Draft Report

on

Environmental Issues Arising in the Context of Business and Human Rights

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1. INTRODUCTION

The last three decades or so have witnessed increasing calls for responsible corporate behavior in the context of sustainable development. These calls are coming from diverse sources, including investors, insurers, environmental interest groups, financial institutions, and international trading partners.¹ A large majority of firms - especially in the industrialized nations of North America, Europe and Japan - are embracing environmental protection as part of their international competitive strategies. In these countries, the shift to proactive environmental management is driven by pressures from governments, customers, employees, and competitors. Some countries are fast achieving a level of equilibrium in the discourse, where both consumers and investors are beginning to see more clearly the relationship between business performance and environmental quality.

But the trend toward proactive environmental management is not merely a preserve of the developed North; it is being accelerated by public pressures on governments to assure a cleaner environment almost everywhere in the world. This has ensured that government regulations are increasingly becoming more stringent, ensuring that legal liabilities for environmental damage become more burdensome, even as customers become more demanding. But, more importantly, there is growing evidence that firms that adopt proactive environmental management strategies become more efficient and competitive. In many countries, the public has become more vocal in demanding responsible environmental performance as incomes rise and education spreads.²

Against this backdrop, the United Nations Human Rights Council endorsed the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" in 2011. This framework consists of the state duty to protect against human rights abuses; the

¹ Proactive corporate environmental management: A new industrial revolution by Michael A. Berry and Dennis A. Rondinelli and available at http://amp.aom.org/content/12/2/38.short

² ibid
corporate responsibility to respect human rights; and greater access by victims to effective remedies.³

Under the framework, the State has a duty to protect against human rights violations committed in its territory and/or its jurisdiction by third parties, including companies/businesses. Therefore, appropriate measures should be taken to prevent, investigate, punish and remedy such abuses through appropriate policies, modification of norms, and mechanisms for access to justice. Within the framework of the duty to protect, states are required to:⁴

• Implement laws that have the purpose or effect of requiring companies to respect human rights and periodically assess the suitability of such laws and address gaps.

• Ensure that other laws and policies governing the creation and continued operation of commercial enterprises, such as corporate law, do not limit, but allow companies to respect human rights.

• Provide effective guidance to companies on how to respect human rights in all their operations.

• Encourage and, where appropriate, require companies to communicate how they address their human rights impacts.

This paper provides a framework within which the challenge of reconciling business and the observance human rights in Kenya can be achieved.

2. BUSINESS, HUMAN RIGHTS AND ENVIRONMENT NEXUS
Companies, and businesses at large, have the potential of impacting the entire range of human rights issues either positively or negatively. But environment is the one field that receives immediate and direct consequences of business activities. The production and supply of both goods and services have environmental consequences. Every business activity uses energy and generates


waste of one form of another which is released into the environment, with potential impacts on human rights. It is for this reason that the environment has become an important subject in global human rights agenda.

In his first report, the UN Special Rapporteur on Human Rights and the Environment stated that one “firmly established” aspect of the relationship between human rights and the environment is that “environmental degradation can and does adversely affect the enjoyment of a broad range of human rights.”\(^5\) According to the Human Rights Council of the UN (Resolution 16/11), “environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights.” This is in consonance with the findings of the 2005 Millennium Ecosystem Assessment (MEA)\(^6\) that “... Everyone in the world depends completely on Earth’s ecosystems and the services they provide, such as food, water, disease management, climate regulation, spiritual fulfillment, and aesthetic enjoyment.” The MEA goes further to note that over time, humans have changed these ecosystems more rapidly and extensively than in any comparable period of time in human history, largely to meet rapidly growing demands for food, fresh water, timber, fiber, and fuel. The effect has been substantial net gains in human well-being and economic development but, as MEA argues, the benefit has not been universal, and has harmed many people, with the full costs of this transformation only becoming apparent. This results in an inequitable outcome that does not concur with the global human rights structure, that at the very core, aims to attain equality for all people (including through progressive realization).

In the wake of major abuses in recent decades, civil societies in most parts of the world have increasingly called for companies to be held to human rights standards. For instance, Union Carbide was widely denounced for the 1984 Bhopal chemical gas leak that killed thousands in India. Similarly, movements against human rights abuses by mining, oil and gas companies, as well as complicity by government security forces in cases of pollution that damage the

\(^5\) A/HRC/22/43, para. 34.
health of people in nearby communities are increasingly attracting condemnation from CSOs and human rights bodies.

As a result, many companies have started integrating human rights agenda in their business strategies as they seek to align themselves with acceptable business standards and social issues through their corporate social responsibility (CSR) programmes. The downside to this approach is that many CSR initiatives are undertaken selectively based on what the company voluntarily chooses to address. On the other hand, a human rights approach requires companies to respect all human rights; they do not have the option of picking and choosing to deal with only those issues with which they feel comfortable. A human rights framework provides a universally recognized, people-centred approach to companies’ social and environmental impacts.7

Some of the more prominent issues of concern in the business-environment-human rights nexus include:-

**a) Environmental protection would lead directly to less employment**

There is great concern among corporates and the general public alike that the implementation of certain stringent environmental protection policies may lead to direct loss of employment and even shutting down of certain businesses in extreme cases. A good example is the current ban on plastic bags in Kenya which has got many stakeholders lauding and criticizing the move in equal measure.

**b) Industrial waste**

Many businesses produce a lot of non-biodegradable industrial waste which automatically pollute the environment in one way or the other.

**c) Disposal of industrial waste**

There are no proper mechanisms of disposal of the waste products from businesses especially in developing countries like Kenya. This situation is made

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worse by the fact that many businesses opt for the cheapest methods of disposing their waste even if it means polluting the environment.

**d) Air emissions**
A lot of industries emit dangerous gases to the atmosphere especially those that do not have proper facilities to trap such gases for purification before emission into the air. This menace has led to widespread air pollution which mostly affects the communities staying around industrial plants and which has caused such populations to suffer many respiratory diseases and even acquire chronic carcinogenic ailments.

**e) Water pollution**
Most businesses dump their waste in water bodies, especially rivers and lakes, as a quicker and cheaper way of waste disposal. This has caused a lot of water pollution and disruption of aquatic ecology.

**f) Soil pollution**
Dumping dangerous, non-biodegradable waste products into the soil or on land has caused a lot of degeneration of the quality of soil.

**g) Lasting Health issues**
The poor manner in which waste products from industries are handled has caused a lot of health issues which can be directly linked to environmental pollution. Communities staying around such industries or around their waste dumpsites are mostly affected.

**h) Social conflicts due to impact on human rights and the environment**
When communities feel the negative effects of poor company practices that negatively affect the environment, conflicts arise due to the conflicting interests of the companies to maximize profits and of the community to live in a safe environment.
Therefore, businesses should not ignore the effects that their operations may have on the society and the natural environment. Quite simply, our business practices are destroying life on earth. Given current corporate practices, not one wildlife preserve, wilderness, or indigenous culture will survive the global market economy.\(^8\)

### 3. LEGAL AND POLICY FRAMEWORK RELATING TO BUSINESS, HUMAN RIGHTS AND ENVIRONMENT

The role of business enterprises as specialized organs of society performing specialized functions, require to comply with all applicable laws and to respect human rights. Various instruments and case relevant to Kenya embody business and human rights obligations on the environment. They include the Constitution, international law, national laws and case law.


There is a diverse array of provisions on environmental protection in the constitution. Some environmental issues are explicitly addressed while others are implicit. The express ones include for example the right to a clean and healthy environment in Articles 42, 60, 69 and 70 of the Constitution. The implicit ones include for example, the right to life\(^9\); the economic and social rights entitling every person inter alia the right to the highest attainable standard of health, freedom from hunger, to have adequate food of acceptable quality and to clean and safe water in adequate qualities;\(^10\) the protection of the right to property;\(^11\) protection of the rights of minorities and marginalized groups amongst others.\(^12\)

Article 42 states that every person has the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures.

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\(^9\) Article 26 of the Constitution

\(^10\) Article 43

\(^11\) Article 40

\(^12\) Article 56
Article 69 (2) obligates every person to cooperate with the State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. This provision guarantees the right to a clean and healthy environment through the application of preventive and precautionary measures (principles) and other international instruments. These principles have been accepted as part of the general rules of international law and thus form part of the Kenyan law by virtue of Article 2 (5) and (6) of the constitution.

Principle 15 of the Rio Declaration provides in part that, “In order to protect the environment, the precautionary principle shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

The precautionary principle has the element of anticipation and preparedness to counter environmental harm by taking effective measures before damage has actually occurred so as to reduce, limit or control activities likely to cause or risk damage to the environment by means of appropriate policy, legal, administrative and other measures.

Article 70 (1) provides that one may apply to court for redress if the right to a clean and healthy environment under Article 42 has been, is being or is likely to be denied, violated, infringed or threatened. Article 70 (1) thus gives every Kenyan access to a court of law to seek redress in environmental matters without the hitherto restrictive locus standi requirements.

3.2. International Law Protection of the Environment

(a) **Universal Declaration of Human Rights**

Article 2 of the Universal Declaration of Human Rights (UDHR)\(^\text{13}\) which recognizes that:

“Everyone is entitled to all the rights and freedoms …, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

(b) **International Covenant on Economic Social and Cultural Rights**

Article 2 of the Covenant states that:-

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Further, Article 12(1)(b) of the Covenant provides that State parties to the covenant should take measures for “the improvement of all aspects of environmental and industrial hygiene” as part of the measure to secure the right to the “enjoyment of the highest attainable standard of physical and mental health.”

(c) **Convention on the Rights of the Child**

Article 24(1) provides for the children’s right to the enjoyment of the highest attainable standard of health. Consequently, State parties are required to take appropriate measures to take into “consideration the dangers and risks of environmental pollution” in accordance with Article 24(2)(c).

(d) **African Charter on Human and Peoples and Rights (ACHPR)**

The African Charter on Human and People’s Rights also contains important provisions linking human rights and other key aspects of life. Its Preambular paragraph states:-

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception, as well as
universality and, that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

In the above quoted text, the ACPHR recognizes that each right possesses a corresponding duty, and affirms that it is imperative to take into close account the right to development, and its close association of both civil, political, economic and social rights. This recognition is inherent in the American Convention on Human Rights,¹⁴ which at article 1 mirrors the UDHR in universal recognition of human rights and the obligation for their respect by State Parties.

Article 24 of the ACPHR provides for a universal right for all peoples to “... a general satisfactory environment favorable to their development.” In addition to the explicit linkage of this environmental right to the question of development, this right is juxtaposed together with other rights dependent on it, such as the right to life (Art.4).

It is worth noting that Kenya is a Party to a number of many other important international conventions and treaties with important implications for the protection of environment and human rights. By dint of Article 2(6) of the Constitution, these treaties and conventions are part of Kenyan law. Similarly, the general rules of international law are part of Kenyan law as stipulated under Article 2(5) of the Constitution.

In addition, Kenya has supported many key non-binding declarations on the protection of the environment, biological diversity and cultural heritage and is an important global player that also hosts the headquarters of the United Nations Environmental Programme (UNEP):¹⁵

- World Charter of Nature (1982)- secures nature from degradation caused by conflict and other hostilities;
- The Forest Principles, 1992- provides a framework within which states can benefit from their forests resources but within a framework of forest protection, management and conservation;
- Agenda 21, 1992- addresses the challenge of combating poverty, hunger, ill health, illiteracy and deterioration of ecosystems;

¹⁵Kenya National Baseline assessment on Business and Human Rights 2017 (Draft), p.16
• Rio Declaration on Environment and Development- sought to balance the need for development and environmental conservation;
• Convention on Biological Diversity (notably adopted in Nairobi in May 1992)- aims to promote conservation of biodiversity, its sustainable use and the question of sharing benefits arising out of utilization of genetic resources;
• Convention on Wetlands of Importance (1972)- provides a framework to inform state parties legal framework on wetlands conservation and use;
• African Convention on the Conservation of Nature and Natural Resources, 2003- provides for the conservation and wise use of forests and other important habitats;
• Convention to Combat Desertification, 1994- provides a framework for addressing the threat of desertification;
• Framework Convention on Climate Change, 1992 and subsequent COP conferences are concerned about stabilization of greenhouse emissions.

3.4. Domestic Legislation

Kenya has a large body of environmental legislation covering virtually every important sector, including water, energy, agriculture, forests and fisheries. This sectoral approach to environmental legislation is primarily a legacy of the colonial command and control approach to environmental protection. This often leads to overlap of institutional mandates and conflicts in the management of the environment sector. Over the years, the sectoral laws have witnessed several piecemeal amendments to meet the ever-increasing environmental challenges and infuse new environmental management concepts. More recently, the laws have undergone substantive revisions to align them with the new Constitution. We cannot examine the full body sectoral environmental laws in this paper. We propose to focus on in more detail on only the framework environmental law called Environmental Management and Coordination Act and the recently enacted Climate Change Act.

(a) Environmental Management and Co-ordination Act, 1999
(EMCA) as read together with the Environmental Management and Coordination (Amendment) Act, 2015 is the key framework law on environmental matters in Kenya.\textsuperscript{16} It establishes institutions at both the national and county levels that are charged with the responsibility of implementing the Act. The National Environmental Management Authority (NEMA) has the authority to develop regulations, prescribe measures and standard to be observed in furtherance of its environmental protection mandate. Under the Act, county governments are permitted to enact legislation to give effect to the provisions of the Act or the constitution. Section 29 established the County Environmental Committee that includes stakeholders in the county among them the local business community. The committee is “responsible for the proper management of the environment” in the county. Under EMCA, the tools available for use in protecting the environment include Environmental Impact Assessments, Environmental audit and monitoring, and issuance of environmental restoration or conservatory orders and easements. The law requires that businesses conduct an environmental impact assessment before commencing operations. For instance, before construction of a commercial residence, one is required to seek NEMA’s approval by submitting an EIA.

\textbf{(b) Climate Change Act, 2016}

Enacted in 2016, the Climate Change Act sets forth the “regulatory framework for enhanced response to climate change; to provide mechanisms and measures to achieve low carbon climate development…”\textsuperscript{17} It provides for the formulation of a National Climate Change Action Plan, which may include measures and mechanisms “to review and recommend duties of public and private bodies on climate change.” It also establishes the National Climate Change Council as the key mechanism to operationalize. Among its functions, the Council mandated to “impose climate change obligations on the private entities, including periodic reports on the status of their performance of their duties and obligations.”

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\textsuperscript{16} Kenya National Baseline assessment on Business and Human Rights 2017 (Draft), p.17
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\textsuperscript{17} Ibid
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This Act is still fairly new and yet to be operationalized. However, it offers a significant opportunity for the State to regulate business practices that may aggravate climate change, and at the same time promote policies that encourage businesses to embrace climate change adaptations strategies.

3.5. Case Law

Judicial decisions are becoming an importance reference point in the emerging jurisprudence on business, human rights and environment. National and international judicial and quasi-judicial bodies are increasingly validating and clarifying the nexus between classical human rights, such as right to life, and environmental rights, as well as the right to development aspirations of business, the rights and duties to ensure a clean and healthy environment. This is illustrated in the caselaw provided below.

(a) Social and Economic Rights Action Centre (SERAC) and Another v Nigeria case

The African Commission on Human and Peoples Rights, established under the ACHPR, in considering the nexus in the Social and Economic Rights Action Centre (SERAC) and Another v Nigeria case,\textsuperscript{18} ruled that the right to ‘an environment satisfactory to development’ in the African Charter imposes clear obligations upon a government to protect the rights of people by preventing pollution and ecological degradation, promoting conservation, and securing ecologically sustainable development and use of natural resources.\textsuperscript{19}

(b) Social and Economic Rights Action Centre (SERAC) and Another v Nigeria case

In the seminal case of Oposa v Factoran,\textsuperscript{20} from the Philippines the court observed as follows concerning the link between ecological rights and present and future rights to life: “As a matter of fact, these basic rights need not even be


\textsuperscript{19} Ibid at 330 & 336, para 52.
written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second.... “

(c) Shehla Zia v. WAPDA

In the case of Shehla Zia v WAPDA, where petitioners had apprehension against the construction of a grid station in a residential area, the Supreme Court of Pakistan, upholding Article 9 of the Constitution of Pakistan, explained that the word life could not be restricted to the mere existence from conception to death. In its view, the Court held that “life” must be given a wide meaning to include proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment.

(d) Peter K. Waweru v Republic

The case of Peter K. Waweru v Republic involved a prosecution against a property developer for disposal of sewerage waste into the (Kiserian) river contrary to the Public Health Act. Examining the case against the backdrop of sustainable development principle and human rights, and High court reiterated that:

“... the act of balancing the rights of the [Kiserian] town developers with those of their brethren living along downstream [Kiserian] river does involve the application of the principle intragenerational equity or environmental justice. Intragenerational equity involves equality within the present generation, such that each member has an equal right to access the earth’s natural and cultural resources. In our view this includes the balancing of the economic rights of the town dwellers

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21 P L D 1994 Supreme Court 693
with the rights of the down-stream dwellers to use unpolluted water. If the balance is achieved, the chances of achieving inter-generational equity shall have been enhanced.

4. ISSUES, ANALYSIS AND IMPACTS

Despite a formidable body of legal and policy instruments, Kenya remains at crossroads in terms of managing a wide range of environment and human rights challenges relating to business. This has prominently emerged during the recent stakeholder consultations undertaken by a team officers from Office of the Attorney General in the Department of Justice, the Kenya National Commission on Human Rights, and Office of the Kenyan office of the High Commissioner for Human Rights as part of the process of developing a national action plan on business and human rights for Kenya. We examine below some of the salient issues that stand out for consideration in the action plan.

4.1. Pollution

Pollution is a key environmental challenge in Kenya. It gravely affects the quality of air, land and water. Air pollution from industrial and domestic sources is a leading cause of respiratory diseases such as chronic obstructive pulmonary disease (COPD), lung cancer, pulmonary heart disease, and bronchitis thereby adversely impacting the health of citizens. Many business, factories and vehicles entities do not adhere to acceptable regulatory standards for emission of pollutants. The effects of outdoor air pollution are compounded by those of indoor air pollution. Most households use charcoal and firewood for domestic cooking. Indoor air pollution affects both urban and rural populations.

Increased industrial activity witnessed in the recent past, particularly in the extractive, agricultural and manufacturing sectors, have exacerbated the problem of pollution. In Turkana, for example, local communities have taken great exception to the environmental damage arising from ongoing oil exploration. Concerns are being raised about decimation of indigenous vegetation, trees and grass by earth moving machines, trucks and oil spills from tankers owned by oil exploration companies and their service providers. This further undermines livelihood options for the local people who depend on the vegetation, grass and
trees for their survival. In particular, local residents complain that there has been an increase in respiratory-related ailments in Lokichar area since the discovery of oil. In addition, communities have lost access to their genetic resources as a result of pollution.

Related problems of pollution and environmental damage have been witnessed or threatened in many other parts of the country such as Baringo, Lamu (Total), Nyakach in Kisumu (Tullow) and Kwale (Base Titanium) during exploration and extraction of minerals. They also occur during implementation of Vision 2030 flagship projects such as the Standard Gauge Railway (SGR), Galana-Kulalu Irrigation Project in Tana River, as well as construction of major roads and energy infrastructure projects (Turkana Wind Firm).

In addition, transport of all kinds – sea, water and air – pose serious pollution problems. The same applies to industrial production and use of chemicals, goods such as batteries, and other goods (salt). This has mainly been witnessed in coastal Kenya. The case of environmental damage and human rights violation in salt mining industry in Malindi is well documented, including by the KNHRC. Agriculture (dominion) and municipal (Mombasa and Kisumu) waste are also critical sources of land, air and water pollution in Kenya.

Noise pollution is also a big problem. Exposure to high levels of noise can result in significant adverse health impacts. The most important is loss of hearing acuity caused by repeated exposure to high noise levels. Noise levels can result in hearing damage are quite loud and significantly interfere with communication. Commercial transportation and social activities within or close to residential areas also form an important category that includes both noise from the activities themselves such as discos and that of associated machinery.

### 4.2. Water and Sanitation

Water scarcity and poor sanitation are serious challenges in Kenya. Poor water quality and a lack of basic sanitation continue to undermine efforts to end extreme poverty and disease in the country. The country is also sewerage systems and waste water treatment plants experience inadequate operation and maintenance and low connection rate to sewers. Mixing industrial effluent and
domestic sewage in mixed sewer system often causes poor performance in pond treatment systems. Cases of pollution by wastewater emptying into storm sewers, soak-ways and cesspits designed for kitchen waste are commonplace. Access to clean drinking water and basic sanitation facilities could transform the lives of millions in the citizens, prevent thousands of deaths and free up hours each day for women and children to go to work or school.

4.3. Solid Waste Management
Inefficient production processes, low durability of goods, and unsustainable consumption and production patterns lead to excessive waste generation. Despite efforts to encourage reuse, recycling and recovery, the amount of solid waste generated remains high and appears to be on the increase. In addition to solid wastes, wastewater effluents represent one of the largest threats to the quality of Kenya’s waters. Wastewater often results in increased nutrient levels leading to algal blooms and depleted dissolved oxygen resulting in destruction of aquatic habitats. Other categories of wastes that require special consideration are waste, military wastes and clinical wastes. Spills from oil tankers can devastate coastal and marine ecosystems. The situation has been recently exacerbated by generation of large quantities of ewaste.

4.4. Toxic and Hazardous Substances
Toxic and hazardous substances are widely used in Kenya particularly in the agricultural and industrial sectors. This mainly happens in large agricultural establishments. Most of these substances end up contaminating soils and water bodies, causing eutrophication and destroying aquatic life (such as fisheries) and biodiversity, including traditional agricultural crops and vegetation. In addition, exposure to these substances is likely to produce chronic and acute effects. Like many other countries in Africa, Kenya is vulnerable to illegal dumping of obsolete and banned toxic and hazardous substances.

4.5. Loss of Biodiversity
Kenya is well-known as one of the of the world’s mega diverse countries in terms biodiversity. Its weal od biodiversity contributes to a wide variety of environmental services. These include regulation of the gaseous composition of
the atmosphere, protection of coastal zone, regulation of the hydrological cycle and climate, generation and conservation of fertile soils, dispersal and breakdown of wastes, pollination of many crops, and absorption of pollutants. The biodiversity supports many of its key industries such as tourism and agriculture. It also provides the backbone of economic activities and livelihood support for the majority of Kenya’s poor rural communities. Kenya’s biodiversity provides genetic resources for food and agriculture, and therefore constitutes the biological basis for food security and support for human livelihoods.

However, Kenya continues to experience loss of biodiversity at an alarming rate. This is caused by several drivers, key among them being poaching, climate change, pollution, unsustainable harvesting of natural resources, unsustainable patterns of consumption and production, and introduction of invasive and alien species. Such invasive and alien species as *Prosopsis juliflora*, *Eichornia crassipes*, and *Lantana camara* constitute major threats to biodiversity in Kenya.

5. RECOMMENDATIONS FOR ACTION ON BUSINESS AND HUMAN RIGHTS IN RELATION TO THE ENVIRONMENT

5.1. Protect the Right to Clean and Healthy Environment

Although the right to clean and healthy environment is protected under the Bill of Rights and several Environment Management and Coordination Act, it is yet to be appreciated fully as a fundamental human right in day-to-day practice. As a result, the enforcement of the environmental right remains fairly skewed against victims of human rights relating to environmental damage. Human rights bodies remain steeped in the narrow confines of the well-established human rights and freedoms – such as life, property, religion, and assembly. Enforcement of human rights relating in relation to the environment is often viewed as a hindrance to much-needed economic development.

**Actions**

- Review sectoral legislation to harmonize with the constitutional right to a clean and healthy environment.
- Review and mainstream the environmental right into the official functions and terms of reference of human rights bodies.
Train judicial and quasi-judicial human rights and law enforcement institutions on the nature and scope of the right to a clean and healthy environment.

**5.2. Institutionalize Environmental Procedural Rights**

The Rio Declaration aptly captures the essence of what is now fondly referred to as the participatory principle. Principle 10 states that:-

"Environmental issues are best handled with participation of all concerned citizens, at the relevant level.... In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

Kenya has undertaken some critical steps in the right direction towards institutionalizing the participatory principle. Public participation is recognized as a key value of Governance under article 10 of the Constitution. Indeed, the move to devolve governance in Kenya was primarily intended to enhance participation of the citizenry in the determination of decisions that affect their lives. Article 69(1)(d) of the Constitution enjoins the government to “encourage public participation in the management, protection and conservation of the environment.”

The right to information is also protected under Article 35 of the Constitution. Similarly, Article 70 of the Constitution protects the rights of access to justice in environmental matters. The establishment of the Environment and Land Court under Article 162 Constitution as well as the Environment and Land Court Act are also critical achievements towards improving access to justice in environment matters. However, there is still need and room to work towards institutionalizing environmental procedural rights in Kenya.

**Actions**

- Support the development of appropriate instruments (policies, laws, regulations and guidelines) on procedural rights, including public participation legislation as envisaged under Article 196 of the Constitution.
- Monitor the implementation of environmental procedural rights in accordance with national and international commitments.
- Build the capacity of relevant institutions to appreciate and institutionalize environmental procedural rights.

### 5.3. Protect Communities’ and Indigenous Peoples’ Rights

The need to protect the rights of indigenous people and local communities has become an important issue in many international and some domestic legal instruments. The International Labour Organization’s (ILO’s) Convention No. 169 Concerning Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples recognizes the rights of indigenous peoples to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination, including the right of indigenous people to work with their governments to put in place measures for ensuring that they benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; and promote the full realization of the social, economic and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs and traditions and their institutions; as well as elimination of socio-economic gaps that may exist between indigenous and other members of the community, in a manner compatible with their ways of life. This is consistent with the UN Declaration on the Rights of Indigenous Peoples which provided that indigenous peoples have the right to enjoy fully all rights established under applicable international and domestic law. According to the 2008 United Nations General Assembly Resolution on a Non-legally binding instrument on all types of forests, indigenous peoples need to contribute to achieving sustainable forest management and should be involved in a transparent and participatory way in forest decision-making processes that affect them, as

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22 International Labour Organization’s (ILO’s) Convention No. 169 Concerning Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples, article 3

23 Ibid, article 2

24 UN Declaration on the Rights of Indigenous Peoples A/61/L.67 and Add.1

25 United Nations, General Assembly Resolution on a Non-legally binding instrument on all types of forests (Sixty Second session, A/62/419 (Part I), 31 January 2008).
well as in implementing sustainable forest management, in accordance with national legislation.

Further, the CBD (article 8(j)), calls for the knowledge, innovations and practices of indigenous and local communities to be respected, preserved and maintained and customary use of biological resources to be protected and encouraged. In addition, CBD Decision 13/3 encourages Parties to make use of the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)\textsuperscript{26}, to promote to promote secure tenure rights and equitable access to land, fisheries and forests.\textsuperscript{27} The VGGT recognize that indigenous peoples and other communities with customary tenure systems on land, fisheries and forests should promote and provide equitable, secure and sustainable rights to those resources, with special attention to the provision of equitable access for women, and that effective participation of all members, men, women and youth, in decisions regarding their tenure systems should be promoted through their local or traditional institutions, including in the case of collective tenure systems.

Article 11 of the Constitution protects the intellectual property rights of Kenyans. It also calls on Parliament to enact legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage. Such legislation must also recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

**Actions**

- Support the development of appropriate instruments (policies, laws, regulations and guidelines) for the protection of the rights of local communities and indigenous peoples of Kenya.
- Train business, communities and government institutions on the value and protection of indigenous knowledge and community rights.

\textsuperscript{26} FAO, Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security (FAO, Rome, 2012)

\textsuperscript{27} CBD CoP 13 Decision XIII/3, para. 7 - Strengthening the mainstreaming of biodiversity through relevant international processes