

EXECUTIVE SUMMARY OF THE KENYA COUNTRY RISK ASSESSMENT

The Kenya Human Rights & Business Country Risk Assessment (CRA)

The Kenya Human Rights & Business Country Risk Assessment (CRA) provides a detailed assessment of Kenya's human rights standards and practice, along with guidance to companies on how to evaluate and adjust their business practices to ensure compliance with international human rights standards when operating in Kenya. The CRA focuses on documenting and assessing risks that are particularly relevant in a business context, and provides a systematic and in-depth overview of sensitive human rights areas within the legal, political, social and cultural fields in Kenya. The CRA has been carried out as desk research using a wide range of recognised information and sources.

The CRA builds on twenty rights drawn from the Universal Declaration of Human Rights. Each right is examined from a corporate perspective in three different categories: i) Formal Law; ii) Societal Practice; and iii) Company Risk. The CRA is modelled on a red-light/green-light rating system and each right is assigned a rating in the Company Risk category, which determines the corporate risks for engaging in human rights violations. The CRA can be used as an independent tool, as well as in conjunction with the Human Rights & Compliance Assessment (HRCA) to help the company localise and streamline its internal compliance processes.

The results of the CRA produced the categorisation of 14 human rights as high-risk areas, 2 human rights as medium-risk areas and 4 human rights as low-risk areas for companies operating in Kenya. The following presents the overall results of the CRA, including a short description of each right. The full CRA offers a detailed, in-depth description of each right and its violations in law and practice.

COMPANY RISK

The following rights received a red rating in the company risk category in the Kenya Country Risk Assessment. This indicates that these human rights constitute a high-risk area for companies that operate in Kenya. A brief assessment of each right follows below.

- Right to Freedom from Discrimination (art. 2)
- Right to Life, Liberty and Security of Person (art. 3)
- Right to Freedom from Forced Labour and Servitude (art. 4)
- Right to Family Life (art. 16)
- Right to Own Property (art. 17)
- Right to Take Part in Government (art. 21)
- Right to Peaceful Assembly and Freedom of Association (art. 20, 23)
- Right to Work and Just and Favourable Conditions of Work (art. 23, 24, 25)
- Right to Health (art. 25)
- Right to an Adequate Standard of Living (art. 25)
- Right to Food (art. 25)
- Right to Adequate Housing (art. 25)
- Right to Education (art. 26)
- Right to Participate in Cultural Life (art. 27)

Right to Freedom from Discrimination (art. 2) constitutes a high-risk human rights area in Kenya. Although the constitution and some new labour laws prohibit discrimination on race, sex, tribe, disability, place of origin, local connection, political opinion, creed, disability or HIV status, discriminatory conduct and cultural practices still subject various vulnerable groups to discrimination, particularly women, children, people with disabilities, homosexuals and



persons affected by HIV/AIDS. Discrimination on the basis of ethnicity is strong in Kenya, while homosexuals are often exposed to violence. Women are systematically discriminated against in employment, and customary law relegates them to an inferior status compared to men. Women, especially those in the informal sector, get paid significantly less than their male counterparts, and some lose their jobs due to pregnancy. Company risk is high due to the proximity of violations of this right to companies operating in Kenya. Companies must take care not to be complicit in violations of the right to freedom from discrimination, including in their supply chain management.

Right to Life, Liberty and Security of Person (art. 3) constitutes a high-risk area in Kenya. The laws of Kenya make provision for this right. Nevertheless, in practice, it is widely violated, particularly by the security apparatus of the state. The police have an extremely poor human rights record. Almost 300 incidents of extra-judicial killings were reported in 2006, and excessive use of force and arbitrary arrest and detention are reportedly common. Vigilante groups with political allegiances are also a threat to security in Kenya, and security is further compromised by the existence of ethnic animosity and clashes in some areas. Women's security is under particular threat in such situations. The proximity of the company to the violation of this right is direct where the company makes use of private security for the company, as it must ensure its security personnel do not violate this right.

Right to Freedom from Forced Labour and Servitude (art. 4) is a high-risk area in Kenya. Kenyan law prohibits forced labour and servitude, and also prohibits human trafficking for purposes of sexual exploitation. In practice, Kenya is a port for receiving and exporting trafficked persons. Victims are trafficked into Kenya for forced labour, especially in the construction and clothing industries. Child labour is a huge problem in Kenya, with an estimated 1.9 million children between the ages of 13 and 17 employed, particularly in the informal sector. The nature of the employment relationship makes the company's proximity to the violation of this right very close. The company must ensure that it does not take part in this practice and, furthermore ensure that its business associates are not guilty of such conduct.

Right to Family Life (art. 16) constitutes a high-risk for companies in Kenya. The constitution does not specifically mention this right. Customary law regulates marriages and other aspects of family life such as divorce. Gender inequality is perpetuated by customary law practices and the application of some aspects of Islamic law. These above bodies of law recognise the practice of polygamy, although such practice is prohibited under civil law. The right of a woman to choose her own family is explicitly curtailed by these systems of law, such as the practice of wife inheritance under customary law. Forced marriages continue to occur. The 2007 Employment Act mandates three months of paid maternity leave, which is below the standards as defined by the ILO. Export Processing Zone workers have been fired for becoming pregnant. Abortions are illegal in Kenya yet occur regularly, exacerbated by high HIV/AIDS rates and resulting in a high mortality rate. The company's proximity to female employees places it at high risk of violating this right, as the company must manage issues of maternity leave and discrimination based on family status.

Right to Own Property (art. 17) is a high-risk area for the company. Although the constitution protects property rights, it also permits the application of customary law, which vests no property to women. It is estimated that women hold only 6 percent of land title deeds in Kenya. The law also does not provide for the property rights of indigenous people. The government's eviction programmes are contrary to international legal standards. Corruption is also a major problem affecting property rights. Many title deeds are disputed as a result of illegal disposal and allocation of land, and land disputes are common. It is encouraged that the company avoid acquiring disputed land and investigate land purchases thoroughly so as not to disenfranchise women and indigenous groups.

Right to Take Part in Government (art. 21) constitutes a high-risk human right for the company. Kenya is a democratic state with the right to freely choose a government. Corruption is chronic in Kenya, however, and serves as a great impediment to the exercise of this right. Allegations of election fraud are routine during election periods. The disputed 2007 presidential elections resulted in violence, killing more than 800 people. Given the large corruption problem in Kenya, the company faces a high risk of violations due to the close relationship with government in regard to the provision of government services, as well as company involvement with various government departments, such as the tax authorities.



Right to Peaceful Assembly and Freedom of Association (art. 20, 23) is a high-risk area for the company. Kenyan law recognises the right to assemble peacefully and the freedom to associate, yet has neglected to ratify important ILO conventions in this area. National law also limits the right to assemble by requiring that political and other public gatherings be reported three days prior to the event. Police use of force to disperse demonstrations has resulted in deaths. Trade unions are also restricted in their work. The Export Processing Zones are notorious for repressing trade union communications and events. Company risk is high with regard to direct violations of the right to peaceful assembly and freedom of association. The proximity between company activities and labour issues and trade unions places the company at great risk of violation of this right both directly and through suppliers.

Right to Work and Just and Favourable Conditions of Work (art. 23, 24, 25) poses a high risk to companies operating in Kenya. The right to work is not adequately entrenched in Kenyan law, and a number of labour standards do not apply to workers in Kenya's Export Processing Zones. Workers in such zones are routinely and systematically exploited in the areas of work hours, rest periods, production quotas, employment contracts, union representation and health and safety. Most EPZ workers are young, unattached females, making them vulnerable to work exploitation and sexual violence. Furthermore, Kenya's investigation and inspection regime is inadequate to monitor employers for violations, both within the EPZs and without. Employers found to have violated labour standards receive only nominal fines. Child labour remains a problem. As company proximity to work conditions is close and direct, companies are advised to exercise caution throughout their human resources policies and remain vigilant for potential problem areas, particularly among suppliers.

Right to Health (art. 25) is a high-risk human rights area for companies. Access to healthcare remains a large problem in Kenya. Government expenditure on health is low and concentrated in urban and politically favoured areas, and Kenya's high poverty rate makes it impossible for many citizens to receive treatment. Though Kenya's HIV/AIDS rate has dropped in recent years, it remains at nearly 7 percent and is often inadequately addressed by government, especially in poor rural areas. Malaria remains the leading cause of death and illness in Kenya. In the employment sector, occupational health and safety standards are very poor, particularly in the Export Processing Zones and the informal sector, where the majority of Kenyan workers are employed. Health and safety standards are poorly defined and protected in law, and the accident and fatality rate is high. Almost one-quarter of employees injured on the job were under 20 years old. The company risk of violating this right is high, especially in regard to health and safety standards at the workplace. As laws are poorly defined and implemented, companies must draft their own health and safety guidelines and training programs relying on international law.

Right to an Adequate Standard of Living (art. 25) is a high-risk area for companies. Though Kenya has experienced rapid economic growth in recent years, general living standards remain very low and around half the population lives below the poverty line. Corruption, unequal distribution of wealth, poor agricultural conditions, conflict and a number of other human and environmental factors have contributed to the current situation. The minimum wage as set by the government does not provide an adequate standard of living for workers and their dependants, and many informal sector workers do not earn even the minimum wage. Social security benefits are hampered by corruption, with payroll deductions often not being sent to the proper authorities and payouts not being delivered to citizens. As companies have a direct impact on wage policies, risk in this area is high, and companies must undergo consultation before setting wages to ensure that they are enough to provide a reasonable quality of life for workers.

Right to Food (art. 25) is at high risk of company violations in Kenya. Up to 50 percent of the rural population and 38 percent of urban population of Kenya faces chronic food insecurity. Five consecutive years of drought have severely affected the ability of Kenyan farmers to obtain enough food. Lack of potable water is an ongoing concern, and less than 8 percent of Kenyan households have running water. Company risk in this area mainly concerns environmental damage, which continues to threaten the health and food security of local communities, as well as their ability to grow crops and earn a living. Desertification affects over 80 percent of Kenya, and a number of rural subsistence farmers have abandoned their plots after they have become nonviable. Companies are advised to be vigilant for environmental effects of their operations, and to investigate surrounding lands for use by farmers or indigenous people.



Right to Adequate Housing (art. 25) is a high-risk human rights area in Kenya. Housing standards are poor in Kenya and there is a general lack of adequate living space, exacerbated by the increasing urbanization. Discriminatory social practices bar women from property tenure and force them to rely on husbands or fathers for housing and property. The urban slums expose inhabitants to health threats and insecure environments. The government reportedly practices forced evictions of rural and indigenous people without consultation, compensation or relocation. Villages and homes have been destroyed the security forces and their populations displaced. This is often done in natural areas under the justification of conservation. As companies may purchase or use land where such evictions have taken place, risk for violations of this human right is high. We recommend companies investigate premises before agreeing to land acquisition, and ensure that any relocations are performed in line with international law regarding consultation and compensation.

Right to Education (art. 26) is a high-risk area for companies with operations in Kenya. Access to education continues to be a problem, and the increasing number of HIV/AIDS orphans has increased the drop-out rate. Educational structures heavily favour men, and the primary enrolment rate is 59 percent among girls and 87 percent among boys. Women constitute 70 percent of the country's illiteracy rate and make up just 36 percent of the university student population. Overcrowding is an issue at the primary level. In the company sphere, Kenya continues to host almost 2 million child labourers, most between 13 and 17. Additionally, some 44 percent of boys and 30 percent of girls from 5-14 are engaged in labour. Most work in the informal sector, making them particularly vulnerable to exploitation. Companies must diligently monitor their own operations and those of their suppliers for violations of this right.

Right to Participate in Cultural Life (art. 27) is a high-risk area for companies. While the government does not generally interfere with the right to participate in cultural life, ethnic minority groups and indigenous peoples remain economically, politically and socially marginalised. Kenya is divided along ethnic lines, and inter-ethnic conflicts occur regularly, often caused by land ownership or squatting disputes. Tribalism and ethnic loyalty continue to be a dominating feature of Kenyan society. Each ethnic group practices favouritism in public and private life. A number of ethnic groups are heavily funded by the government, while others are neglected. As companies have a high probability of interacting with ethnicity structures at a government and human resources level, this right is at high risk of company violation. Companies are advised to practice diligence in their employment and government relations policies to ensure that they do not support or encourage racially discriminatory practices.

COMPANY RISK

The following rights received a yellow rating in the company risk category of the Kenya CRA, indicating a medium risk for companies operating in Kenya. A brief assessment of each right follows below.

- Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment (art. 5)
- Right to Intellectual Property (art. 27)

Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment (art. 5) is a medium risk to companies in Kenya. Police violence and torture during interrogation are widespread. Prison conditions are overcrowded and violent. Women are subject to sexual harassment and violence throughout society, including in employment. More than 90 percent of female Export Processing Zone workers have experienced or observed sexual abuse at their workplace. Domestic violence against women is generally tolerated in the public and private sphere. Though violations of the right to freedom from torture are severe and widespread in Kenya, the risk to the company is rated as medium. Company proximity to most violations of this right is not close, and complicity is indirect except in cases of workplace sexual harassment. Companies are advised to implement strict no-tolerance harassment policies and provide training for managers and employees.



Right to Intellectual Property (art. 27) is rated medium-risk for companies in Kenya. Violations of intellectual property are common, particularly infringements of copyrights. It is estimated that 90 percent of the software in use in Kenya is pirated, particularly business software, resulting in a US\$3.5 million annual loss. The sale of pirated audio and videocassettes is extensive, although there is little domestic production. The statutory fines for intellectual property violations are neither punitive nor deterrent, and the enforcement regime is weak. This rights area is rated as medium-risk due to the potential for companies to obtain intellectual property that has been removed from indigenous peoples or damage the livelihood or local people. Companies should remain vigilant to avoid removing patentable inventions from their creators, and should compensate indigenous groups for any intellectual or cultural property that is appropriated.

COMPANY RISK

The following rights received a green rating in the company risk category in the Kenya CRA, indicating that they constitute low-risk area for companies operating in Kenya. A brief assessment of each right follows below.

- Right to a Fair Trial and to Recognition as a Person Before the Law (art. 6, 7, 10, 11)
- Right to Privacy (art. 2)
- Right to Freedom of Movement (art. 13)
- Right to Freedom of Opinion, Expression, Thought, Conscience and Religion (art. 18, 19)

Right to a Fair Trial and to Recognition as a Person Before the Law (art. 6, 7, 10, 11) is a low risk for companies in Kenya. This right is guaranteed by the law, although many violations occur in practice. The lack of government-provided legal representation facilitates the violation of this right, as many persons cannot afford legal counsel. Lack of funding, widespread corruption, and executive interference are further impediments to the guarantee of this right. A large backlog of cases has resulted in sometimes years-long waits for court decisions. Delays in trials also infringe the rights of juveniles. Although the company is not directly affected by this right, it should remain vigilant as to not be complicit, even indirectly, in conduct that would violate this right.

Right to Privacy (art. 2) is a low-risk human right for the company. There is no explicit right to privacy in Kenyan law, though the constitution provides protection against arbitrary search and entry. The police may enter premises without warrants, but in general obtain warrants. Privacy International reports that the government maintains a network of informants to monitor the activities of the opposition and human rights advocates. Nevertheless, improvements have been noted, and there are fewer infringements of this right as the police and intelligence services continue to professionalize and modernise. It is important, due to the personal and confidential nature of information in the possession of the company that it remains cautious to avoid direct and indirect violations of this right.

Right to Freedom of Movement (art. 13) constitutes a low-risk right for the company. The constitution recognises the freedom of movement. Asylum seekers, however, are restricted to designated refugee camps and Kenya has no laws providing for asylum seekers or the provision of refugee status. The movement of migrants from rural to urban areas has caused congestion, unemployment and a number of social problems in the big cities, exacerbated by the lack of adequate government response to this trend. This right invites the involvement of other rights, including the right to life, liberty and security of person and the right to freedom from forced labour and servitude. It is critical, therefore, that the company avoid liability for conduct that will involve the violation of any of such implicated rights, while ensuring the free movement of its employees.

Right to Freedom of Opinion, Expression, Thought, Conscience and Religion (art. 18, 19) is a low-risk human right for the company in Kenya. Kenyan law recognises this right. Limitations of freedom of expression are common, particularly in regard to media censorship. Journalists report being harassed, threatened and beaten by security forces, and have been arrested for their publications. Nevertheless, the media remains mainly independent, and the international media operates freely in Kenya. The right to religious freedom is generally respected by the government, though the Muslim



community is marginalized in Kenyan society. Although the risk to the company is not severe, the company must take care to not violate this right by restricting freedom of expression, or by discriminating or perpetuating discrimination among employees or in hiring practices.

