

## **I. The role and mandate of NHRIs in facilitating access to effective remedy for business-related human rights abuses**

1. Does your NHRI have an explicit or implicit mandate to handle complaints concerning alleged business-related human rights abuses? If yes, what methods (e.g. mediation or conciliation) can be used to facilitate access to remedy for human rights abuses?

The Kenya National Commission on Human Rights (KNCHR/Commission) is the National Human Rights Institution (NHRI) for Kenya. It is established by the Constitution of Kenya (Article 59) and operationalised by the Kenya National Commission on Human Rights Act, 2011 (revised 2012).

The Commission is also established as per the Paris Principles, and further rated an A Status by the Global Alliance for National Human Rights Institutions (GANHRI). The Commission enjoys a wide mandate on the protection and promotion of human Rights in the country.

In relation to business related human rights abuses, KNCHR has a comprehensive mandate. Section 8 of the Act carries the functions of the Commission. The Functions inter alia mandates the commission to:

- i) Promote the protection and observance of human rights in public and private institutions (Sec.8 (b)).
- ii) Receive and investigate complaints about alleged abuses of human rights and take steps to **secure appropriate redress** where human rights have been violated, Sec 8 (d).

This is in addition to the Powers and functions of commissions and independent offices conferred by article 252 of the constitution. It has been the practice both at policy and operations for KNCHR to widely interpret its mandate in order to address all human rights issues from across sectors- public and private.

2. What types of remedies can your NHRI offer to individuals or communities affected by business-related human rights abuses? Do you consider those remedies to be effective?

In facilitating access to remedy, section 29 (2) of the KNCHR Act provides that the Commission should endeavour to resolve any matter brought before it by conciliation, mediation or negotiation -section 29 (2) of KNCHR Act.

For example in the year 2018, a complaint was brought to the Commission by a community regarding water pollution by a big business. On receiving the complaint, the Commission conducted thorough investigations and on weighing the best form of intervention, opted to explore mediation. Therefore KNCHR approached the parties and they all agreed to go through mediation. The mediation was carried out with both parties signing an agreement which brought about a relationship between them. Among the key points of agreement were: that the company apologises unconditionally for its mistakes, that the company modernises and rectifies its waste disposal mechanisms and that it becomes a member of the Water Users Association and proceeds to pay the necessary rates. On this the Community agreed to accept the apology without demand for compensation.

Mediation is more productive as a means of accessing effective remedy for victims of human rights abuses by businesses because they are cheaper, acceptable to both parties and as opposed to the adversarial court process, it builds trust and cooperation between the victims and the perpetrator hence building more sustainable relationships. However the flipside is that the agreements reached can be breached with ease in the absence of goodwill.

3. Does your NHRI have a mandate to investigate, conduct inquiry and adjudicate individual cases of alleged human rights abuses by businesses? If yes, please provide relevant statistics in relation to complaints received and adjudicated.

The Commission has an array of remedial measures it can offer individuals or communities affected by business related human rights abuses. Besides the mediation mentioned above, the commission has engaged in Public Interest Litigation (specific to business it has appeared as Amicus Curiae in a case filed by a citizen regarding salt mining in Malindi- where the commission had earlier carried out a public inquiry). KNCHR has so far carried out public inquiries on business

related matters. In 2005/6, the commission carried out a public inquiry into salt mining in the coast region. The inquiry was informed by complaints received from the community, CSOs, CBOs and individuals around the salt belt in which they had complained about poor working conditions, pollution of the sea and vegetation, denial of access to the ocean by the companies, dispossession of land and salination of fresh water wells by the companies.

On receiving several complaints from the members of the community regarding various forms of violations by state agencies and private companies in the gemstones and iron mining operations in Taita Taveta, KNCHR conducted a ‘Public Inquiry on Mining and Impact on Human Rights’ in 2016. The findings and recommendations of the 2 inquiries are available through this link<sup>1</sup>.

KNCHR additionally uses inter-agency referral mechanism in assisting members of the public access remedy where it does not have the mandate to deal with issues brought to its attention. Through this mechanism, several cases have redirected to the relevant agencies to deal with. This includes labour disputes, corruption cases, environmental pollution and maladministration of justice by public business entities. For example, labour cases for a long time dominated the complaints received at the commission. However there exists other agencies such as the department of labour which should ideally receive the complaints. However due to inaction over a long period of time, members of the public affected would report the same to KNCHR. However KNCHR has improved on its referral to the labour department and the response has improved over time.

In the last three years, KNCHR and the National Environmental Management Agency has developed a working relation that has helped improve on the response to human rights issues related to environmental pollution by businesses. The two institutions have carried out trainings for artisanal miners to help in environmental management and reduction in human rights impacts. The two institutions have had joint training on Environmental and Social Impact Assessment and human rights in order to strengthen the capacities of the two institutions to deal with human rights impacts emanating from business activities.

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<sup>1</sup> <https://www.knchr.org/Publications/Thematic-Reports/Ecosoc-Rights/Business-Human-Rights>

4. Does your NHRI give any special attention to facilitate access to your complaint mechanisms by vulnerable or marginalised groups? If yes, what measures have been taken in this regard?

The Commission has a Complaints Management System that is able to disaggregate data into the various groups or categories of complainants and what type of complaints received, state/stage of redress etc. This means that one is able to show information regarding complaints received by minority groups and persons with disabilities, gender and sexual minorities. This data is crucial in addressing issues relating to the various groups of petitioners and remedies due and hence also forms good reporting information to the government and other mechanisms such as UPR and treaty body reporting.

5. What gender-sensitive and gender-responsive measures your NHRI take in dealing with cases of alleged business-related human rights abuses?

KNCHR identifies gender specific issues in the complaints received or while carrying out its promotive activities and addresses the same through a gender lens. While carrying out the public inquiry in Taita Taveta in 2016, the commission ensured that the issue of gender violence and decision making in relation to consent by women while businesses seek consent for access to land, that women are fully engaged. It was found out that sexual violence and exploitation in the mine fields was rampant and needed redress. During the hearing, there was a session where the affected women were heard in camera so as to protect their dignity while giving evidence.

During the drafting of NAP on business and human rights, KNCHR and UN Women held a workshop in which gender specific perspectives were captured and incorporated into the NAP with recommendations for gender responsive policy actions.

6. What other measures does your NHRI undertake to facilitate access to remedy indirectly for business-related human rights abuses (e.g. raising awareness about rights and remedial mechanisms, providing legal assistance, building capacity of communities or businesses, assessing effectiveness of other grievance mechanisms, and recommending reform of the national legal system to strengthen access to remedy)?

The Commission plays a key role in influencing policy and legislation. This is done through carrying out research on topical human rights issues of which businesses are part of it. Further the Commission is entrusted with the task of ensuring that the state complies with its international human rights obligations<sup>2</sup>. The Commission is also mandated to formulate, implement and oversee programmes intended to raise public awareness of the rights and obligations of a citizen under the constitution<sup>3</sup>.

Through the reporting mechanisms at the international level, KNCHR also submits shadow reports or works with the state in writing reports to the various reporting mechanisms. By attending the reporting sessions and in some instances delivering reports, KNCHR is able to bring to the attention of the various committees issues that require state attention. After the recommendations are made to Kenya, KNCHR is able to pick recommendations and assist the state in implementation. A good example is the advocacy and support that KNCHR offered to the government on the development of NAP<sup>4</sup> on business and human rights. The NAP is now awaiting approval by the state for it to become a policy.

7. How does your NHRI collaborate with other judicial or non-judicial remedial mechanisms (e.g. courts, labour tribunals, National Contact Points, and operational level grievance mechanisms) in dealing with complaints concerning business-related human rights abuses?

The Commission is an active member of the Court Users Committees in which various stakeholders meet to discuss issues affecting access to justice and make recommendations on how to improve access to justice. Among the participants are the Judiciary, Commissions, Communities and Civil Society Organisations. The Commission is a member of several referral platforms/mechanisms that would enhance efficient and effective access to justice. Further the commission is a member of several Task Forces emanating from legislative/legal obligations<sup>5</sup>.

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<sup>2</sup> Article 59 (1) (c) and Section 8 (f)

<sup>3</sup> Section 8 (g), KNCHR Act

<sup>4</sup> Draft NAP has been shared with the Working Group

<sup>5</sup> KNCHR would be glad to provide a comprehensive list of these mechanisms.

8. Can your NHRI deal with alleged business-related human rights abuses with a transnational or cross-border dimension (e.g. through informal visits and exchange of information or a cooperation arrangement with counterparts in other States)?

KNCHR has not had any cross border dealings on issues of business and human rights- in terms of seeking resolution of business related human rights abuses. This is because KNCHR has no extra-territorial mandate. Under section 30 of its constitutive Act, the KNCHR has limitation in jurisdiction in matters relating to relations between the State and any foreign State or international organization. However, KNCHR continues to collaborate with other NHRIs to build capacity and develop strategies that would advance human rights issues in business. The Commission has for example attended trainings with other NHRIs, held round table discussions and participated in large forums like the UN Forum on BHR in order to share experiences on BHR.

9. Is your NHRI involved in any initiatives to stimulate effective multi-stakeholder grievance mechanisms to strengthen access to remedy for business-related human rights abuses?

KNCHR has built a tradition of partnership with multiple stakeholders to address human rights issues including in businesses. This is reflected in the Universal Periodic Review (UPR) mechanism where KNCHR convenes stakeholders including government agencies to build their capacity for reporting on the various thematic areas. It is through this reporting that Kenya received a recommendation from Norway to develop the NAP on business and human rights.

The commission is also involved in several referral partners' networks and CSO platforms through which it seeks remedy.

10. Where a National Action Plan on Business and Human Rights exists (or is under development), does it provide for a role for NHRIs in relation to access to remedy in case of business-related human rights abuses?

As is reflected in the UNGPs, KNCHR has been given prominent role of capacity building for state and non-state actors on business and human rights and also using its mandate to facilitate access to remedy where business related human rights abuses have occurred. This same role is reflected in the draft NAP for Kenya and KNCHR is further entrusted with Implementation and Monitoring the NAP once it is adopted by the State.

Generally speaking, the Commission retains the mandate as the designated state organ responsible for ensuring state compliance with international human rights obligations.

## **II. Challenges and limitations faced by NHRIs in facilitating access to effective remedy for business-related human rights abuses**

1. What are the most critical challenges and limitations (e.g., legal, practical, or financial) that your NHRI has experienced in facilitating access to effective remedy in business-related human rights abuses? How could these challenges or limitations be overcome?

Whereas the constitution offers protection against human rights abuses by private actors and calls on all persons to respect human rights, the enforcement of the same is quite weak. Of note is the relatively weak legal and policy framework in regard to business and human rights. This limits the capacity of the judiciary to offer effective remedy in regard to business related human rights abuses. Another critical challenge is that business related complaints take a very long time to resolve and hence denies individuals and communities access to real time justice.

An example of delayed cases is one encountered during the public inquiry in Taita Taveta County. This is the case<sup>6</sup> involving Wanjala Mining Company Ltd and Kishushe Ranching Cooperative Society Ltd. The dispute concerns land in which the ranching company claims ownership and Wanjala Ltd which claims mining rights. There has been numerous suits and counter suits, government/political interventions including an attempt by KNCHR to mediate but despite the fact that the matter has been running for more than three decades, there is no conclusive judgement on the matter.

2. What additional challenges has your NHRI faced in dealing with complaints with a transnational dimension (e.g., exploitation of migrant workers, or cross-border environmental pollution)?

KNCHR has not dealt with any matter of a transnational nature dealing with business and human rights. Additionally, Kenya has not ratified the international Convention on the

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<sup>6</sup> Kenya National Commission on Human Rights; Public inquiry report on mining and impact on human rights

Protection of the Rights of All Migrant Workers and Members of their Families. KNCHR continues to push for this ratification.

3. How has your NHRI dealt with complaints involving multiple victims?

KNCHR receives complaints relating to many victims or group complainants. In this scenario, the commission will engage in intensive and extensive investigations and once it has gathered sufficient information, KNCHR has used Public Inquiry method to further investigate, educate and make necessary recommendations that would lead to remediation of the abuses by businesses. Since its establishment, KNCHR has conducted two public inquiries on business related human rights abuses. One was conducted in 2005/6 (Public Inquiry on Salt Mining in Malindi) and the other in 2016 (public Inquiry on Mining in Taita Taveta county)<sup>7</sup>.

4. What has been the experience of your NHRI in dealing with complaints concerning parent and subsidiary companies or the supply chain of a company?

Extra-territorial issues remain a weak-point in dealing with business related human rights issues. KNCHR has no mandate to deal with matters or actors outside the jurisdiction of Kenya. However, in meetings with other NHRIs, there have been proposals for collaboration to resolve cross border human rights violations. This will mean that in cases involving MNCs, the NHRI from the host country should build synergies with that of the home country of the MNC to seek remedy for victims of human rights violations.

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<sup>7</sup> Ibid footnote 1

### **III. Good practices, innovations and recommendations to strengthen the role of NHRIs in facilitating access to effective remedy for business-related human rights abuses**

1. Can you share any good practice examples in which your NHRI was able to facilitate, directly or indirectly, effective remedies for business-related human rights abuses?

KNCHR has been involved in two public inquiries involving businesses in which various levels of remedies have been realised for the host communities and individuals have been realised.

In 2005/6, KNCHR conducted its first public inquiry on salt mining in the coast region of Kenya. Some of the violations reported included poor working conditions in the salt mines, denial of access to the sea by the companies among others. Some remedies were immediate such provision of protective clothing, access to the sea by communities etc. In 2016, KNCHR conducted another inquiry on the impact of mining activities on human rights in one of the counties in Kenya- Taita Taveta County. Key violations included gender based violence in the mines, poor health and safety measures, environmental degradation etc.

2. Are there good practice examples of your NHRI supporting the work of civil society and human rights defenders (including women human rights defenders) working to secure access to effective remedy for business-related human rights abuses?

KNCHR works closely with CSOs and HRDs to enhance the realisation of human rights in the business sector. In the inquiries mentioned, KNCHR worked very closely with these groups including receiving complaints from them and taking steps to offer redress. For example in the Malindi Inquiry, the partnership between KNCHR and Malindi Rights Forum was key in understanding the issues on the ground.

3. Can you identify any innovative steps taken by your NHRI in overcoming various challenges and limitations faced in dealing with complaints concerning business-related human rights abuses?

KNCHR is using training and capacity building on business and human rights as a key strategy to realise long term observance of human rights by businesses. Currently KNCHR is carrying out capacity building on human rights for Kakuzi PLC (MNC) to enable them observe human rights in their operations. The reception so far has been good with an invitation to expand our trainings to include the entire security team. This after training all their senior managers and supervisors.

NB: Kakuzi PLC is a multinational company specialising in agriculture. It occupies a large area in the central region of Kenya. There has been historical claims of injustice regarding land ownership and displacement of local populations. There have been other complaints that KNCHR has received from the community around Kakuzi such as killings of purported trespassers, denial of access roads for communities and also poor working conditions. Over the years there has been no progress in resolving the matters raised and Kakuzi had remained closed from public scrutiny. However following persistent advocacy by KNCHR, CSOs and intervention by the OHCHR and the Working Group on Business and Human Rights, Kakuzi opened its doors for training on human rights by KNCHR. Since February 2019, KNCHR has trained 150 members of its senior management and supervisory team. It has extended an invitation for training of its entire security team and also to be assisted in carrying out Human Rights Due Diligence in its operations in Kenya. This is work in progress

4. What measures should be taken to strengthen the mandate, role and capacity of NHRIs in facilitating access to remedy for business-related human rights abuses?

NHRIs should be given powers to offer direct remedies in cases (for example awards) where businesses abuse human rights. This could be through quasi-judicial powers such as tribunals.

5. How could NHRIs collaborate with regional and international human rights monitoring mechanisms (including the Universal Periodic Review) to facilitate access to remedy for business-related human rights abuses?

NHRIs should enhance their data collection tools and processes and participation in the reporting at these levels so as to facilitate holding of States accountable for protection and promotion of business related human rights within their jurisdictions.

The NHRIs should also remain actively engaged in the reporting and monitoring of recommendations of treaty bodies and make specific recommendations regarding access to justice and in particular business and human rights.

In UPR, NHRI can lobby states to support recommendations that support effective remedies for business violations.

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