

# **Statement at the end of visit to Kenya by the United Nations Working Group on Business and Human Rights**

**Nairobi, 11 July 2018**

## **Introduction**

In our capacity as members of the United Nations Working Group on Business and Human Rights, we have today ended our ten-day visit to Kenya. We thank the Government for its facilitation of this visit, and the many people from civil society and the business community with whom we engaged in an open and frank dialogue on current initiatives, opportunities and challenges to implement the UN Guiding Principles on Business and Human Rights (UNGPs).

During our visit, we met with the Attorney General and with representatives of following Government ministries and departments: Ministry of Foreign Affairs; Office of the Attorney General and Department of Justice; Ministry of Public Services, Youth and Gender Affairs; Ministry of Industry, Trade and Cooperatives; Export Processing Zones Authority, and the Ministry of Energy and Petroleum. We also met with officials from the County Governments in Turkana, Nakuru and Mombasa.

In addition, we held meetings with parliamentarians of the Senate Committees of Justice, Legal Affairs and Human rights and Tourism, Trade and Industrialization; the Parliamentary Caucuses on Human Rights and on SDGs and Business; the Chairperson of the Kenya National Commission on Human Rights and her team; with officials of the National Gender and Equality Commission; and with the Director and staff of the Kenya Judiciary Training Institute.

During our meetings held in Nairobi, Lodwar, Nakuru, Solai, Naivasha, Thika and Mombasa, we met with more than 400 representatives of civil society organizations, affected communities, indigenous peoples, workers and trade unions; as well as with members of United Nations Country Team and representatives of companies and business associations covering a wide range of sectors, including members of the United Nations Global Compact Network in Kenya, the Federation of Kenya Employers, Kenya Private Sector Alliance, and Kenya Association of Manufacturers. We are grateful to all the individuals, organizations and companies that made themselves available to share their experiences with the Working Group.

## **General context**

We are pleased to note a range of efforts to strengthen democratic institutions, the rule of law, respect for human rights and combat corruption. Notably, the 2010 national Constitution sets out a range of human rights and safeguards, alongside the decentralization and transfer of power and resources from the National Government to the County Governments aimed to enhance peoples' participation in decision making. A main challenge ahead is to deliver on the promises of laws and policies to improve human rights protection, including in the context of business operations.

Kenya is in the process of developing a National Action Plan (NAP) on Business and Human Rights, and is set to become the first country on the African continent to develop such plan, following the example of growing number of countries across other world regions. We hope that the visit of the Working Group will assist in identifying priority actions for the NAP.

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

In its efforts to promote responsible business conduct, the obvious place to start is for the Government to consider what steps it could take to ensure that its own practices, as an economic actor, adheres to the UNGPs.

### *State-owned Enterprises*

The Kenyan economy draws heavily on state-owned enterprises and parastatals. Such entities are expected to lead by example in ensuring respect for human right.<sup>1</sup> In the meetings and discussions touching on state-owned enterprises, it was not evident to us that these enterprises have the necessary awareness or processes to deliver on their responsibilities to respect human rights.

### *Public Procurement*

In the spirit of leading by example, when the national and county governments engage in procurement and employment activities, they should ensure that their own business operations align with the UNGPs. Currently there are no mechanisms to set out the expectation and requirement that contractors respect human rights, including mechanism to ensure that contract employees (e.g. for security or cleaning services) are paid the minimum wage.

The Kenyan Constitution requires that up to 30% of government tenders be designated for women, youth and persons with disabilities. This is a positive step, and we heard from SMEs that the policy had opened up new business

opportunities for female-owned companies. Implementation by county governments varied and further work is needed to assist eligible businesses to apply for tenders.

### **Businesses' engagement with the business and human rights agenda**

We noted a marked variance in awareness of the UNGPs among the business community in Kenya. A number of larger business enterprises are aware and seeking to adjust their practices, while others, including most smaller and micro enterprises seems largely unaware of this agenda. Business associations, such as the Kenyan Federation of Kenyan Employers and Kenya Private Sector Alliance have a central role to raise the level awareness among their members and promote good practices of human rights due diligence and community engagement.

### **SMEs and the large informal economy**

Kenya has a large and vibrant SME and informal sector, a reflection of its entrepreneurial culture. This is not unusual as it is typical of most economies, majority of whose SME and informal sector make up between 85% to 99% percent of economic activity. It follows, in our opinion that the effective implementation of the UNGPs in Kenya needs to include this category of enterprise.<sup>2</sup> We met with SMEs who sought to embed respect for human rights into their business models and were pioneering innovative approaches to worker welfare in sectors such as cleaning and landscaping.

Kenya is ahead of many countries on avenues for proposing responsible business conduct in the informal sector. The government has taken measures to regularise enterprises, including the creation of micro and small enterprises authority. Yet, the informal sector is still growing and reached 83.4 per cent of the total employment in 2018. Kenya has credible opportunities, including working in collaboration with mobile money platforms, such as the MPesa system, that track financial activity to craft a strategy for the implementation of the UNGPs. Also, the Government, through its trade and investment promotion, could provide incentives for informal businesses who respect human rights (e.g. in the agricultural sector) in the form of certification schemes.

### **Recurring issues and governance gaps**

In our meetings with different stakeholders across the country we found a number of recurrent themes concerning gaps and shortcomings in current

practices. We were able to explore a few cases in more detail, which illustrate some general findings.

#### *Dam breach in Solai*

On 10 May 2018, a dam used for irrigation of the Patel Coffee plantation burst and flooded a village causing the death of 48 persons, a majority of them women and children, and displacing over 5000 people. Investigations revealed that the dam had been constructed in an irregular manner and, on 5 July 2018, days before we were scheduled to meet with company representatives, the Director of Public Prosecution ordered the arrest of the farm's managing director and general manager on criminal charges, as well as of officials of the Water Resource Authority (WRA), National Environment Management Authority (NEMA) on charges of criminal neglect of their responsibility to inspect and monitor the safety of the dam.

At the site of the disaster, we witnessed the devastation caused and heard the personal accounts of victims of the disaster. In addition to the trauma and the loss of loved ones, the way emergency relief funds had been disbursed was causing anger and frustration.

We learned that a week earlier, on 28 June, victims had been called to a meeting convened by the Deputy County Commissioner with the presences of company representatives. According to the account of victims, they had been informed that representatives of the farm were present to offer an apology. At the meeting the company handed out cheques, ranging from KSh 10,000 (approx. USD 100) for the loss of a family member, to KSh 1 million (approx. USD 10,000) for the loss of permanent housing, and asked people to sign a document, which turned out to be an indemnity form to absolve the company of any responsibility for the disaster. Those who participated in the meeting expressed that they had been misled into signing the form, while others complained that they had not been considered for the cheques handed out by the company, including those who were farmers and tenants.

It is a matter of great concern that government officials appear to have facilitated what amounts to an attempt by the company to obstruct access to an effective remedy for victims.

#### *Oil extraction in Turkana County*

In Turkana County, we learned about some of the challenges relating to oil extraction. A majority of the population who live below the poverty line earn

their livelihood from traditional nomadic pastoralism. More than 80 per cent of the County's territory has been licenced for oil exploration, and following discovery of oil reserves in 2012, the first extraction had commenced as part of the Early Oil Pilot Scheme.

In our meetings with local authorities and communities, we learned about the grievances that had led road blockades to prevent the oil transport. As we found out, local communities were not generally opposed to oil extraction, and appreciated the opportunity for economic development in one of the country's poorest regions. However, concerns were expressed about the need to ensure that oil extraction would benefit the local economy, including through greater local employment, and not adversely impact on the traditional livelihoods of local nomadic herders. Concerns were also raised about a lack of genuine consultation with affected communities prior to the allocation of land to oil extraction, and about how community land was being projected. Local authorities and the involved oil companies need carefully to consider such concerns.

#### *Plantations in Nakuru*

In Nakuru County we met with workers and local residents as well as with representatives of the County Government and the company Kakuzi PLC concerning labour practices and the impact of plantations on local communities. We appreciate the openness of company representatives to meet with us to share their experiences, which helped highlight some of the human rights risks faced by plantations in Kenya.

We learned how a collective bargaining agreement on the terms and conditions of employment was negotiated every second year with shop stewards representing workers in the negotiations. Workers appreciated the stable income it provided to them. The company explained steps it had taken in line with its core value to respect the well-being of its workers. At the same time, there were several concerns that we advise the companies in this sector to pay close attention to.

Testimonies from several former shop stewards who had been dismissed, indicated that raising grievances on behalf of workers had led to their dismissal. The company contested this. The Working Group was also informed of serious work accidents caused by workers who hurt themselves falling from avocado trees. As we learned, the current wage incentive structure, resulted in workers climbing into the trees, even if this was against company rules.

As we visited the farm, there was an ongoing investigation into allegations that security guards had caused the death of a young man who had reportedly been apprehended on suspicion of stealing avocados. Equally, we heard of past incidents in 2014 and 2016, including credible first-hand accounts women and elderly persons about attacks they had experienced in 2014, from which they still suffered physical and psychological injuries. We encouraged the company to supplement police investigations of alleged wrongdoing with its own credible investigations and to strengthen its training and oversight mechanisms for security guards.

### *Lead poisoning in Owino Uhuro*

In Mombasa we met with residents of the Owino Uhuro settlement and met with representatives of the County Government about a case of serious environmental contamination caused by a factory, Metal Refinery EPZ. The factory that was in operation between 2009 and 2014 caused high levels of lead contamination of the adjacent settlement, with high concentration of lead found in the environment as well as in the blood of residents, causing serious health impacts, particularly to children living in the area.

Local residents, with the support of civil society had filed a class action against the Government and the company. Apart from seeking compensation for the harm suffered, the main demand of residents was for the State to test all residents for lead poisoning, and provide access to doctors and medicine for all those affected.

A study carried out by NEMA in 2013 had only been made available to residents in 2015. According to residents, NEMA had refused to disclose the report describing it as secret. It showed high lead concentrations posing a serious health threat, and prompted other studies including by a parliamentary committee.

We learned that several community members had faced threats as a result of their efforts to seek legal redress. In response to information about such threats, on 30 May 2018, we issued a public statement to call for the protection of environmental and human rights defenders,<sup>3</sup> and the Office of the Director of Public Prosecution subsequently provided protection for three of the witnesses in the ongoing court case.

## **Environmental and social impact assessments**

Another recurring challenge we witnessed relates to the current system of environmental impact assessments to prevent and mitigate adverse human rights impacts. Environmental disasters such as the dam breach in Solai and lead contamination in Owino Uhuro underscore the need for more solid environment impact assessments and the serious human and environmental cost of inadequate human rights due diligence.

We regret that during our visit were unable to discuss these issues directly with representatives of NEMA, that is mandated under the Environmental Management and Coordination Act to administer EIAs.

EIAs are carried out at the cost of the project proponents and carried out by consultants (registered by NEMA). Importantly, the law requires that a project proponent in consultation with NEMA shall seek the views of persons who may be affected by a project and hold at least three public meetings with them. We heard repeated concerns that EIAs had been granted without affording space for meaningful consultation with affected individuals.

From all stakeholder groups reference was made to the limited capacity of NEMA to effectively carry out its mandate, and the need to review current EIA procedures. We understand that a process is under way to revise the EIA requirements, also to address social impacts. NEMA was perceived as lacking independence, being part of the Government that often had a vested interest in the projects being promoted. There was a consistent call for setting up an independent oversight body, for example a committee with the participation of business and civil society, which could serve as a watchdog and complaint mechanism concerning EIA processes. For example, many counties are in the process of establishing Countywide Environmental Committees, which are meant to be comprised of diverse stakeholders. We heard that in the 20 or so counties that have created such bodies, there are currently no civil society representatives but only national government participants, MPs, business and the county.

## **Prior consultation and other forms of public participation**

Kenya has a solid legal framework for public participation, including specific provisions in the 2010 national Constitution. What is lacking is effective implementation.

Meaningful, prior, informed consultation with communities affected by business operations, is a central aspect of human rights due diligence to prevent adverse human rights impacts. A consistent concern raised was that consultations were often mere notifications, and not genuine meaningful, prior and informed consultations. The Office of the Attorney General informed us that new guidance on what constitutes meaningful public participation is being drafted. We encourage the government to develop such guidance in a way that accounts for the views of rights holders and communities.

## **Land and security of tenure**

Concerns were raised with the Working Group about confusion and uncertainty about the regulations and safeguards in the context of forced evictions, resettlement, and compensation. The Community Land Act should serve to strengthen the recognition and protection of community land rights, though no community title has been issued so far. Many stakeholders also noted the need for the Government to enact pending regulations setting forth procedures whereby communities may register their land to acquire greater rights. We noted that when the National Land Commission allocates public land for private investment, the land is not surveyed in advance, which has resulted in situations where the investor acquires the right to use land which is already occupied and/or used. This is causing problems both to the companies and communities concerned, and both stakeholder groups called on the National Land Commission to provide support and guidance in such cases, including on issues of compensation and resettlement.

## **Devolution**

The devolution process has brought about some positive outcomes in terms of bringing governance closer to the people, improving access to basic services and strengthening public accountability. However, we noted a need for intergovernmental mechanisms to enhance collaboration and coordination and avoid uncertainty of responsibilities.

## **Labour rights**

### *Minimum wage*

Low minimum legal wage exacerbates poverty and we noted the marked disparity between minimum wage levels, with the minimum wage of agricultural workers set at half that of general laborers. The Working Group welcomes the

decision of the Government to increase the minimum wage in 2018, but is concerned that it remains insufficient to ensure a decent living. The Working Group heard from business enterprises, CSO and workers that the minimum wage was hardly met, including in the supply chain of the public sector.

#### *Labour inspections*

We learned from workers, representatives of trade unions, and the private sector that the system of inspection is inadequate. The labor inspectorate is seen to lack the resources to carry out its mandate effectively, and to lack the power to visit business premises without prior notice.

#### *Occupational safety and health*

Several cases of severe industrial accidents and labour-related diseases in the agriculture and construction sectors were presented to us during our visit. We are concerned that the growing casualization of workers may lead to an increase in industrial accidents unless preventive measures are taken.

#### *Trade unions and the rights of assembly*

Business enterprises shared with the Working Group that unionization among workers is a growing trend. At the same time, we heard concerns about restrictions on freedom of association of workers, including in the agribusiness and public sectors. Several testimonies by trade unionists referred to examples of dismissals of workers who joined or formed independent trade unions or who demanded the respect of their labor rights.

We regret that during our visit we were unable to discuss these issues with representatives of the Ministry of Labour and Social Protection, and we will follow up with questions in writing as we prepare our report.

#### *Child labour*

Child labour remain a serious concern in several sectors, including agriculture, domestic work, and artisanal mining, and we learned about some of the initiatives to address child labour, including the 2016 National Policy on the Elimination of Child Labor.

#### *Persons with disability*

Another challenge in Kenya is the inclusion of persons with disabilities in the labour market. Kenya has established an employment quota of five per cent. However, as also highlighted by the Committee on the Rights of Persons with Disabilities in 2015, more needs to be done to ensure compliance.

## **Gender aspects**

We noted that women are particularly vulnerable to human rights abuse, particularly in the agricultural sector. Moreover, workers and representatives of trade unions drew attention to a general problem of sexual harassment against women in the workplace. We noted the lack of official statistics and data, and encourage the Government to improve data collection in this area.

We commend measures to fight against discrimination against women and vulnerable groups in line with the Constitution 2010 and international human rights law. Among tangible outcomes, we noted an increase in women's participation in leadership and public service. In the flower industry, gender committees have been established in 39 flower companies to combat sexual harassment and gender based discrimination. Flower pickers with whom we met shared their positive experience with these committees.

We heard testimonies about stigma and intolerance towards LGBTBI persons in the workplace and when seeking employment. We urge the State to adopt a comprehensive anti-discrimination framework to protect all individuals, irrespective of their sexual orientation or gender identity, and also encourage the private sector to take the lead in combatting discrimination against LGBTBI persons.

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

Human rights defenders are vital actors as they help to provide communities and individuals impacted by business-related human rights abuses, with a voice. Throughout our visit, we heard from numerous human rights defenders and communities about the reprisals they have faced when raising concerns about adverse human rights impacts. Such reprisals take the form of intimidation, termination of employment, beatings, and arrests and malicious prosecution. We received information about numerous cases where human rights defenders appear to have been charged with criminal offenses, as a pretext for intimidating them or penalizing them for their advocacy. Often these individuals have the charges dismissed, but only after being subjected to lengthy criminal proceedings which span over multiple years.

The Kenyan National Human Rights Commission has drafted a model human rights defender policy. They have urged, alongside the Kenya Coalition for Human Rights Defenders, that the Government enact a national policy that would be incorporated into the National Human Rights Plan. The Working Group believes such a policy is vitally important. It is important for private sector

organizations to sensitize business to the important role that defenders play as important partners in identifying and mitigating adverse human rights impacts linked to business activity.

## **Access to remedies**

The Working Group noted that a range of remedial mechanisms are available to individuals and groups to submit complaints regarding cases of human rights abuse in the context of business activities. However, we heard from victims that the mechanisms are not widely known by rights holders and may not be accessible, affordable and timely.

### *Judicial mechanisms*

Kenya has a variety of courts, including specialized courts with status of the high court in the areas of employment and labour relations and of environment and land issues. However, it would seem that the full effectiveness of judicial mechanisms is hindered by the high cost of bringing a legal case before the courts, the limited accessibility of specialized courts and well as delays in court proceedings. Access to free legal aid and the implementation of the 2016 Legal Aid Act 2016 would assist in ensuring access to effective remedy.

The Working Group welcomes the role of the Office of the Director of Public Prosecutions in undertaking investigations into alleged business-related human rights abuses.

### *The Kenya National Commission on Human Rights*

The Kenya National Commission Human rights is national human rights institution as per the Constitution of 2010, article 58. It is mandated to investigate any complaints received, or on its own initiative, any matter relating to human rights in a public office or a private institution. The Working Group heard only 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 between businesses and victims. This role, of mediation in business and human rights cases could be expanded, in connection with court-annexed mediation,

### *Operational-level grievance mechanisms*

Business enterprises and associations shared with the Working Group some of the initiatives taken to establish grievances mechanisms at the operational level. Some good practices have been observed in the salt sectors where the

KAM has set up an independent grievance mechanism for the sector, so that complaints may be made to a separate body rather than to the companies directly.

For other grievance mechanisms we head of, however, complaints were received and handled by company management, which may result in a lack of trust in such mechanisms. We encourage more companies to revise their operational-level grievance mechanisms to ensure that they comply with the effectiveness criteria set forth in the UNGPs (Principle 31).

### **Responsible business and integrity**

We commend the national government for prioritizing corruption prevention. Corruption has a strong connection to human rights; it reduces the capacity of the government to deliver basic social services, it hinders the access to effective remedies and hampers the observance of safeguards to protect environment and health. The effective implementation of the right to access to information, provided for under Article 35 and in the Access to Information Act 2016 would be one important step to combat corruption and ensure greater transparency.

### **National Action Plan**

We welcome the decision by the Government to prepare a NAP in line with the UNGPs. The NAP process is coordinated by the by the Department of Justice in collaborating with the Kenya National Commission on Human Rights and the Kenya Human Rights Commission (an NGO). A first draft of the NAP is expected to be disseminated for comment in 2018. We are pleased that the process so far has followed the steps suggested in the Working Group's Guidance on National Action Plans, in which we stressed in the importance of an inclusive and transparent process with the participation of both civil society and business. A number of consultations have been carried out and two useful studies commissioned by the Government have been completed, including a National Baseline Assessment on Business and Human Rights. Importantly, the NAP process is designed to be an ongoing endeavour under the guidance of a Steering Committee, involving several ministries and representatives of civil society and business. We noted that various CSOs and business associations were not fully aware of the NAP process, and we encourage the Government to strengthen its outreach, including by involving main business associations in addition to the members of the UN Global Compact Network. The NAP will be the first in Africa and we hope it will serve as an example for other countries in the region to follow.

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1 *Report of the UN Working Group*. Presented to the Human Rights Council in June 2016, at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/091/71/PDF/G1609171.pdf?OpenElement>.

2 *Report of the UN Working Group on Business and Human Rights on Small and Medium-Sized Enterprises*. Presented to the Human Rights Council (June 2017) at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/73/PDF/G1709873.pdf?OpenElement>

3 Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23138&LangID=E>