act fails to require prior consent before entering privately owned land but instead required 48 hours of notice to the occupier of the land.

<sup>26</sup> ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169); and United Nations Declaration on the Rights of Indigenous Peoples, art. 25.

<sup>27</sup> The African Commission on Human and Peoples' Rights, in its decision 276/03, found that Kenya had violated articles 1, 8, 14, 17, 21 and 22 of the African Charter on Human and Peoples' Rights in the case of the displacement of the indigenous Endorois community from ancestral lands around the Lake Bogoria area in order to create the Lake Hannington Game Reserve.

<sup>28</sup> African Court on Human and Peoples' Rights, Application No. 006/2012, Judgment, 26 May 2017, p. 65.

<sup>29</sup> Constitution, art. 67.2; and National Land Commission Act, No. 5 of 2012.

Land Commission to provide support and guidance concerning negotiations on land acquisition between communities and companies. Community members may sometimes suffer power asymmetry when negotiating, given the lack of education, information and legal assistance. Consequently, the free and prior consultation process cannot be fulfilled if pertinent information is not shared.

### **Kibera**

28. The recent mass eviction from the Kibera informal settlements in south-west Nairobi left approximately 30,000 people homeless and 2,000 children without access to education. The evictions, which started in July 2018 to allow for the construction of a public road, were conducted without adequate notice and with no arrangements for resettlement and compensation. Evictions were carried out in disregard of an earlier agreement between the Kenya Urban Roads Authority, the National Land Commission and the Kenya National Commission on Human Rights, and in breach of a High Court order that prohibited the Government from evicting the residents until an agreed resettlement plan had been put in place.<sup>30</sup> The Working Group learned that a measure taken by the Government to mitigate the situation was to reallocate children to schools. Nevertheless, this situation illustrates the need for a stronger legal framework providing for resettlement and compensation and requiring a human rights-based approach in any situation involving eviction.

## **B. Environmental impact assessment**

29. The Working Group welcomed the enshrinement of the right to a clean and healthy environment in articles 42, 60, 69 and 70 of the Constitution. Environmental rights are justiciable under the Environmental and Land Court.<sup>31</sup> The Environmental Management and Coordination Act (No. 8 of 1999) establishes the National Environment Management Authority, which has the authority to develop regulations and prescribe measures under its environmental protection mandate.

30. Under the Environmental Management and Coordination Act, business enterprises are required to conduct an environmental impact assessment before commencing any operations. Oversight of the assessments, which are conducted by external consultancies, rests with the National Environment Management Authority. Cases reported to the Working Group stressed that the current system of assessments had not effectively prevented adverse business-related human rights impact. The Authority is perceived as lacking resources and independence, since it is part of the Government, which often has a vested interest in the projects being promoted. The assessment process does not allow for meaningful participation, owing, *inter alia*, to difficulty of access to the assessment documents. The assessment procedures should incorporate a stronger focus on human rights. The Working Group also recommends that the Government set up an independent oversight body, with the participation of businesses and civil society organizations, which could serve as a watchdog and complaints mechanism.<sup>32</sup>

31. Another concern brought to the attention of the Working Group during its visit was the lack of meaningful participation of all stakeholders who may be affected by a project. The Working Group recognized that local multi-stakeholder institutions called county environment committees enabled greater direct participation of stakeholders to monitor compliance with environmental impact assessments and incorporate community concerns.<sup>33</sup> However, among the committees already created, there is no representation of civil society, despite being required by law.

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<sup>30</sup> Environment and Land Court, Petition No. 974 of 2016, Ruling, 28 April 2017.

<sup>31</sup> Constitution, art. 162; and Environmental and Land Court Act, No. 19 of 2011.

<sup>32</sup> See UNDP and Kenya, Ministry of Mining, "Report on the Kenya Country Mining Vision (KCMV) Retreat", June 2017.

<sup>33</sup> According to Section 29 of the Environmental Management and Coordination Act, county environmental committees are composed of representatives of the county authorities, farmers, women, youth, pastoralists, the business community, non-governmental organizations and the community.

### **Solai dam breach**

32. The dam breach disaster in Solai demonstrates the need for more comprehensive environmental impact assessment and a stronger oversight mechanism. In May 2018, a dam used for irrigation of the Patel coffee plantation burst and flooded a village, causing the death of at least 48 persons and displacing over 5,000.<sup>34</sup> Investigations by the Office of the Director of Public Prosecutions revealed that the dam had been constructed by unqualified staff, that the dam's water was extracted by the owner, that the water permit had been irregularly issued and that the owner and Government had failed to ensure environmental compliance. On that basis, the Director of Public Prosecutions ordered the arrest of the farm's managing director and general manager on criminal charges, as well as of officials of the Water Resources Management Authority and the National Environment Management Authority on charges of manslaughter, neglect of official duty for the public authorities and failure to prepare an environmental impact assessment report.<sup>35</sup>

33. During its visit in situ, the Working Group met with members of affected communities and was concerned to hear that during a meeting convened by some company managers with the presence of local authorities, cheques had been handed to people who had lost family members, housing and/or business, in exchange for their signing an indemnity form that would absolve the company of any responsibility for the disaster. This could amount to an obstruction of access to an effective remedy for victims.

34. A Senate ad hoc committee was set up to probe the Solai dam disaster. This committee formulated 27 recommendations, including requesting the punishment of the charged persons and requesting the enterprise to cede part of its farmland for the purposes of resettling affected families.

## **C. Labour conditions**

35. The Working Group heard that the main normative frameworks regarding labour and employment, dating from 2007, needed to be reframed to align them with more recent norms.<sup>36</sup> The Working Group was concerned to learn about precarious labour conditions prevailing in the country. The Working Group also heard that these conditions were exacerbated in special economic zones where compliance with labour and environmental norms appeared to be weak.

### **Minimum wage**

36. The increase of the minimum wage in 2017 is a positive measure, but it remains insufficient to ensure decent living conditions and eradicate poverty.<sup>37</sup> Moreover, setting the minimum wage of agricultural workers at half that of general labourers exacerbates the inequalities among workers and regions.<sup>38</sup> In addition, business enterprises, civil society and workers underlined to the Working Group that this minimum wage was hardly ever met, including in the supply chain of the public sector.

### **Labour inspections**

37. The Ministry of Labour and Social Protection has under its mandate a dual system of inspection: general labour inspection, under the Labour Department, and occupational

<sup>34</sup> Kenya, Office of the President, "President Kenyatta leads nation in mourning Solai Dam tragedy victims", 16 May 2018.

<sup>35</sup> Kenya, Director of Public Prosecutions, press statement on the Milmet (Solai) dam disaster, 4 July 2018.

<sup>36</sup> Employment Act, No. 11 of 2007; Labour Institutions Act, No. 12 of 2007; Labour Relations Act, No. 14 of 2007; Occupational Safety and Health Act, No. 15 of 2007; and Work Injury Benefits, Act No. 13 of 2007.

<sup>37</sup> Regulation of Wages (General) (Amendment) Order, 2017.

<sup>38</sup> The minimum wage is 6,415.55 Kenya shillings per month for unskilled workers employed under the agricultural industry category, and 12,926 Kenya shillings per month for general labourers under the general category.

safety and health inspection, under the Directorate of Occupational Safety and Health Services, working from 8 provincial labour offices and 20 district labour offices.<sup>39</sup> The Working Group learned that the system of inspection lacks the resources to carry out its mandate effectively. This is exacerbated by poor coordination between the labour and the occupational safety and health inspection systems. At times they are located in different premises and have limited exchange of information, and they conduct joint visits only exceptionally.<sup>40</sup> In addition, the requirement of prior notification for inspections suppresses the element of surprise and the deterring effect that the inspections can play, in addition to reinforcing the impression of perceived collusion between the Ministry and companies.<sup>41</sup> Beside this, the Working Group observed a lack of information on the results of their visits. County governments stated that closer collaboration between devolved national labour authorities and county governments in conducting inspections may address some of these weaknesses.

### **Occupational safety and health**

38. Several cases of severe industrial accidents and labour-related diseases in the agriculture and construction sectors were presented to the Working Group. In these cases, victims were not adequately compensated and some were subsequently laid off. In addition, workers emphasized to the Working Group that often they were not provided with the required safety equipment. Consequently, they were reportedly exposed to chemicals and other hazards, which could have adverse effects on their health. The growing casualization of workers may lead to an increase in industrial accidents and a lack of compensation unless preventive measures are taken.

### **Trade unions and right of assembly**

39. An increase is noted in the total number of registered collective bargaining agreements, to 232 in 2017 from 128 in 2016.<sup>42</sup> However, the Working Group heard several testimonies from workers who linked their dismissal to joining or forming independent trade unions or demanding that their rights be respected.<sup>43</sup>

### **Casual workers**

40. The Working Group learned with concern that the casualization of workers in the private and public sectors would be growing. The lack of social protection for workers and barriers to unionization are issues of concern arising from this trend.

### **Child labour**

41. The adoption of the National Policy on Elimination of Child Labour in 2016, the creation of the Child Protection Unit within the Kenya police to investigate cases of child exploitation, and the measures taken to achieve universal free primary and secondary education are key in combating child labour. However, this scourge remains a challenge in Kenya, including for agricultural, domestic, artisanal mining work and in the context of sexual exploitation and sale of children.<sup>44</sup> The creation of mechanisms to monitor the enforcement of the prohibition of child labour should therefore be encouraged.

### **Persons with disabilities**

42. While only 1 per cent of persons with disabilities work (see CRPD/C/KEN/CO/1), measures have been taken to foster their access to the labour market, including setting an employment quota of 5 per cent in the public and private sectors, establishing the National

<sup>39</sup> Labour Institutions Act, art. 35; and Occupational Safety and Health Act, art. 32.

<sup>40</sup> See [www.ilo.org/labadmin/info/WCMS\\_151305/lang-en/index.htm](http://www.ilo.org/labadmin/info/WCMS_151305/lang-en/index.htm).

<sup>41</sup> Occupational Safety and Health Act, art. 32; and Labour Institutions Act, art. 34.

<sup>42</sup> Kenya National Bureau of Statics, *Economic Survey 2018*, p. 52.

<sup>43</sup> See [www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3342040](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3342040).

<sup>44</sup> See CRC/C/KEN/CO/3-5; and National Plan of Action for Children in Kenya 2015–2022.

Fund for the Disabled of Kenya; and reserving a minimum of 30 per cent of budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. The Working Group commends these initiatives and encourages the further adoption of effective enforcement mechanisms and sanctions for non-compliance, along with work and employment programmes in the open labour market aimed at persons with disabilities, as recommended by the Committee on the Rights of Persons with Disabilities in 2015 (ibid.).

### **Examples of labour conditions in the horticulture sector**

43. Agriculture is the most important economic activity in Kenya, contributing 25 per cent of GDP, 20 per cent of employment opportunities and 50 per cent of export revenues.<sup>45</sup> Women constitute 60 to 70 per cent of employees of agribusinesses, especially in flower farms. During its visit, the Working Group visited Kiambu and Nakuru Counties to assess the situation of human rights in this sector.

#### *Flower cultivation in Nakuru County*

44. Women workers reported on the long hours that they had to work and the insecurity that they faced on their journey to and from work during the hours of dark. The experts were concerned to hear that despite some progress, sexual harassment was still rampant in this sector. According to the workers with whom the experts met, the gender committees established at the operational level to handle complaints of sexual harassment in more than 20 flower companies in Nakuru County have had good results and should be replicated. The experts were concerned to hear that the flower workers were routinely not provided with the required equipment and were exposed to chemicals, which have adverse effects on their health, including reproductive health.

#### *Agribusiness in Kiambu County*

45. The Working Group met with workers, local residents and representatives of the company Kakuzi PLC. The Kakuzi farm covers an area of 30,000 hectares, dedicated to the cultivation of avocados, pineapples and macadamias, and to forestry. It employs more than 2,000 people. The experts welcomed the openness of company representatives to meet with them in a spirit of sharing of experiences, goodwill and willingness to learn.

46. The Working Group was encouraged to hear that the company and trade unionists negotiated a collective bargaining agreement every two years to ensure the well-being of the workers. However, workers pointed out that several former shop stewards had been laid off after raising grievances on behalf of workers.

47. The experts also heard testimonies from workers who had suffered serious work-related accidents, such as falling from avocado trees, and had subsequently been dismissed. These accidents may have been encouraged by the current wage-incentive structure, which encourages workers to engage in dangerous activity to pick certain high-quality produce in order to earn bonus payments. The Working Group advised the company to look into the problem, including through a human rights due diligence process. The Working Group also recommended the use of accessible, transparent and independent grievance mechanisms to resolve worker complaints, rather than channelling them through a company email complaints system.

48. Another area where companies need to be particularly vigilant is its engagement with surrounding communities. The Working Group heard several cases of the use of violence by companies' private security guards against community members. At the time of the visit, there was an ongoing investigation into allegations against security guards who had allegedly killed a young community member for having reportedly stolen avocados. The Working Group also heard of past incidents in the context of allegedly peaceful demonstrations in opposition to a blockade, caused by the extension of the company, to the

<sup>45</sup> Kenya National Commission on Human Rights, *Kenya National Baseline Assessment on Business and Human Rights 2017* (Nairobi, 2017).

main roads and public installation. In this context, during a demonstration in August 2014, villagers were beaten by security guards and the police, and some of the villagers alleged that they still suffered from their injuries. The Working Group encouraged the company not to rely only on the police to investigate wrongdoing, but also to conduct its own investigations and strengthen its own training and oversight mechanisms, including effective grievance mechanisms.

#### **D. Human rights defenders and civic space**

49. Human rights defenders can provide critical information regarding adverse business-related impacts, and should be a key part of business consultation processes and stakeholder engagement. However, human rights defenders and witnesses confessed to the Working Group that they faced growing obstacles to exercising their activities, due to repeated threats and attacks when denouncing business-related human rights concerns. Such reprisals comprise intimidation, termination of employment, beatings, arrests and malicious prosecution.

50. The Working Group urges the Government to adopt and implement effective measures to protect human rights defenders to ensure that they can carry out their work without fear of harassment, violence or intimidation, including a national policy on human rights defenders. Operationalizing the Public Benefit Organizations Act of 2013 would help to create an environment conducive to the work of the civil society and human rights defenders and provide them with adequate protection of their rights (A/HRC/29/10, paras. 142.125, 142.128 and 143.51). In parallel, the experts call on the Office of the Director of Public Prosecutions to systematically activate protection mechanisms for witnesses after the review of a complaint regarding such a situation. They also urge business associations to raise awareness among businesses on the important roles played by human rights defenders.

##### **Lead poisoning in Owino Uhuru**

51. In Mombasa, the Working Group visited the Owino Uhuru settlement, where lead-acid battery recycling factory, Metal Refinery EPZ, which had operated between 2009 and 2014, had contaminated the adjacent settlement and the blood of residents with high levels of lead. The contamination had serious health impacts, particularly on children living in the area. Dozens of people from this settlement are reported to have died, and hundreds suffer from debilitating diseases based on severe contamination.

52. The Working Group learned about residents' struggle to get support from the Government, including to gain access to information and to have blood tests and be medically treated. As an illustration, the National Environment Management Authority had refused to disclose the outcomes of a study conducted in 2013 on affected residents, arguing that the information was confidential. The report, whose disclosure was finally ordered by the Commission on Administrative Justice, showed high lead concentrations. This situation prompted other studies, including one by a parliamentary committee in 2015, which subsequently issued recommendations to the competent authorities. The Working Group encourages the national Government and the municipal government to comply with these recommendations, supported by the community members. Moreover, all community members should be tested for lead poisoning and those affected should be provided with appropriate treatment in a nearby hospital. Pending hospital bills for related treatment of community members should be waived and the community land and soil cleared.

53. Local residents, with the support of civil society, have filed a class action against the Government and the company. In this context, several community members have faced threats for seeking legal redress. On 30 May 2018, the Working Group issued a public statement to call for the protection of these human rights defenders.<sup>46</sup> The experts welcomed the fact that the Office of the Director of Public Prosecutions had subsequently ordered protection measures for witnesses in the ongoing court case.

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<sup>46</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), "UN experts urge Kenya to protect environmental defenders", 30 May 2018.

## E. Extractive sector: meaningful participation of affected peoples

54. The extractive sector has grown over the past decade, as the recent discovery of oil, gold and coal led the Government to target the extractive sectors with a view to achieving middle-income status by 2030. The contribution of the extractive industry to the GDP was 4 per cent in 2015, and is forecast to reach 10 per cent by 2030 by Kenya Vision 2030. Nevertheless, this potential for rapid growth in the sector may have an adverse impact if environmental protection, revenue-sharing, access to food and water and access to land are not addressed. The meaningful participation of potentially affected people in decision-making regarding extractive projects, both by companies and the Government, is critical to identify, prevent and mitigate negative human rights impacts.

55. Two ministries oversee the extractive sector. The Ministry of Energy and Petroleum oversees the exploration of oil, gas and fossil fuels, and issues the related licences, through the National Fossil Fuels Advisory Committee, under a regime set up by the Petroleum Act. The Ministry of Mining grants mining licences and oversees the operations of mining companies, in accordance with the Mining Act.

56. Kenya has a solid legal framework to facilitate community consultations, including specific provisions in the Constitution and requirements for consultations as part of environmental impact assessments.<sup>47</sup> The Mining Act provides for increased transparency and access to information, including obtaining consent for access to land and environmental protection. However, these provisions are yet to be operationalized. In turn, the Petroleum Act does not provide for any consultative process with landowners, occupiers or community members. Affected community members living around extractive projects, including indigenous peoples, reported that, as a result, they had not been properly informed about extractive projects and their impacts, and their opinions had not been taken into account.

57. The Office of the Attorney General and Department of Justice informed the Working Group that new guidance on meaningful public participation was being drafted and that a policy on public participation, based on applicable international and regional human rights standards, had been developed, but not yet adopted. These tools should be designed in a way that accounts for and protects the views of rights holders.

58. The Working Group deplors the fact that no specific provision exists to consult indigenous peoples, in accordance with international standards. A recent ruling by the High Court of Kenya at Nairobi paves the way for further development in this area, as the Court criticized the proponent of the Lamu Port-South Sudan-Ethiopia Transport Corridor project (“LAPSSET” project) on coal mining for violating the rights of the indigenous community on Lamu island. The Court stated that the project proponent had an obligation not only to consult indigenous communities at the point of the project’s conceptualization, but also to hold ongoing consultations with the communities throughout the project cycle.<sup>48</sup>

59. Meaningful, prior and informed consultation with communities affected by business operations is a central aspect of human rights due diligence, enable business and Government to identify concerns and grievances early on. Companies and national or local government authorities can establish memoranda of understanding with local communities, and publicize to create a measure of accountability. This would strengthen the trust between companies and local communities.

60. The sharing of extractives revenue is a constant source of tension between local communities, governments and companies. The Mining Act (sect. 183 (5)) provides for revenue-sharing between the national Government, county government and host community at a percentage ratio of 70, 20 and 10 per cent respectively. However, this is yet to be implemented. On the other hand, the relevant share for oil revenues still needs to be established, as the Petroleum Act fails to do so. The revenue-sharing formula is currently decided upon case by case, which has caused opposition and tension.

<sup>47</sup> Constitution, art. 35; and Access to Information Act, No. 31 of 2016.

<sup>48</sup> High Court of Kenya at Nairobi, Petition No. 22 of 2012, Judgment, 30 April 2018, para. 329.

### **Turkana oil exploitation**

61. The Working Group visited Turkana County, where more than 80 per cent of the population living below the poverty line earn their livelihood from traditional nomadic pastoralism. A total of 700 square kilometres of the county's community land, encroaching on nomadic pastoralist livelihoods and spiritual practices, has been licensed for oil extraction.<sup>49</sup> Local communities shared with the experts that they appreciated the opportunity for economic development in their region, but that oil extraction should benefit the local economy and local employment without adversely affecting their traditional livelihoods as local nomadic herders. They also expressed the need to be genuinely consulted prior to the allocation of land for oil extraction.

62. The Working Group heard from community members that the community engagement process of the company Tullow Oil had substantively improved, but that more could be done to make sure that the principle of free, prior and informed consent was respected, in accordance with the International Finance Corporation's Performance Standards. Tullow Oil's own human rights policy stipulates requirements for obtaining "broad community support" and "the informed agreement" of communities affected by projects. On the basis of that policy, further measures should be taken to make available transparent, proper and accessible documentation on the impact of its activities and ensure continuous engagement with interested stakeholders, including to inform them about progress made towards commitments.<sup>50</sup> The Working Group highlights the honest and committed engagement of the company and its willingness to address challenges to comply with human rights standards. Its recent efforts to improve its practices are encouraging steps, which should be replicated and supported by greater involvement of the local and national authorities.

## **VIII. Other issues**

### **A. Devolution**

63. The devolution process introduced by the 2010 Constitution has brought institutions closer to the people, improved access to basic services and strengthened the accountability of public institutions. However, collaboration and coordination across public institutions at all levels should be strengthened, in order to ensure policy coherence and clear allocation of responsibilities and to reinforce accountability for public decision-making processes. The oversight of businesses operating at the county level is a key area where coordination should be ensured. For example, environmental oversight, labour inspection and the management of land are national competencies, which should be better coordinated with county governments. Stronger coordination is particularly needed in remote areas, where some companies reported to operate in legal and policy uncertainty. The issue of the need for greater coordination arose during the Working Group's visit to several different counties.

64. On the other hand, key technical competencies have been transferred to county authorities, notably the implementation of policies on natural resources and environmental conservation. There is therefore also a need to strengthen local capacities to understand the challenges and complexities of economic projects and their impacts on natural resources.

### **B. Gender aspects**

65. Numerous measures have been taken to enhance women's participation in the public and economic spheres, which have enabled an increase in their representation in leadership

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<sup>49</sup> Food and Agriculture Organization of the United Nations, "Triggering the voluntary guidelines on the responsible governance of tenure (VGGT) in the context of oil extraction in Kenya's Turkana County: a case study", April 2018.

<sup>50</sup> Oxfam, *Testing Community Consent: Tullow Oil Project in Kenya* (Oxford, 2017).

and public positions. Kenya Vision 2030, further buttressed by the 2010 Constitution (arts. 27 and 60), provides for gender equality and women's empowerment. This has been accompanied by multiple public initiatives for women's economic empowerment, including the creation of the Women Enterprise Fund, the Youth Enterprise Development Fund and the Uwezo Fund, as well as the reservation of 30 per cent of public procurement opportunities for women, young people and persons with disabilities.<sup>51</sup> Nonetheless, the Working Group heard that the lack of enforcement of laws and policies relating to women's equality is hampering the achievement of the expected outcomes. The experts echo the recommendations of the Committee on the Elimination of Discrimination against Women to design and establish enforcement mechanisms for these measures, assist women and vulnerable groups to gain access to these funds and facilitate their applications (CEDAW/C/KEN/CO/8, para. 41).

66. Despite these positive initiatives, women still report that they face disproportionate and distinctive business-related impacts. Gender inequality remains pervasive. In 2017, Kenya ranked 137 of 189 countries in terms of the Gender Inequality Index.<sup>52</sup> It is estimated that only 5 per cent of land is owned by women, that less than 10 per cent of women have access to credit, and that women hold only 1 per cent of all agricultural assets.<sup>53</sup> Women mainly work in the informal sector, and 32 per cent of formal workers are women. Women's average monthly income is approximately two thirds that of men.<sup>54</sup> Comprehensive official statistics would help to build a comprehensive picture of the situation and track the effectiveness of measures taken.

67. Women also suffer discrimination in the world of work. Unrecognized and undervalued work by women still represents a huge barrier for them to enter to the paid labour market and to receive financial assets. The Working Group heard reports of many women having been harassed by men at the workplace. "Sex for a better job" was the sentence that women used to reflect the situation. The experts heard with appreciation that some businesses had created gender committees within their companies, as reporting mechanisms to combat sexual harassment and gender-based discrimination. As recommended by the Committee on the Elimination of Discrimination against Women (CEDAW/C/KEN/CO/8, para. 37 (c)), Kenya should adopt legislation criminalizing sexual harassment in the workplace and include sanctions for all perpetrators. It should also conduct research to measure and value the unremunerated work of women.

68. The Working Group noted with concern that women were also disproportionately affected by cases of eviction, resettlement and compensation, considering the central role played by women in the family. Specific gender-responsive measures should be taken by the Government, based on a gender-sensitive assessment, to address the differentiated impacts suffered by women in these situations. In addition, companies should engage in a gender-responsive due diligence process to address these distinctive adverse human rights impacts on women.<sup>55</sup>

69. During their visits, the experts heard testimonies about stigmatization of and discrimination against lesbian, gay, bisexual, transgender and intersex persons in the workplace and when seeking employment. A comprehensive anti-discrimination legal framework to protect all individuals, irrespective of their sexual orientation or gender identity, is yet to be adopted.<sup>56</sup> In parallel, the private sector should take the necessary measures to combat discriminatory practices against lesbian, gay, bisexual, transgender and

<sup>51</sup> See [www.wef.co.ke](http://www.wef.co.ke), [www.youthfund.go.ke](http://www.youthfund.go.ke) and [www.uwezo.go.ke](http://www.uwezo.go.ke).

<sup>52</sup> See <http://hdr.undp.org/en/composite/GII>.

<sup>53</sup> United Nations Development Assistance Framework of Kenya, 2018–2022, p. 16.

<sup>54</sup> Kenya National Bureau of Statistics, *Economic Survey 2018*.

<sup>55</sup> Geneva Academy of International Humanitarian Law and Human Rights, *Gender-Responsive Due Diligence for Business Actors: Human Rights-Based Approaches – Academy Briefing No. 12* (Geneva, 2018).

<sup>56</sup> CCPR/C/KEN/CO/3, para. 8; CEDAW/C/KEN/CO/8, para. 11; and A/HRC/29/10, paras. 143.36 and 143.47.

intersex persons, in the light of the Office of the United Nations High Commissioner for Human Rights (OHCHR) Standards of Conduct for Business on the issue.<sup>57</sup>

## **IX. Human rights due diligence in the context of development projects**

70. The Working Group welcomed the accounts that it heard from different companies about the way in which they have paved their way towards genuine management of human rights risks. In this vein, the Guiding Principles provide for human rights due diligence, by which business enterprises identify, prevent, mitigate and account for how they address their adverse impact on human rights. The experts heard that human rights concerns were only a matter for big businesses, since micro-, small and medium-sized enterprises did not have the necessary resources and capacity. However, in an economy consisting principally of micro- and small enterprises, this represents a real challenge, exacerbated by the fact that such enterprises are exempt from reporting to the Government the main risks and uncertainties that they face.<sup>58</sup>

71. One key component of human rights due diligence is meaningful consultations with potentially affected groups and other relevant stakeholders. However, the Working Group heard several testimonies from community members that, in some situations, companies had failed to consult communities at all. Civil society and communities explained to the Working Group that they were not against economic development projects, but would like to be consulted from the very beginning of projects, including on the way in which they would be implemented. Such consultation would allow civil society and communities to express their needs and ideas, which would contribute to preventing and mitigating potential human rights abuse. Businesses should consult them in a manner that takes into account potential barriers to effective engagement, such as power imbalances between the parties resulting from lack of access to information, expertise and financial resources. This engagement would also build trust among the actors.

72. The Working Group recalls that the State should set out clearly the expectation that all business enterprises respect human rights throughout their operations, providing sufficient guidance to enable them to do so, indicating expected outcomes, helping share best practices and advising on appropriate methods, including human rights due diligence. The draft national action plan represents an opportunity to provide for human rights due diligence, and to set out clear guidelines and parameters on non-financial reporting by businesses to the Government.

73. During its visits, the Working Group participated in a workshop organized by the Global Compact Network Kenya for its members, which aimed to raise awareness among companies on human rights, the Guiding Principles and human rights due diligence. The experts commend and encourage the initiative of business associations to encourage peer learning and a race-to-the-top dynamic among companies.

## **X. Access to remedies**

74. The Working Group noted that a range of remedial mechanisms were available to individuals and groups to submit complaints regarding business-related human rights abuses. However, the mechanisms are not widely known by rights holders and may not be accessible, affordable or timely. The Working Group encourages the Government to clearly outline to rights holders the remedial options which are available to them at all levels.

<sup>57</sup> OHCHR, *Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business* (New York, 2017).

<sup>58</sup> Companies Act, No. 17 of 2015, sect. 655 (3)–(6).

## A. Judicial mechanisms

75. Kenya has a variety of courts, including specialized courts with the status of High Court in the areas of employment and labour relations and of the environment and land issues.<sup>59</sup> The High Court has the jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been infringed. However, according to testimonies, the effectiveness of judicial mechanisms is hindered by costly and long judicial proceedings, scarcity of expert witnesses and geographic barriers. For example, the specialized courts mandated to hear labour and environmental issues are not present in every county.

76. Initiatives have been adopted to respond to some of these concerns, such as the growing use of mediators, through court-annexed mediation, to avoid long judicial process, and the adoption of the Legal Aid Act, which provides for free legal aid.<sup>60</sup> However, the Act has not yet been fully implemented. The experts also learned about human rights training organized for judges and prosecutors. However, the experts are of the opinion that stand-alone training on international human rights law and standards should be developed, including specific modules on business and human rights.

77. The Working Group welcomes the role that the Office of the Director of Public Prosecutions has recently taken in conducting investigations into alleged business-related human rights abuses by corporations and government officials. Such action contributes to combating impunity and harnessing the rule of law, which strengthens rights holders' confidence.

## B. Kenya National Commission on Human Rights

78. The Kenya National Commission on Human Rights is mandated to investigate any complaints received or, on its own initiative, investigate any matter relating to human rights in a public office or a private institution. The Working Group heard positive comments on the work performed by the Commission, including its investigation of complaints in relation to business and human rights and its efforts to mediate disputes between businesses and victims. This role of mediation in business and human rights cases could be expanded, in connection with court-annexed mediation. Adequate financial resources should be allocated to the Commission to enable it to fulfil its mandate.

## C. Operational-level grievance mechanisms

79. The Working Group welcomed the innovative grievance mechanisms created by business associations to hear complaints. In the salt sectors, the Kenya Association of Manufacturers has set up an independent grievance mechanism, so that complaints can be submitted before a separate independent body. The Federation of Kenya Employers has encouraged the creation of occupational health and gender committees with its member companies. Some other initiatives taken up by business enterprises are to be welcomed, but most of the complaints are received and handled by company management, which may result in a lack of trust by victims in such mechanisms. Companies are encouraged to revise their operational-level grievance mechanisms to ensure that they comply with the effectiveness criteria set forth in principle 31 of the Guiding Principles. Moreover, companies should make sure that potentially affected individuals are aware of these mechanisms.

<sup>59</sup> Constitution, art. 162 (2) (b); and Environment and Land Court Act, No. 19 of 2011.

<sup>60</sup> Legal Aid Act, No. 6 of 2016, art. 35.

## XI. Policy coherence

### A. Responsible business and integrity

80. Prioritizing the prevention of corruption is key to protecting and respecting human rights, including in order to secure the full capacity of the Government to deliver basic social services and observe the safeguards for the protection of the environment and health. While the Constitution provides for increased accountability and transparency, and legal and institutional schemes adopted address corruption, tax evasion and illicit financial flows,<sup>61</sup> corruption remains pervasive. Kenya is ranked 143 of 180 countries in 2017 according to the perceived level of public sector corruption, analysed by Transparency International.<sup>62</sup> The Working Group encourages the full implementation of the Mining Act provision on revenue-sharing and the adoption of a further policy and regulatory framework for the management of oil and gas revenues. Committing to the Extractive Industries Transparency Initiative would also support such transparency in the extractive sector.

81. Effective implementation of the right of access to information, as provided for in the Constitution (art. 35) and the Access to Information Act, would be an important step to combat corruption and ensure greater transparency.

### B. National action plan

82. The Working Group commends the decision of the Government to prepare a national action plan in line with the Guiding Principles. The national action plan will be the first in Africa and could serve as an example for other countries in the region to follow. The national action plan process is coordinated by the Office of the Attorney General and Department of Justice in collaboration with the Kenya National Commission on Human Rights and the Kenya Human Rights Commission. A national advisory steering committee was established in 2016 for the preparation of the document, and comprises representatives of the Ministry of Mining, the Ministry of Energy and Petroleum, the Ministry of Labour and Social Protection, the Kenya Human Rights Commission, the Central Organization of Trade Unions, Federation of Kenya Employers, OHCHR, the Council of Governors, the Institute for Human Rights and Business, the Kenya Private Sector Alliance and Global Compact Network Kenya. Regional multi-stakeholders consultations were held to raise awareness of the Guiding Principles and to gather concerns and opinions from participants. The Kenya National Baseline Assessment on Business and Human Rights was published in 2017 as a result, to serve as the basis for the national action plan.<sup>63</sup> According to the information collected, the process so far has followed the steps suggested in the Working Group's guidance on national action plans, which underlines the importance of an inclusive and transparent process with the participation of both civil society and business.<sup>64</sup>

## XII. Conclusions and recommendations

83. **The Working Group welcomes the important role that Kenya plays at the regional level in championing the advancement of the business and human rights agenda. The development of a national action plan is a reflection of this role. The adoption of a progressive legislative framework brings hope that the related policy**

<sup>61</sup> Constitution, art. 79; Ethics and Anti-Corruption Commission Act, No. 22 of 2011; Proceeds of Crime and Anti-Money Laundering (Amendment) Act, No. 3 of 2017; and Bribery Act, No. 47 of 2016. Other examples are the creation of the Anti-Corruption and Economic Crimes Division of the High Court, and the creation of the Public Procurement Regulatory Authority.

<sup>62</sup> See [www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](http://www.transparency.org/news/feature/corruption_perceptions_index_2017).

<sup>63</sup> Kenya National Commission on Human Rights, *Kenya National Baseline Assessment on Business and Human Rights 2017*.

<sup>64</sup> OHCHR, "Guidance on national action plans on business and human rights: UN Working Group on Business and Human Rights", December 2014.

commitments will be translated into reality. Full enforcement of these norms are yet to be seen, hence the need to establish and implement compliance mechanisms.

84. The Working Group takes the view that the Government should endorse and publicize more strongly its role in implementing the Guiding Principles, including by putting human rights at the centre of its activities as an economic actor, such as in procurement and trade promotion; setting clear expectations to companies to respect human rights, such as through human rights due diligence processes; and holding companies accountable for human rights abuses.

85. The Working Group reminds the Government and businesses that meaningful engagement with all stakeholders, through transparent access to information and technical assistance, is critical to prevent, mitigate and remedy business-related human rights impacts. Furthermore, such engagement would help to build trust in an environment where wealth disparity and power asymmetry between actors hamper inclusive negotiation and collaboration.

86. The Working Group recommends that the Government:

(a) Strengthen capacity and raise awareness among civil servants, judiciary and lawmakers of the Guiding Principles;

(b) Take measures to ensure the full implementation of policy and legislative frameworks related to business and human rights, such as enforcement measures; monitoring and sanctions for non-compliance;

(c) Ensure that State-owned enterprises lead by example, adopt clear criteria on when human rights due diligence should be conducted and provide for remediation mechanisms;

(d) Include human rights criteria in its public procurement practices and implement effective monitoring systems for the verification and enforcement of human rights requirements;

(e) Provide guidance and set clear expectations for all business enterprises, including micro- and small enterprises, about their responsibility to respect human rights throughout their operations, including promoting the exchange of good practice among these businesses as a trigger for expansion and peer-learning exercises;

(f) Take additional steps to scale up the regularization of informal enterprises, including by providing incentives for regularization, reducing the number of required licences and related costs and creating a database of existing companies;

(g) Develop a clear legal framework on resettlement and eviction that takes into account the rights of affected individuals and communities, in accordance with international standards, with a specific focus on the disproportionate impact suffered by women and indigenous peoples;

(h) Scale up the processes of adjudication of land, including through the full implementation of the Community Land Act;

(i) Enforce the implementation of norms related to consultation and public participation and adopt and disseminate the guidance on meaningful public participation and the policy on public participation; specific and differentiated attention should be paid to indigenous peoples, including in terms of free, prior and informed consultation;

(j) Take measures to ensure that all stakeholders, in particular the affected people, are provided with support in land acquisition negotiations, including in terms of access to information and technical assistance, with specific attention paid to the situation of indigenous peoples;

(k) Ensure prior and informed consultation with communities affected by development projects and business operations at the very beginning of project planning and throughout the whole project cycle;

(l) Facilitate dialogue between businesses and communities affected by business operations;

(m) Review the environmental protection measures under the mandate of the National Environment Management Authority, including the current procedures for environmental impact assessments, in order to incorporate a stronger focus on human rights and greater transparency, and establish an independent body to oversee compliance with environmental norms;

(n) Ensure the participation of civil society organizations in county environmental committees;

(o) Strengthen the capacity of labour inspectors to monitor compliance with labour standards and step up efforts towards greater collaboration between the inspection mechanisms under the Labour Department and the Directorate of Occupational Safety and Health Services, as well as between the county governments;

(p) Take measures to disclose the main conclusions of labour inspections and provide more resources to the inspectorates to allow for more frequent inspections;

(q) Establish mechanisms to monitor the prohibition of child labour and the enforcement of specific measures to advance the economic inclusion of persons with disabilities;

(r) Step up efforts to address gender-based discrimination and sexual harassment in the workplace, including with a view to protecting all individuals, irrespective of their sexual orientation or gender identity, and adopt legislation criminalizing sexual harassment in the workplace and include sanctions for all perpetrators;

(s) Assist women and groups living in situations of vulnerability to access funds aimed at strengthening economic inclusion and public tenders;

(t) Implement the Public Benefits Organizations Act and adopt and implement effective measures to protect human rights defenders to ensure that they can carry out their work without fear of harassment, violence or intimidation;

(u) Take additional steps to scale up collaboration and coordination across public institutions at the national and county levels, in order to ensure policy coherence and clear allocation of responsibilities, including in the oversight of businesses operating at the county level;

(v) Enforce the Legal Aid Act, including by ensuring free legal assistance;

(w) Allocate appropriate resources to the Kenya National Commission on Human Rights.

87. The Working Group recommends that all business enterprises, including private enterprises, State-owned enterprises and business associations, implement the Guiding Principles, and specifically:

(a) Adopt gender-responsive human rights due diligence procedures so that they can identify actual and potential human rights impacts, and prevent, mitigate and account for how they address the adverse human rights impacts of their activities, including in their supply chains;

(b) Ensure meaningful consultations with potentially affected individuals and communities, making sure that they have timely and complete information about proposed projects or changes that may affect them;

(c) Establish grievance mechanisms at the operational level, in accordance with criteria set forth in principle 31 of the Guiding Principles.

88. The Working Group recommends that civil society organizations:

(a) Continue to support affected communities and fully engage in human rights-related policymaking processes, including the national action plan process;

(b) Continue to raise awareness about the respective obligations and responsibilities of the Government and of business enterprises under international human rights law.

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