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NATIONAL HUMAN  
RIGHTS  
INSTITUTIONS AND  
ACCESS TO REMEDY  
IN BUSINESS AND  
HUMAN RIGHTS

PART 2: FOUR COMPARATIVE  
CASE STUDIES FROM AFRICA



**NATIONAL HUMAN RIGHTS INSTITUTIONS AND ACCESS TO REMEDY IN  
BUSINESS AND HUMAN RIGHTS  
PART 2: FOUR COMPARATIVE CASE STUDIES FROM AFRICA**

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## **ABBREVIATIONS**

BHR	Business and Human Rights
CNDH	Commission Nationale des Droits Humains (Niger)
CSO	Civil Society Organisation
DIHR	Danish Institute for Human Rights
ESC	Economic, Social and Cultural
GANHRI	Global Alliance of National Human Rights Institutions
KNCHR	Kenya National Commission on Human Rights
MOU	Memorandum of Understanding
NAP	National Action Plan on Business and Human Rights
NHRC	National Human Rights Commission of Nigeria
NCP	National Contact Point
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
UHRC	Uganda Human Rights Commission
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNWG	United Nations Working Group on Business and Human Rights

# CHAPTER 1

## 1 INTRODUCTION

### 1.1 OVERVIEW

This document is part of a two-part report that examines the role of national human rights institutions (NHRIs) in facilitating access to effective remedy in the context of business and human rights (BHR). The primary objective is to identify common challenges faced by NHRIs and how these might be addressed to strengthen NHRI capacity, action and collaboration to enhance access to effective remedy for victims of business-related human rights abuses.

Part 1 of the report (“Reviewing the role and practice of NHRIs”) presents an analysis of the role and practice of NHRIs regarding access to remedy in BHR, based on analysis of 2019 survey data gathered by the United Nations Working Group on Business and Human Rights (UNWG), as well as a review of the literature relevant to the topic. Part 2 (“Four comparative case studies from Africa”) presents four NHRI case studies from the African region (Kenya, Niger, Nigeria and Uganda) and a comparative analysis examining key practice challenges and recommendations, as well as corresponding opportunities for further research. The executive summary captures key points as well as outlining 10 topic areas with concrete policy recommendations that can be implemented by states, NHRIs and other actors to strengthen the ability of NHRIs to contribute to access to effective remedy for business-related human rights abuses.

### 1.2 CONTEXT

NHRIs have an important role to play in supporting remedy of business-related human rights abuses. This role has been noted in key frameworks and initiatives, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs), the current Action Plan of the Global Alliance of National Human Rights Institutions (GANHRI) BHR Working Group and the 2018 United Nations General Assembly Resolution on improving accountability and access to remedy in BHR, which calls out “the important role of national human rights institutions in supporting activities to improve accountability and access to remedy for victims of business-related human rights abuse, including through supporting the effective implementation of the Guiding Principles on Business and Human Rights.”<sup>1</sup>

Effective access to remedy remains a key gap in BHR. While attention to the role of NHRIs in the field of BHR has increased substantially over the years, including in relation to the role that NHRIs can play in relation to remedy, research in this area remains limited. In this context, the primary objective of this report is to identify common challenges faced by NHRIs and how these might be addressed to strengthen NHRI capacity, action and collaboration to enhance access to effective remedy for victims of business-related human rights abuses.

For further elaboration of the objectives and context, see Part 1 of the report.

### **1.3 THE CASE STUDIES**

The four case studies presented here were written in collaboration between the respective NHRIs and the DIHR, informed by publicly available information as well as interviews with select NHRI staff and relevant external stakeholders. On-site interviews and data collection was undertaken in Kenya and Niger, while other interviews were conducted remotely. A short methodology overview for each of the case studies is provided in Annex A (see separate document).

The case studies were selected on the basis of the following criteria: (1) tangible activities of the NHRIs in the field of BHR; (2) GANHRI A-status listing of the NHRIs; (3) existing DIHR contacts and established relationships with the institutions; and (4) the NHRIs' interest and availability to participate in the project.

To ensure consistency in the collection and analysis of the data as well as translation of the findings into meaningful policy recommendations, the authors took the structure of the UNWG questionnaire as a reference point. A comparative analysis of the findings from the four case studies is presented in Chapter 3, drawing also on the perspectives gained through the analysis of the written answers provided by the NHRIs to the 2019-issued UNWG questionnaire.

# CHAPTER 2

## 2 NHRI CASE STUDIES

This Chapter of the report presents four case studies exploring the different approaches taken by select NHRIs in the African region (Kenya, Niger, Nigeria and Uganda) to apply their Paris Principles mandate in the area of BHR, specifically focusing on access to remedy for business-related human rights abuses.

### 2.1 KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

#### 2.1.1 MANDATE

##### 2.1.1.1 Complaints, investigations and inquiries regarding BHR

The Kenya National Commission on Human Rights' (KNCHR's) constitutive law, the KNCHR Act 2012 in Section 8, provides among the functions of the Commission to "(b) promote the protection and observance of human rights in public and private institutions; (c) monitor, investigate and report on the observance of human rights in all spheres of life in the Republic". Section 29 (1)(b) provides that the Commission can investigate any human rights related matter in a public or private institution based on a complaint or on its own volition. All the above give KNCHR an explicit mandate to handle allegations of business-related human rights abuses.

According to the Constitution (Article 59(3)), every person has the right to complain to the Commission alleging that a right or freedom has been "denied, violated or infringed, or is threatened". The Commission has the mandate to address these individual complaints. These are received by the complaints department and categorised into economic, social and cultural (ESC) rights, and civil and political rights. Statistics on the types of complaints received are regularly kept. Furthermore, in 2019 it was decided that a new 'BHR' category of complaints would be included in the complaints management system. As such, there are no statistics to date on how many complaints relate to BHR but it will be possible to track this going forward. However, reportedly, to date the majority of the complaints received that relate to the topic of BHR concern labour rights. The KNCHR Act identifies conciliation, mediation or negotiation as

the means that the Commission can apply to resolve complaints (Section 29(2)). Where this fails, the Commission may make recommendations as it deems fit (Section 29(3)).

Additionally, the Commission has the mandate to initiate an inquiry where it considers this necessary, given the nature of the complaint (Section 33). Public inquiries are usually undertaken where human rights abuses are symptomatically widespread, including where these relate to business activities. In this regard, the Commission has undertaken two public inquiries relating to BHR and has made a number of recommendations to the state ministries and agencies and companies involved, as well as other relevant actors. These are the 2006 inquiry on salt mining in Malindi (including a follow-up audit published in 2018) (see Box 1, below) and the 2016 inquiry on mining activities in Taita Taveta.<sup>2</sup> The public hearings during an inquiry “shall be open to the public, except where the Commission otherwise decides” (Section 38). Pursuant to the KNCHR Act, the Commission is required to make a report to the state organ, public office or organisation to which the investigation relates, after concluding the inquiry (Section 44).

The Commission has extended powers and tools to support its investigations. According to Section 26 of the KNCHR Act, the Commission may:

- “conduct audits of any public or private institution to establish the level of compliance with the Constitution with regard to integrating the principle of equality and equity in its operations; and
- require any public or private institution to provide any special report on matters relating to the institution’s implementation of the principle of equality and equity including gender equity.”

During its investigations, the Commission may, as a court:

- “issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;
- question any person in respect of any subject matter under investigation before the Commission; and
- require any person to disclose any information within such person’s knowledge relevant to any investigation by the Commission” (Section 27).

In addition, the Act (Section 26(e)) foresees that the Commission may by order of the court, “enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission and in particular, for the purpose of obtaining information,



inspecting any property or taking copies of any documents, and for safeguarding any such property or document.”

Furthermore, the Commission may instigate Public Interest Litigation cases *suo moto*, seek leave of the court to join a case as an interested party, and be invited by the court to submit an opinion as a “friend of the court” (*amicus curiae*). To date, the Commission has used these powers in the realm of BHR on the topic of unfair dismissal only. The Commission also has referral powers to prosecutors and/or courts. Section 41 of the Act provides: “The Commission may, upon inquiry into a complaint under this Act take any of the following steps – (a) where the inquiry into a violation of human rights or negligence discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons.”

**Box 1: Kenya National Commission on Human Rights 2006 inquiry into salt mining in Malindi district and 2018 follow-up audit**

In 2006, the Commission undertook an inquiry into salt mining in Malindi district. The inquiry concerned allegations that salt manufacturing companies committed human rights abuses against the community, in collusion with public institutions, including: evictions from land that belonged to communities; health complications from salt manufacturing; abuses of workers’ rights; role of police and provincial administration in harassment of residents; and environmental degradation.

Key findings and recommendations included:<sup>3</sup>

- Land
  - The government leased their land to salt manufacturing companies without ensuring that the people had recourse to other settlements. It was therefore recommended that the government should make an inventory of communities/descendants; and that the process of adjudication be re-opened to allow indigenous communities to present claims to their land.
  - Companies had been breaching the terms of their grants. It was therefore recommended that companies that had breached the terms of their grants should be legally penalised; and that rates paid by salt companies should be revised according to the current value of the land.
  - Compensation for the communities was not sufficient for the land the companies were acquiring. Adequate compensation for

- communities was therefore recommended; as well as that the government review the framework used for crop compensation.
- Settlement schemes were fraught with corruption, well-connected individuals were allocated the land. It was therefore recommended that the government establish new settlement schemes for landless indigenous communities.
  - Public administration (Provincial Administration and Police)
    - Police and provincial administration destroyed property while evicting community members from the land. It was therefore recommended that the police and attorney general investigate all public officers involved and ensure prosecution where relevant.
    - Police and provincial administration colluded with salt companies to harass, arrest and intimidate community members. It was therefore recommended that a peace and reconciliation initiative between salt companies and communities be established; that public officials be investigated; and that redress be provided for those who had been arrested.
  - Labour
    - Poor working conditions without appropriate work attire. It was recommended that the salt mining companies provide appropriate clothing and ensure that they provide equipment for harvesting salt at no cost to workers.
    - Poor health and safety in the mines. Leading to the recommendation that salt companies should obtain a certificate of registration from the occupational health and safety department in order to operate; provide sanitation facilities to workers; and find more appropriate modes of transport than basins to transport salt.
    - Workers were not employed on a fulltime basis and were not given contracts, in order to pay low wages. With the corresponding recommendation that the Department of Labour should develop an acceptable common standard for measuring piece rate work for salt harvesters; that persons working on a casual basis should also be prevented from exploitation; and that salt companies should employ workers on a contractual and not casual basis.
    - Workers were found to have limited opportunity to participate in collective bargaining process. With the recommendation that companies must be bound by Kenyan laws to not deny workers the right of association.

- Government departments in charge of labour-related issues did not have sufficient resources to supervise the salt companies. It was therefore recommended that the Department of Labour and the Occupational Health and Safety Department should prepare a district-wide inspection plan to be implemented and reviewed on a continuing basis; and that the Ministry of Labour should rationalise its resources to carry out its mandate.
- The policy and legislative framework that governs labour relations was found inadequate for good labour relations. With the recommendation that the framework should be overhauled; as part of this it was recommended that the Task Force on Labour Laws established by the government in 2001 be scrutinised and enacted.
- Environment
  - Fresh water sources for the surrounding communities were found to be contaminated, forcing the communities to ferry fresh water at a greater cost. Accordingly, it was recommended that the Ministry of Water and Resource Management and the Malindi County Council should carry out a hydrological assessment to establish surface and ground water sources in the area; implement an appropriate waste water treatment system; and that salt companies be prosecuted when they discharge excess effluent into the water.
  - Mangrove trees, coastal forests, woodlands were destroyed to construct salt-harvesting ponds. It was therefore recommended that clearing of all trees should stop and a set-back line from the forests to the salt ponds be established.
  - Salt companies did not measure their environmental and social performance in annual environmental audits. With the recommendation that the National Environment Management Authority should establish environmental quality standards and strengthen capacities of key players in environmental management.
- Corporate citizenship
  - Companies had been participating in ad hoc initiatives to support community projects. With the recommendation that companies liaise with communities to incorporate these projects into long-term plans.

In 2017, the Commission collaborated with the UN Global Compact Kenya and the Kenya Association of Manufacturers (KAM) to conduct an audit to follow up on the 2006 inquiry.<sup>4</sup> The audit established that concerted efforts had been

taken towards resolving the issues identified in 2006, including efforts involving KNCHR. Key outcomes of the inquiry included that a salt sub-sector working group was formed in 2013 under the stewardship of KAM. This initiative employed an executive officer and community liaison officer to deal with issues between the salt firms and community members. It also ran a programme with the UN Global Compact to build understanding on BHR. Reportedly, in some cases corporate social responsibility programmes by the companies became more organised as a result, including increased consultation with community members. Workers' mobilisation, provision of safety equipment to workers, increased attention from government to issues of labour, health, and environmental protection were also reported as outcomes.<sup>5</sup> The presence of unregulated artisanal salt miners was found to persist. However, the audit also found that not all issues had been resolved. Noting, for instance, that "land ownership within the salt sub-sector remains a controversial matter. The audit team obtained official land documents detailing ownership by the salt companies. However, the local communities disputed the authenticity of the documents."<sup>6</sup> The National Land Commission held an inquiry in early 2016, an exercise in which the salt companies participated. However, its report had not been finalised at the time of the audit. It was also noted that "the government resettlement program of the squatters is pending and must therefore be revisited and an immediate solution found."<sup>7</sup>

Media coverage included mixed responses to both the inquiry and the follow-up audit. Some sources argued that recommendations of the 2006 inquiry had not been satisfactorily implemented. Reporting in the *Daily Nation*, Mazera Ndurya commented, for instance: "None of the recommendations has been implemented, and the community feels the exercise was just another public relations gimmick meant to hoodwink the public into believing that their problems were being sorted out."<sup>8</sup> Conflict between residents and salt mining companies over land claims were still being reported in 2018, with reports of residents demanding compensation and that the National Land Commission's intervention had not been effective.<sup>9</sup> Likewise, political reactions to the audit were mixed. Magarini Member of Parliament Kingi, for instance, dismissed the report, alleging that the KNCHR was shielding the salt firms at residents' expense, quoted as commenting: "The report on salt harvesting was a sham and we are against it. We shall continue fighting for the rights of our people who reside around the salt mining sites."<sup>10</sup>

#### **2.1.1.2 Types of remedies and their effectiveness**

The Commission is empowered to make non-binding recommendations only.

In the case of individual complaints, the first step is to call upon both parties for more information, and then following this seek a negotiated outcome through mediation or conciliation. Where an outcome is reached, this may be captured in a written agreement, however, the enforceability of the agreement then depends on the good will of the parties involved. The rule of mediation is that the parties must be willing to undergo mediation. Once convened, there are rules on confidentiality which are signed by all parties including the mediators. Agreements reached are not public but are signed by the parties and each gets a copy. KNCHR does not have powers to enforce the agreements and any information given cannot be adduced in court or any other forum. For example, in a case mediated in 2018, one party agreed that the violation cited will not recur and it had by the time of mediation worked on preventive mechanisms. Solutions provided cannot cure criminal liabilities.

KNCHR is in the process of developing regulations (rules about the process) for mediation. Currently, the Commission is guided by the general principles applicable in mediation processes. Agreements reached through mediation are not published and what is agreed upon depends on the issue at hand. In terms of limitations, the Commission cannot, for instance, require payment of compensation/reparations. A negotiated outcome mediated by KNCHR is not the same as one that can be obtained from quasi-judicial bodies as KNCHR has no quasi-judicial powers. This means a matter cannot be appealed to court but one would instead have to bring a fresh complaint to court. However, KNCHR is now awaiting the adoption of the rules and regulations that would govern quasi-judicial interventions. These were prompted by a KNCHR tribunal case which was appealed to the courts. The court nullified the ruling of the tribunal and asked that rules and regulations be formulated to ensure a Chinese wall in instances where the Commission both investigates and holds a tribunal hearing on the same matter.

Where an investigation or an inquiry has found a breach of a binding legal requirement (e.g., a local authority implementing their designated mandate, a company adhering to specific legislative requirements), this breach is brought to the attention of the relevant governmental authority for enforcement and remediation.

As an alternative, the Commission may encourage the rights-holders involved to take the case to court for enforcement. However, given the lengthy and costly process involved, as well as the adversarial nature of this course of action, this is not always advised.

Despite these limited enforcement powers, some remedies are nevertheless delivered. The relationship-building and consensus-oriented nature of mediation was noted by some interviewees as beneficial in terms of generating remedies, in particular in the case of business-related matters, where knowledge, power and positions between the parties can be very polarised. In several tourism-related cases received by the Commission, for instance, mediation reportedly yielded positive results through relationship building and finding solutions collaboratively. Similarly, in a case involving quarry blasting, some of the technical elements of the complaint (blasting and noise levels) were referred to the relevant governmental authority, in this case the National Environment Management Authority, for investigation and resolution; whereas the Commission undertook mediation for the building damage. Two cases were presented to KNCHR (Kisumu Office) alleging pollution of the environment and cracking of houses as a result of quarrying activities. KNCHR undertook investigations into the matters as well as seeking the intervention of the National Environment Management Authority. The necessary intervention by the latter yielded positive results as safeguards were put in place to minimise the effects of the blasting. Those whose houses had been damaged were compensated. As such, this case is a useful illustrative example of collaborative solution finding to achieve access to remedy for the victims. However, lack of resources for follow-up to verify the implementation and effectiveness of the remedies provided remains a key issue.

In some cases, simply by virtue of being involved early on in a complaint, the issue in question is resolved by the Commission engaging the parties in question. This has also been the case in instances involving businesses, where a call by the Commission to the business has been enough to result in cessation of the problematic conduct. In other instances, however, despite resorting to the Commission's subpoena powers, businesses have been unwilling to participate in mediation, or implement the negotiated outcomes reached through mediation. This is particularly so where the power imbalance between the business, KNCHR and rights-holders is pronounced. In one case, for instance, the business turned down engagement with KNCHR to resolve complaints brought to the Commission by the communities living around company operations but eventually opened up, following interest from the UN Working Group on BHR in the particular case. Following a site visit by the UN Working Group, the company commissioned human rights training for some of their staff. In sum, while mediation can be important in terms of relationship building between communities and companies, there is significant variance in terms of the effectiveness of remedies sought through mediation.

In terms of public inquiries, while Commission staff reported that a number of recommendations have been implemented, systematic follow-up to the inquiries has not taken place. Several media reports document dissatisfaction of community members with the low level of implementation of the recommendations, indicating the need for more systematic follow-up to inquiries. It was also noted, however, that the information from the public inquiries has been used by civil society organisations (CSOs) in court cases, to substantiate claims made. Following the 2016 Taita Taveta inquiry, for example, one of the key witnesses in a subsequent court case concerning land ownership of a community member in a mining context, used the findings of the inquiry to support the court case asserting his land rights and was awarded a remedy by the court.

#### **2.1.1.3 Accessibility, gender responsiveness and vulnerable groups**

To increase accessibility, the Commission has six offices in different locations in the country. In addition, the Commission has a strong partnership policy that allows for collaboration with CSOs and CBOs throughout the country. Through the complaints referral and coordination mechanisms, the Commission receives and refers cases as necessary. One state entity to which complaints are regularly referred is the Ministry of Labour. Complaints can be brought by individuals or groups and can be oral or written and made over different mediums such as in person, over telephone including short code SMS services, letters, email, or via the institution's website.

The Commission adopts a human rights-based approach in complaints management, for example, promoting participation of rights-holders and other parties. However, it was noted by some interviewees that more should be done in terms of capacity building regarding gender-responsive approaches and accounting for the inclusion of vulnerable individuals and groups. This should apply both to the capacity and methods used by the inquiry team itself, as well as being better reflected in the recommendations made. Notably, in 2017 the Commission published a report on women human right defenders<sup>11</sup> that includes recommendations on how to better protect them. While this is not BHR-specific, applying these recommendations in BHR-related complaints and inquiries going forward would be one way to strengthen attention to gender.

#### **2.1.1.4 Cross-border dimensions**

Section 30(c) prohibits the Commission from dealing with matters construed as pertaining to relations between the state and any foreign state or international organisations recognised as such under international law. The Commission has interpreted this as a bar to dealing with cross-border matters, i.e. the

Commission will deal with local companies registered in Kenya, rather than parent companies in other jurisdictions.

#### **2.1.1.5 Other measures taken to facilitate access to remedy, including collaboration with other actors**

Beyond the complaints and inquiry mandate, the Commission addresses access to remedy in BHR in a number of different ways, emphasising the importance of triangulating between the different NHRI mandate areas to strengthen access to remedy. For example, the Commission raises awareness among the public on their rights generally and vis-à-vis companies and available mechanisms; and with companies on their responsibilities to respect human rights. This may be through forums on BHR; referral to relevant authorities; public interest litigation; dialogues and trainings with companies; internal KNCHR capacity building on BHR; legal aid forums (KNCHR conducts legal aid clinics where it offers over the counter legal advice to members of the public, but KNCHR does not offer individual representation in court unless the case would provide jurisprudential reference); work with government on legal/justice capacity; and treaty body reporting.

Section 8(h) of the KNCHR Act requires collaboration with relevant institutions as necessary to realise KNCHR's mandate. KNCHR collaborates with all relevant ministries, departments and agencies, such as the National Gender and Equality Commission and the National Land Commission; as well as workers unions and business organisations such as the Federation of Kenya Employers, Kenya Association of Manufacturers and so forth.

The Commission also has the mandate to ensure compliance by the state with its international obligations. One way through which states fulfill this obligation is by domesticating international obligations. As part of its advisory role, the Commission advises the state on legislation and thus has the potential to shape company obligations and consequences for human rights abuses. Furthermore, some of the recommendations flowing from the public inquiry reports relate to the need for law review/amendments.

Interviewees explained that collaboration with different actors is a key strategy in addressing business-related matters. For example, in a case about sewerage, liaising between the National Environment Management Authority, water authorities, CSOs, the county government and the central government was an essential part of dealing with the complaint. The legal aid forums, which are delivered regionally and include participation by CSOs, the judiciary, different government agencies and sometimes businesses, were also noted as a key



information sharing and capacity building platform for the different actors that may be involved in business-related access to remedy.

Collaboration with CSOs was noted by the interviewees to be mixed. In some instances, reportedly there is good collaboration between the Commission and CSOs, for example, in the form of information sharing during inquiries or specific investigations, or the participation of CSOs in the Commission's activities that support complaints resolution, such as the legal aid forums noted above. In some cases, CSOs have used the Commission's inquiries and reports in court to substantiate their claims in business-related cases. However, in other instances collaboration is less effective.

Examples of collaboration with judicial remedy mechanisms were also noted by Commission staff. The Commission may be called upon to deliver an amicus opinion in court, for instance. One example of this occurred in a case against Unilever regarding post-election violence,<sup>12</sup> where the Commission submitted a letter to court in support of the claimants to substantiate the argument that Unilever "should have known" that violence might occur and take necessary precautions accordingly.

Collaboration with BHR-specific remedy mechanisms, on the other hand, has been very limited to date. For example, collaboration or engagement with project-level grievance mechanisms has not occurred, and knowledge about project-level grievance mechanisms within the Commission is limited. Collaboration with National Contact Points (NCPs) has likewise not occurred to date (noting that there is no NCP in Kenya but that collaboration with other NCPs may be possible). Involvement with development finance institutions mechanisms has been limited to one instance, where the European Investment Bank (EIB) complaints mechanism invited the Commission to participate in a meeting as an observer regarding a complaint on road infrastructure in Mombasa. As such, engagement with international financial institutions to date has been more on their environmental and social performance standards generally, rather than on access to remedy specifically.

Collaboration with UN mechanisms, home governments and sister NHRIs were noted as key opportunities that could be better utilised. For example, the 2018 UNWG country visit report on Kenya<sup>13</sup> highlighted the Kakuzi case, which the Commission had previously been aware of but had hit a dead end in addressing. Following the country visit report, pressure has been exerted on Kakuzi by the main UK shareholder Camellia PLC, and there are tentative signs that Kakuzi is beginning to reach out to external stakeholders to address the issues that have been highlighted in relation to the site. This indicates opportunities for the

Commission to collaborate closely with UN mechanisms where relevant, including to utilise reporting by these mechanisms to support access to remedy in BHR. Likewise, while the KNCHR mandate is restricted to Kenya, collaboration with sister NHRIs in specific instances, as well as on access to remedy in BHR more broadly through sharing lessons learned and ways forward, presents opportunities to strengthen access to remedy in BHR in Kenya.

### **2.1.2 CHALLENGES AND LIMITATIONS**

The Commission's mandate is largely investigative and not adjudicative. Despite the generally-worded recognition in the KNHRC Act that "the Commission shall have power to [...] adjudicate on matters relating to human rights" (Section 26(c)), the practical meaning of this is unclear. In relation to the three approaches spelled out above, i.e. conciliation, mediation and negotiation, the Commission has faced challenges in its application of these remedial mechanisms. The law is silent on, if the settlements reached or recommendations made are binding, and neither is there a mechanism for enforceability and follow-up. Furthermore, while Section 27 gives the Commission the powers of a court to issue summons requiring appearance before it, and production of documents relevant to an investigation, question any person; and/or require the disclosure of any information within a person's knowledge, the law fails to spell out immediate consequences for non-adherence to the above and the Commission's only recourse is to file contempt proceedings through the civil courts, an often long process. This virtually renders participation in the remediation process voluntary, with implications for the effectiveness of the remedies reached. Nonetheless, the Commission has ensured that staff are trained in alternative dispute resolution methods and continues to use conciliation, mediation and negotiation to bring about resolutions for various complaints. Likewise, recommendations emanating from public inquiries are also not binding and implementation thereof has been very slow.

Additionally, Section 30 limits the Commission from investigating matters that are pending before any court or judicial tribunal. While Section 31 offers some reprieve in that the Commission can investigate a matter that has been finalised, Section 30's blanket bar fails to appreciate that disputes and specifically cases of BHR-related abuses not only have legal questions for determination but are most often social conflicts that may require out-of-court settlements. Moreover, the antagonistic nature of court battles may drive parties so far apart that attempting to bring them to dialogue might be harder.

To deal with some of the legal challenges, there are efforts to develop regulations pertaining to certain sections of the Act such as public inquiries and the possibility of doing the same for Section 29(2) was also mooted. The rules

and regulations to operationalise the provisions of the KNCHR Act that give the Commission judicial powers, however, have not yet been finalised. The need to develop such rules and regulations was prompted by a court ruling following an award of damages to a petitioner by the Commission. The defendant claimed that the Commission tribunal dealing with the complaint did not act procedurally because the Commission received the complaints, carried out investigations and also presided over the tribunal and hence there was deemed to be a conflict of interest. The Court therefore directed that rules and regulations be developed to demarcate the boundaries and demonstrate a Chinese wall where the Commission both investigates and conducts a tribunal hearing on the same matter. These are now at the tail end of completion and gazettment. The other mechanism for accessing remedy is the Public Interest Litigation (PIL) Strategy being developed by the Commission, which will inform how cases are selected for litigation. The PIL Strategy has been elaborated and awaits final validation within the Commission.

Other challenges are the limited geographical reach of the Commission, human resources as well as financial constraints. For example, the Commission's reduced budgetary allocation has been noted.

Specific challenges related to engagement of business actors were also noted, including the lack of business understanding of human rights, the power disparities between businesses and communities, and the lack of engagement of businesses when approached by KNCHR. For example, in one instance KNCHR was investigating, the company under scrutiny sent junior staff members to the meeting, and only when KNCHR persisted and escalated the complaint within the business, did the business respond by sending company representatives with the necessary knowledge and authority to be involved in the investigation and complaints resolution process. Likewise, although KNCHR has the mandate to enter business premises and subpoena information and attendance of company representatives to investigations, in some instances this is ignored by businesses. Mixed experiences were reported in terms of the types of companies that were more or less likely to cooperate, with some interviewees indicating that local companies were more likely to participate, whereas others reported the experience that larger and international companies were more likely to comply.

KNCHR interviewees indicated that in other instances, companies had relied on a restrictive interpretation of Section 30, which stipulates that the Commission cannot investigate matters that are before a court or criminal matters, using this section as a blanket provision. However, some Commission staff noted that a more nuanced approach is needed that distinguishes between the different

matters at play, and that overly broad interpretations of this provision can be abused by companies to restrict the Commission's involvement.

Lack of human rights knowledge among businesses, including of the responsibility to respect and the "responsibility", rather than "duty" dimension of the human rights expectations of companies were also noted as challenges experienced in practice. The issue of political will and elite capture were also noted.

Regarding the summons power, the broad phrasing of Section 52 of the KNHCR Act ("A person who [...] fails to honour summons [...] commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both") likewise presents a challenge and the consequences of non-compliance could arguably be strengthened to ensure that they are more immediate and significant.

How to deal with scientific data in complaints and inquiries was also noted as a challenge. Commission interviewees pointed out, for instance, that business-related complaints and matters frequently involve allegations and disputes that require specific scientific evidence, such as levels of water salination or the like. Complaints involving this type of evidence can be challenging for the Commission because it does not have the scientific skills necessary in-house, nor the financial resources to commission an independent study.

The nature of some BHR-related matters also presents challenges. For example, the largely unregulated, dispersed and opaque nature of the artisanal and small-scale mining sector, which was the subject of the 2016 inquiry, presents inherent challenges that require multidisciplinary analysis, extensive resources and the involvement of many different actors to address the issues identified.

Increased parliamentary engagement was likewise noted as a challenge but also as an opportunity going forward. For instance, Commission reports, including inquiries, go to the parliament. In theory, this means that legal breaches noted in the inquiries and recommendations made should be picked up and followed up, following parliamentary presentation. This, however, does not always occur in a systematic and consistent manner, which is a key opportunity for greater engagement on access to remedy for business-related matters going forward.

### **2.1.3 RECOMMENDATIONS TO STRENGTHEN THE ROLE OF KNCHR**

Opportunities to strengthen the role of KNCHR noted include the following:

- **Mediation and public inquiry function regulations:** Specific regulations that further elaborate the Commission's function with regard to mediation and

public inquiry could help to clarify and strengthen the role of the Commission, for example, through specifying the process of public inquiries and mediation, including with regard to possible outcomes and follow-up.

- **Capacity building to strengthen gender-responsiveness, attention to vulnerable groups and the rights of indigenous peoples:** Capacity building of Commission staff involved in business-related access to remedy on gender-responsive methodologies and approaches to account for vulnerable individuals and groups could significantly enhance the Commission's approach to access to remedy in BHR. With the view to ensuring that a human rights-based approach is implemented in all matters concerning business-related access to remedy.
- **Increased collaboration with regional and international human rights mechanisms:** The positive experience of collaboration and synergies between the Commission and the UNWG in preparation of the Kenya UNWG country visit report highlights the potential for increased utilisation of regional and international human rights mechanisms to support access to remedy in BHR. For example, the Commission could ensure increased collaboration with Universal Periodic Review processes, the African Court of Human Rights, and the UNWG and other relevant UN special procedures to ensure that business-related access to remedy issues are captured in these processes. The power to refer cases to the African Court of Human Rights should be utilised where relevant.
- **Systematic follow-up to inquiries:** Undertaking systematic follow-up to inquiries to determine which recommendations have been implemented and which not, as well as to capture any intended and unintended consequences of the inquiry process, could contribute to enhance learning and promote effectiveness and progressive improvement of these.
- **Enhanced enforcement powers:** Legislative change to enhance the enforcement powers of the Commission, for instance with regard to compelling information, stakeholder appearance when summoned and implementation of mediated agreements, may contribute to strengthening the Commission's ability to address business-related matters.
- **Increased collaboration with government duty-bearers:** Increased collaboration with government duty-bearers on specific topics could contribute to enhanced access to remedy for business-related matters. For example, increased collaboration with the Office of the Attorney General on judicial learning regarding BHR, or with the Department of Justice to follow up on specific BHR cases.
- **Strengthening information sharing and collaboration with civil society, academia and think tanks/knowledge institutions:** In addition to continuing to involve civil society in inquiries and investigations, increased collaboration with civil society actors in specific instances and cases could contribute to

enhanced access to remedy for BHR-related matters. For example, making sure that publicly available information about investigations and inquiries is proactively shared with CSOs, seeking their inputs where relevant, and building alliances with CSOs that have expertise on specific themes and topics, e.g., water quality, resettlement, artisanal and small-scale mining. Seeking out new allies with specialist expertise may also contribute to enhancing business-related access to remedy, for example, collaborating with scientific institutes to establish independent analysis of environmental or other data (e.g., on-call scientists model).

- **Learning exchanges between NHRIs:** Learning exchanges between NHRIs on the topic of access to remedy in BHR, including at programme/implementation and not only policy level, can make a valuable contribution to exchange learning and experiences, including to create a knowledge base and communication channel to exchange on specific cross-border cases where relevant. Learning exchanges may also be utilised to co-develop specific tools for NHRIs, for example, a good practice guide to audits of business-related instances.
- **Legislative review and advisory work on relevant law and policy reforms:** Undertaking legislative review and providing government advisory services on human rights compatibility remains critical going forward and should always include BHR-related law and policy proposals. For example, engaging on the current public participation bill.
- **Setting expectations of businesses:** The educative and convening functions of the Commission may be further applied to BHR, with the view to strengthening access to remedy. For example, engaging businesses on access to remedy as part of their responsibility to respect, including in collaboration with allies such as the UN Global Compact local network and others, engaging with home state embassies in Kenya (i.e. embassies of countries where businesses are headquartered) to generate awareness of BHR generally as well as regarding specific instances, and further building relationships with industry associations to work collaboratively on systemic issues.
- **Building knowledge about and further utilising BHR-related remedy mechanisms:** The Commission can further build its internal knowledge of BHR remedy mechanisms, such as NCPs, international financial institutions complaints mechanisms and project-level grievance mechanisms, including reviewing how collaboration with such mechanisms might be strengthened going forward.
- **Exercise the lead agency role to review human rights content of environmental and social impact assessments (ESIAs):** ESIAAs provide critical information about specific human rights related concerns in projects early on in the development phase of business projects. As part of ensuring prevention of business-related human rights abuse, identifying issues early

and developing measures to effectively prevent and address adverse business-related impacts, the Commission can exercise its ESIA reviewer role to highlight to the National Environment Management Authority any key actual and potential human rights abuses in specific projects at the early project development phase.

## **2.2 NIGER COMMISSION NATIONALE DES DROITS HUMAINS**

### **2.2.1 MANDATE**

The Commission Nationale des Droits Humains (National Human Rights Commission, CNDH) is established under Article 44 of Niger's Constitution. Law No. 2012-44 of 24 August 2012 defines its composition, organisation and functions. The CNDH replaces the Observatoire National des Droits de l'Homme (National Human Rights Observatory), which was set up following the military coup of February 2010. Prior to that, there was the Commission Nationale des Droits de l'Homme et des Libertés Fondamentales (National Commission on Human Rights and Fundamental Freedoms), established in 1998. The 2012 Law strengthens compliance of the CNDH with the Paris Principles. In 2017, GANHRI accredited the CNDH with "A status" with comments (see sub-section 2.2.2).

#### **2.2.1.1 Complaints, investigations and inquiries regarding BHR**

Under Article 19 of the Law establishing the CNDH, it can receive complaints and conduct investigations into cases of human rights abuses and report all cases of human rights violations, without restriction, to the Government. The CNDH is also involved in human rights education and promotion (Article 20) and can "provide to the Government and the National Assembly, either at the request of the authorities concerned, or using its power to act on its own motion, opinions, recommendations and proposals on any matters concerning the promotion and protection of human rights" (Article 21).

The CNDH has broad subject-matter jurisdiction. Although the 2012 Law does not explicitly mention business-related human rights abuses, they are expressly mentioned in the Constitution of Niger. According to Article 44 of the 2010 Constitution, the CNDH ensures the promotion and effectiveness of the rights recognised in Title II of the Constitution on human rights and duties. These include a set of rights and obligations relevant to business activities: non-discrimination in the workplace (Article 33), trade union rights and the right to strike (Article 34), and the right to a healthy environment and protection of human health (Articles 35 and 37). For example, Article 35 of the Constitution specifies that "the acquisition, storage, handling and discharge of toxic waste and pollutants from factories and other industrial or artisanal facilities established on national territory shall be regulated by law. Transit, import, storage, landfill or

dumping of foreign toxic waste or pollutants on national territory, and any related agreement shall constitute a crime against the Nation punishable by law. The State shall ensure the evaluation and monitoring of the environmental impact of any development project or programme.” Article 37 imposes a direct obligation on national and international businesses “to protect human health and contribute to preserving and improving the environment.”<sup>14</sup>

Concerning the exploitation and management of natural resources and the sub-soil, the Constitution provides that, “the State shall exercise its sovereignty over natural resources and the sub-soil. The exploitation and management of natural resources and the sub-soil must be transparent, taking into account the protection of the environment and cultural heritage, as well as the safeguarding of the interests of present and future generations.”<sup>15</sup> In addition, “the State shall ensure the effective implementation of the exploration and exploitation contracts granted”<sup>16</sup> and “shall ensure investment in priority areas, in particular agriculture, livestock, health and education, and the establishment of a fund for future generations.”<sup>17</sup>

Referral to the Commission can be made by a wide range of actors: any victim as well as their beneficiaries, any association or any natural or legal person may make a referral. Applications falling outside the CNDH’s jurisdiction or pending before the courts will be deemed inadmissible. The CNDH can also use its power to act on its own motion, by decision of the Commissioners approved by simple majority (Article 32 of the 2012 Law). The CNDH has extensive powers of investigation (see the following sub-section).

The CNDH is organised into five working groups on the following themes: (1) detention and torture; (2) migration, combating slavery-like practices, racial, ethnic and religious discrimination; (3) women’s rights, children’s rights, the rights of elderly persons and the rights of persons with disabilities; (4) economic, social, cultural and environmental rights; and (5) civil and political rights. The Working Group on economic, social, cultural and environmental rights focuses, in particular, on abuses committed by businesses, concerning two main themes: (1) respect for labour rights; and (2) the social and environmental impact of the extractive industries, in particular international companies operating in Niger in the mining (uranium, gold, coal) and oil sectors.

With regard to business-related abuses, the CNDH uses four main working methods.

Firstly, the CNDH conducts investigations into complaints submitted by victims. According to the Commissioner in charge, the working group on economic,



social, cultural and environmental rights receives the highest number of complaints, in particular concerning violations falling under the scope of the Labour Code (wages, dismissals, occupational health and safety, etc.). Nine complaints against businesses were registered in 2018, and 18 complaints in 2019. Of these 18 cases, a majority concerned alleged wrongful dismissal or termination of contract. Additional cases related to the non-payment of wages and other allowances.<sup>18</sup> Many of these complaints concerned private security companies. The CNDH indicates that 14 of these 18 cases were successfully resolved through conciliation (reinstatement of employees who were unduly dismissed, payment of arrears); the other cases have either been referred to the Labour Inspectorate or are being processed. In addition to admissible complaints dealt with by the CNDH, the CNDH frequently advises and provides guidance to individuals who appear before it to raise disputes with their employees. Often in such cases, the CNDH does not ask for a complaint to be drafted and plaintiffs take their cases directly to judicial bodies or the Labour Inspectorate, as appropriate.

Secondly, the CNDH uses its power to act on its own motion, following cases brought to its attention in particular by media reports or exchanges with non-governmental organisations (NGOs), trade unions or other stakeholders. For example, in August 2019, the CNDH decided to act on the issue of dismissals announced in the context of the takeover of the activities of the phone company Orange Niger by a national provider, in order to facilitate resumption of dialogue between the company and its employees.

Thirdly, the CNDH organises annual own motion investigations into extractive industry sites.<sup>19</sup> The systematic aspect of these field work is such that the CNDH's personnel describes them as being part of the Commission's "sovereign missions". According to a Commission staff interviewed, "the objective of these missions is to verify the situation of workers' rights and the impact of industrial activities on the environment. These missions have also enabled the CNDH to raise the awareness of managers of industrial companies on respect for human rights, and to raise the awareness of workers, especially those on gold panning sites (artisanal gold mining) on the dangers of using certain chemicals such as cyanide and mercury in mineral processing." The results of these investigations are published in the CNDH's annual report, which is also presented to Parliament. The CNDH frequently also publicises a summary of its field missions and organises information sharing with CSOs and government ministries. Box 2, below, describes the 2016 investigation mission.

Fourthly, the CNDH produces thematic studies. In the framework of its partnership with the Danish Institute for Human Rights, for example, the CNDH

conducts and publishes one study each year. In 2016, this study focused on respect for human rights in two public companies: the Niamey refrigerated slaughterhouse (a public institution of industrial and commercial nature) and the Niamey Tannery (a cooperative placed under the authority of the Ministry of Tourism). A total of 72 persons were interviewed during the course of this inquiry conducted between 20 and 29 August 2016, including state duty-bearers, company managers, workers, cooperative actors and other users of the two public entities, and neighbouring communities. The study found violations of workers' rights (trade union rights, salaries, occupational health and safety issues), child labour on the sites and various negative environmental impacts. Recommendations were addressed to the Government, in particular to strengthen the efficiency of the Labour Inspectorate and monitoring by the Bureau d'Évaluation Environnementale et des Études d'Impact (Office on Environmental Evaluation and Impact Assessment). A follow-up mission was organised in 2017. The CNDH's annual study in 2017 focused on access to pastoral resources in the Tesker department and the 2018 study on the illegal occupation of pastoral lands; both studies looked at the impact of businesses on the issues addressed (pastoral land grabbing by mining companies or private ranches, for example).

**Box 2: Annual investigations on extractive industries<sup>20</sup>**

The CNDH's 2015-2016 Annual Report presented the annual investigations carried out by the CNDH on extractive industries sites. Between 17 August and 2 September 2016, a CNDH delegation led by its Chairperson, Prof. Khalid Ikhiri, visited a uranium mining company (SOMINA), as well as various gold mining sites in the Agadez, Ingall and Arlit regions. The delegation was composed of Commissioners, senior CNDH administrative and technical staff and representatives of CSOs. Before the mission, letters announcing the missions were sent to the central (Ministry of the Interior) and regional (Governors) authorities for their information.

The CNDH's approach is to assess the working conditions of employees, as well as the economic, social and environmental impact of the mining sites. The challenge is to ensure that exploitation of natural resources occurs in a way that generates economic growth and positive local development, while at the same time respecting human rights, including the right to a healthy environment.

Visit to the Société des Mines d'Azélik (Azelik Mining Company - SOMINA)

The SOMINA case (uranium mining) illustrates the dual nature of the Commissions' concerns. The SOMINA site was partly chosen for the

investigation because its operations had been suspended, leading to potential consequences for local job opportunities. On the one hand, the CNDH sought to understand the reasons for shutting down production on the site and its impact, while being cognisant of the importance of resuming production from the workers' perspective. At the same time, the CNDH sought to analyse governance conditions and the economic, social and environmental impact of the site, calling for changes in relation to a range of problematic aspects of the site's operations.

On the basis of these investigations, the findings of the CNDH report included the following: the lengthy period of cessation of operations (20 months); low Nigerien representation within governance bodies (one deputy general manager compared to four of Chinese nationality); the State's inability to guarantee its contribution as an investor (5% of the 45 billion CFA francs allocated by the State of Niger were effectively disbursed); the import from China of resources necessary for uranium mining (nitrate, salt, etc.) despite local availability; the withholding of information by Chinese interlocutors; the contamination of the region's wells and boreholes by SOMINA's activities; the loss of animals and herds poisoned by chemical spills; an open uranium quarry; the lack of road infrastructure; the lack of safe drinking water for the population; and the departure of several households from the village.

In addition to supporting workers' advocacy for restarting on-site operations, the CNDH's recommendations included the following: social development for the neighbouring population (establishing a school and a health centre, building roads, etc.); SOMINA's compliance with environmental protection conventions; use of Nigerien human resources with expertise in the area; full participation of the Nigerien party in the company's decision-making process; review of the shareholding plan in order to balance decision-making powers between the Nigerien and Chinese parties.

Although the Commission lacks the means necessary to conduct sustained follow-up to these investigations, one way of ensuring follow-up is to visit the same companies during successive missions. For example, the CNDH carried out a field mission from 13 and 22 December 2019, to investigate four companies which were previously visited several years earlier (SOMINA, SONICHAR, SOMAÏR and COMINAK), in order to assess the development of the situation.

#### Visit to the Arlit and Agadez artisanal gold mining sites

The artisanal nature of these sites raises questions about the establishment of private gold panners on specific sites (either for extraction or crushing of raw

materials, or for extraction of gold from raw materials through various chemical processes) and their supervision by state authorities. During this mission, the CNDH first interviewed the state representatives of the two regions, before visiting the sites in question.

In its findings, the CNDH's report identified several benefits, such as the development of direct and indirect job opportunities and the contribution to peace-building, however, it expressed concern over the following: non-compliance with norms and standards on artisanal gold mining; failure to control headcounts; lack of training of gold panners; absence of law-enforcement authorities on the sites; environmental pollution (contamination of groundwater tables, loss of herds, etc.) with the use of highly toxic chemical products – cyanide, mercury, etc.; use of dynamite; and an increase in petty crime.

The CNDH's recommendations included the following: speeding-up the process of establishment of gold panners on new sites, while respecting the norms and standards in force; the drafting of a charter by the authorities and gold panners on gold mine exploitation; issuing licences for mining operations; ensuring the security of gold mining as well as that of persons and their property; adopting measures to protect the environment; banning the use of dynamite; training and supervision of gold panners; construction of retention ponds in compliance with standards; use of banking services for transactions in order to avoid the handling of cash; ensuring the effective recovery of taxes, fees and charges accruing to the State and community. The report addressed its recommendations to the Ministry of Mines, the Ministry of the Interior, the Ministry of Finances and the Ministry of Trade, in particular.

#### **2.2.1.2 Types of remedies and their effectiveness**

Complaints are processed in accordance with the procedures described in the CNDH's "Practical guide on processing complaints", but also in the law governing the CNDH. According to the 2012 Law, the CNDH has an obligation to meet and confer within a maximum of 48 hours following the referral of a case. The CNDH's powers of investigation are broad. It can request any document from the administration, companies or individuals. The CNDH can summon any natural person or legal entity to appear before it. The refusal to transmit documents or appear before the Commission are statutory offences and the CNDH can request the assistance of the police to enforce its powers. Furthermore, under Article 53 of the 2012 Law, "anyone who by his/her action, omission, refusal to act or by any other means has hindered or attempted to hinder the performance of the functions assigned to the Commission shall be punished with a period of

imprisonment from six (6) months to one (1) year and a fine of between one hundred thousand (100,000) CFA francs and one million (1,000,000) CFA francs or only one of these two sanctions.”

However, the CNDH’s decision-making powers are limited to a mediation or conciliation exercise between the parties. The CNDH cannot, for example, issue measures for reparation. The CNDH’s decisions are not binding or enforceable. After processing the complaint, the CNDH may take the following steps:

- Notify the plaintiff of the cessation of the rights violation;
- Issue an official notice of conciliation of the parties;
- Issue an official notice of non-conciliation of the parties;
- Call on the accused person to cease the established violation, with a certified copy to the Public Prosecutor and the President of the Republic;
- Write a letter to the authority with hierarchical superiority to the accused; or
- Write a letter asking about the steps taken in a complaint pending before the courts.

According to interviews with representatives of the CNDH, mediation and conciliation are interchangeable concepts. The official notice of conciliation has no legal value, rather it represents a commitment by the parties who co-sign it. In the event that mediation fails, the CNDH refers the victim to the competent courts, or can send the file directly to the Public Prosecutor. However, the Prosecutor retains prosecutorial discretion.

Filing a complaint with the CNDH does not constitute a default mechanism in the search for a remedy in cases of human rights abuses committed by businesses. This observation emerges from interviews conducted with representatives of unions and NGOs.

In relation to respect for labour rights, “the available remedies are set out in the Labour Code: firstly, internal dialogue through the staff representative; secondly, arbitration and submission of a complaint to the Labour Inspectorate; and thirdly, legal action before the courts”, according to a union representative. The latter considered that the CNDH, as well as other public actors such as the Conseil National du Dialogue Social (National Social Dialogue Council) or the Médiateur de la République (Ombudsman) are “social dialogue institutions”, which have a role to play in finding negotiated solutions, for example in cases of mass violations, and the CNDH can exercise its influence and bring the disputing parties to the negotiating table.

Concerning extractive industries, NGO advocacy is centred on respect for social and environmental regulations in force and voluntary commitments undertaken

by businesses, as well as mechanisms for transfer of shares in mining and oil revenues to the municipalities in which these industries are established, in order to contribute to local development.<sup>21</sup> In this regard, attention is focused on the institutions responsible for making these mechanisms operational: the Bureau d'Évaluation Environnementale et des Études d'Impact and the monitoring work which is required to be undertaken by ministries. According to NGOs, legal actions and prosecutions may be brought directly by the ministries responsible for Hydraulics and the Environment, Public Health, Urban Planning, Public Works, Agriculture and Livestock before the relevant jurisdictions, against extractive industries companies, in cases of violations of the law.<sup>22</sup> In relation to the transfer of shares in mining and oil revenues, according to the NGO interviewed, the Cour des comptes (Court of Auditors) is in charge of monitoring governmental activity. It should nevertheless be underlined that these mechanisms do not have the power to grant reparation to victims of human rights infringements, rather they aim to ensure that business activities have the intended economic benefits. In general, according to a 2014 study by the Réseau des Organisations pour la Transparence et l'Analyse Budgétaire (Network of Organisations for Transparency and Budgetary Analysis, ROTAB), "the texts provide for compensations, but their application is not effective, despite the existence of situations which could give rise to reparation. In practice, there is no reparation system and harmful situations are dealt with on a case-by-case basis with serious difficulties for the victims."<sup>23</sup>

Nevertheless, NGOs interviewed expressed that the CNDH does remarkable work on these issues, in terms of documentation and questioning state actors and companies. The CNDH has means of action which NGOs do not possess: the CNDH has a more receptive audience, given its status as a state body, and has legal access to documents held by the administration. NGOs, on the other hand, have difficulties accessing impact assessments and contracts concluded between extractive industries and the Government, despite the fact that they are legally required to be published in the Official Journal.<sup>24</sup> The Extractive Industries Transparency Initiative also plays a significant role as a framework contributing to the documentation of the activities of these industries – but has no complaints mechanism.

In terms of documentation, the CNDH can obtain information from sources to which other actors have limited access. This can be crucial since the lack of transparency concerning both the operations of extractive industries and the monitoring undertaken by state bodies, as well as over contracts signed between industries and the state, constitutes fertile ground for human rights violations. In terms of advocacy, the CNDH's consistent approach to business-related abuses has positioned it as an actor identified by businesses themselves – for example,

the Compagnie Minière d’Akouta (Akouta Mining Company) spontaneously sends its annual environmental, social and societal report to the CNDH. However, it must be recognised that the CNDH does not use its powers systematically (see below sub-section 2.2.2), and that its follow-up field work reveal the persistence of the abuses reported.

### **2.2.1.3 Accessibility, gender-responsiveness and vulnerable groups**

Vulnerable groups form a general focus of the CNDH, not specifically linked to its work on BHR. This is demonstrated, for example, by the establishment of a specific working group on slavery and slavery-like practices and a working group on the rights of women, children, elderly persons and persons with disabilities. Furthermore, mounting insecurity has led the CNDH to focus particular attention on the victims of terrorist groups and internally displaced persons. According to the CNDH’s Annual Report for 2015-2016, priority was given to the areas most affected by acts of violence (Diffa, Tillaberi and Agadez) for the opening of CNDH regional field offices. The establishment of regional field offices, supplemented by a network of CNDH focal points in the other regions, is intended to strengthen the reliability of the data collected by the CNDH and its accessibility to victims of violations.

The CNDH also has two prerogatives which enable it to provide specific support to vulnerable groups in terms of access to justice. The 2012 Law states that one of the CNDH’s missions is to “facilitate legal assistance to victims of human rights violations, in particular women, children, elderly persons and persons with disabilities, as well as any other vulnerable persons” (Article 19), and that the Commission can act in place of victims of slavery-like practices, bringing legal actions on their behalf (Article 30). However, the interviews revealed that legal assistance was granted only six times between 2017 and 2019, in the context of matrimonial and land cases, and that to date, the CNDH has not used the possibility of bringing a legal case on behalf of a victim of slavery-like practices.

In relation to access to the CNDH and effective remedies in the context of business-related abuses, there are no other specific provisions on vulnerable groups or adopting a gender-responsive approach on these issues.

### **2.2.1.4 Cross-border dimension**

The CNDH has jurisdiction over any abuses committed in Niger by transnational businesses located there. However, it is not competent to handle violations committed outside Niger.

### **2.2.1.5 Other measures taken to facilitate access to remedies, including collaboration with other actors**

The CNDH has limited interaction with judicial actors. Cases pending before the courts cannot be referred to it. In contrast to other NHRIs (e.g., see the other case studies in this report), Niger's CNDH does not have competence to submit *amicus curiae* briefs in ongoing trials. The CNDH can, however, enquire about respect of the right to a fair trial and other rights related to the administration of justice. The CNDH often requests information from the courts on the steps taken in a case of denial of justice, for example, where the time taken to process a case seems abnormally long.

In the event of failure of attempted conciliation following the submission of a complaint to the CNDH, it can refer the victim to the competent courts or send a file directly to the Public Prosecutor. The CNDH can also direct victims of violations of labour rights towards the Labour Inspectorates, for example in the case of a complaint based on a claim for damages following dismissal, so that this body may determine legal indemnities.

The CNDH can draw on a system of focal points in various ministries. This is the case, for example, in the Ministry for Mines. These civil servants in the ministries act as relays for the recommendations issued by the CNDH. Yet, they seem to be rarely used by the CNDH and have scant means and support to actively contribute to effective follow-up in their ministries.

The interviews with NGOs and a union demonstrated the strength of interaction between these structures and the CNDH, as a result of the CNDH's pluralist composition. The Chairperson of the CNDH comes from an NGO actively involved in issues of respect for human rights by extractive industries and the CNDH Commissioner nominated by the unions acts as a conduit to ensure synergies between these two types of actor on issues linked to labour rights. The CNDH's capacity to supplement and highlight the work of other actors, in particular by using its powers to document, publish and question, provides significant added value in relation to the work of non-state actors.

In this regard, it should be noted that the CNDH's Annual Report focuses principally on an assessment of the human rights situations in Niger and is not limited to a summary of the Commission's activities. This attention to substantive rights issues enables the CNDH to generate mobilisation around questions and attract attention to the situations documented by the CNDH, but also by other sources. Thus, in relation to violations of the right to a healthy environment caused by extractive industries, the CNDH report for 2015-2016 cites a scientific study by the Faculty of Science and Technology at Abdou



Moumouni University and the Société de Patrimoine des Mines du Niger (Nigerien Mining Asset Company). This study measures the impact of uranium exploitation on groundwater tables in the Arlit region. By publishing its conclusions and recommendations, the CNDH provides visibility to the recommendations arising from the study and addressed to the Government.

### **2.2.2 CHALLENGES AND LIMITATIONS**

In its response to the questionnaire of the UN Working Group, the CNDH considers that the following obstacles diminish its capacity for action in relation to business-related human rights abuses:

- Insufficient resources to carry out regular investigation and inquiry missions: both in terms of financial resources and material and logistical resources (e.g., CNDH's obsolete vehicles);
- Weak geographic coverage of the CNDH by its branches: currently the Commission only has three regional field offices out of the seven planned;
- Lack of staff with adequate training in this area; the Working Group on economic, social, cultural and environmental rights relies on the work of two individuals, despite the broad range of questions it covers: one Commissioner and one Director from among the CNDH's staff;
- The CNDH also links its lack of impact to the weak legal status of its decisions which are non-binding and self-executory. The CNDH regrets that often the recommendations it issues when it finds that violations have been committed are not implemented. The CNDH also notes that every year it tends to repeat recommendations previously issued.

The interviews confirm this situation, including the interviews with the CNDH focal points within relevant ministries. One of them considered that the CNDH's annual reports are not followed by action. The publication of reports and their presentation to the National Assembly do not in themselves constitute a sufficient form of advocacy propelling Ministers to react. External commentators also underline the lack of regular monitoring by the CNDH, in particular at mining sites. However, officials from two ministries point out that the CNDH has more resources than they do for this type of monitoring, and they rely on the CNDH to make up for the weakness, or inexistence, of state inspections and monitoring. During an interview with the Ministry for Mines, for example, a proposal was made that the CNDH should, prior to conducting its annual field missions, request information from the Ministry about recommendations from impact assessments, obligations imposed on extractive industries when exploration and exploitation permits are granted, and voluntary commitments by businesses recorded by the Ministry. Without substituting the types of monitoring that should be conducted by state departments, the CNDH would benefit from using this type of opportunity which provides an anchorage point to ensure the

accountability of businesses. Synergies of action could be made systematic with NGOs, which consider that the CNDH has the powers and is uniquely placed to obtain information, document and ask questions.

Yet, analysis of the CNDH's reports shows that uneven use is made of its capacity to document and ask questions. The CNDH indicates that it often makes a publicised declaration following its investigation missions. Nevertheless, it does not publish a specific investigation report following annual site visits, or summaries of complaints processed by the relevant working group. A situation summary may be included in the CNDH's annual report, but not systematically. The 2013-2014 report contains a separate chapter for each year on "environmental rights and corporate social responsibility". However, the analysis is of a general nature, with a non-specific recommendation calling on the "Government to ensure strict compliance by multinationals [...] with the regulations in force in Niger and the United Nations Guiding Principles on Business and Human Rights" (Recommendation No. 13). The absence of records of activities and detailed public reports makes follow-up of this type of activity difficult. The 2015-2016 report is the most detailed (see Box 2 and sub-sections 2.2.1.1 and 2.2.5.1). However, there is little or no coverage of these issues in the 2017 and 2018 annual reports.

Furthermore, the accessibility of the CNDH raises a number of questions. The complaints received by the CNDH concerning business-related abuses seem to almost exclusively focus on Nigerien businesses and violations of the Labour Code (wages, dismissal, working conditions). Abuses committed by international businesses are not the subject of complaints submitted to the Commission. In addition, action on its own motion remains an exception and is rarely used by the CNDH.

Finally, some organisational challenges may impede the action of the CNDH. As seen in sub-section 2.2.1.3, few measures have been taken to focus on women victims of business-related violations or vulnerable groups. This may be linked to a structural problem in the composition of the CNDH, underlined by both the GANHRI Sub-Committee on Accreditation when it granted it A status in 2017 and the United Nations Treaty Bodies: pluralism and representation of women remain insufficient, among Commissioners as well as CNDH staff.<sup>25</sup>

### **2.2.3 RECOMMENDATIONS TO STRENGTHEN THE ROLE OF THE CNDH**

Opportunities to strengthen the role of the CNDH noted include the following:

- **Increasing the Commission's resources:** both generally and for specific BHR-related activities.

- **Strengthening the capacity of members and administrative staff:** in the area of BHR, through capacity building and training
- **Strengthening the powers of the institution by making its decisions binding:** in relation to the handling of complaints concerning business-related human rights abuses; alternatively, the Commission could be enabled to launch legal procedures on behalf of victims, as is the case in relation to slavery-like practices.
- **Making maximum use of the CNDH’s existing powers:** for example, the power to act on its own motion as well as the possibility of requiring, subject to criminal penalties, the transmission of any document and interviewing any person in the context of an investigation, can be put to good use.
- **Publication and dissemination of investigations and inquiries relating to business activities:** maximum use should be made by the CNDH of the possibility of publishing the results of its investigations; in this way the CNDH would complement relevant ministries as well as NGOs, using its powers where those of others are limited, strengthening and contributing to informing and mobilising other actors.
- **More systematic cooperation with relevant government actors:** for example, cooperation with the Ministry for Mines could be made more systematic.
- **Exercising the advisory function for business-related laws and policies:** it could be useful to make official submissions on draft laws or revisions of texts, such as the ongoing reform of the Mining Code.

## 2.3 NIGERIA NATIONAL HUMAN RIGHTS COMMISSION

### 2.3.1 MANDATE

#### 2.3.1.1 Complaints, investigations and inquiries regarding BHR

Pursuant to the law establishing the National Human Rights Commission of Nigeria (NHRC), the Commission has a broad mandate which does not pose restrictions on the types of complaints that can be entertained. The National Human Rights Commission Act 1995 (as amended in 2010) empowers the Commission to address all issues related to human rights.<sup>26</sup> The institutional mandate contains several independence safeguards, with regard to investigation noting for instance: “In exercising its functions and powers under this Act, the Commission shall not be subject to the direction or control of any authority or person” (Section 6(3)).

According to the Standing Orders and Rules of Procedure of the NHRC, options for dealing with complaints include mediation, conciliation and routine

investigation. This includes the ability of the Commission to investigate business-related complaints and make binding determinations, as well as to undertake *suo moto* (on own motion) investigation.<sup>27</sup> Types of complaints are categorised into: (1) civil and political rights; (2) economic, social and cultural (ESC) rights; and (3) women, children and vulnerable groups. In the past, BHR-related complaints to the Commission were handled under the Thematic Area of Labour, Niger Delta or Environment. While efforts have been made to now establish a category of “BHR complaints”, there are currently no statistics available on BHR-related complaints as a specific category. Though clearly cross-cutting, most BHR matters received by the Commission relate to ESC rights. Matters received concern issues such as: demolition of houses and forced evictions; environmental pollution associated with extractive industries; labour rights violations in the hotel industry; or impacts associated with the telecommunications industry. Complaints involving criminal liability are referred to the Attorney-General’s Office for prosecution.

The Commission can also make *amicus curiae* submissions in court but to date this power has not been utilised regarding BHR matters. Where a matter received by the Commission concerns the ambit of another government authority, the NHRC refers the matter to the relevant authority. In such cases, the investigating NHRC officer is also charged with responsibility of following up with the relevant ministry to which the matter is referred to ensure that it has been dealt with. In the case of systemic matters, the Commission may conduct an inquiry, which was the approach taken to address complaints regarding the human rights consequences of environmental pollution associated with the oil industry, by setting up the Akwa Ibom Investigation Panel (See Box 3, below).

However, in 2016 the Commission’s power to investigate BHR complaints was challenged by oil companies (which had been complained against by persons and communities in Akwa Ibom State, Niger Delta region). In short, the contention was that the NHRC lacked power to entertain these complaints because they pertain to the environment (e.g., pollution) and that therefore the Federal High Court has exclusive jurisdiction (as contemplated by section 251 of 1999 Constitution). The Commission contended, however, that the subject matter was not the environmental degradation but the human rights consequences of the activities of the oil companies and that therefore the NHRC jurisdiction was justified. In April 2017 the Federal High Court gave judgment in favour of the oil companies but the Commission appealed. In April 2019 the Court of Appeal quashed the High Court decision on procedural grounds. The substantive grounds of the matter are currently pending before the court (see Box 3, below, for further details on the Panel and case).

Overall, BHR is one of the key Human Rights Thematic Areas of focus for the Commission. The BHR Thematic Area is currently focusing on stakeholder sensitisation about the link between business and human rights, as well as the Commission's involvement in the process to develop a National Action Plan on BHR (NAP). As such, the Akwa Ibom Investigation Panel, even though not the first intervention of the Commission in this area, has drawn public attention in a bid to facilitate access to remedy for business-related human rights abuses in Nigeria.

**Box 3: Special investigation panel on oils spills and environmental pollution<sup>28</sup>**

In February 2016, the NHRC established an investigative panel to address complaints from Niger Delta communities where activities by oil companies had led to environmental pollution, degradation and related human rights abuses. The decision to investigate came after multiple similar complaints were brought before the Commission, indicating the need for a more systemic approach to addressing the issues raised.

The Commission set out to make findings that could be used as the basis for determining the appropriate remedial measures. During the fact-finding stage, instead of dealing with each complaint in isolation, the Panel decided to address the matters through a public hearing because the complaints were systemic and on similar issues. A call was made in various newspapers for submissions/memoranda from the public on the subject. This approach aimed to give other members of the public (persons or communities) an opportunity to raise concerns related to the hearing. It also provided respondents with an opportunity to respond to the allegation(s), in line with the right to a fair hearing. The Panel commenced hearings and held sittings with the view to hearing the complaints, making findings, and determining the issues presented. In all, there were six sessions of the panel held in the court premises in Akwa Ibom State, comprising five days each. Participants included community members and representatives, relevant government agencies and representatives of the companies. The Commission also had two university professors with scientific knowledge present to advise the Commission on the technical environmental matters. The Commission kept rights-holders and their representatives updated regarding progress throughout the process.

Midway through the hearings in 2016, however, the Panel was served summons from various Courts that had been initiated by different oil companies challenging the Commission's powers to carry out such investigations. The plaintiffs argued, among other things, that the Federal High Court has the exclusive jurisdiction to deal with minerals, oil spills, pollution

and environmental degradation by virtue of Section 251 of the 1999 Constitution, and cannot share such powers with an inferior tribunal or panel; and that the powers exercised by the Commission in establishing the Panel of Inquiry are *ultra vires* – that is, beyond its powers. As a result, the Commission had to suspend its Inquiry, pending the outcome of the case challenging its powers to conduct such investigations. The Court processes stalled the Inquiry's progress, as it would be *sub judice* for the Panel to continue its investigations while the question of jurisdiction was before the courts. No remedies have been awarded, as the Commission had not reached a stage of making findings that would have warranted a determination of remedy, before the jurisdictional challenges, which suspended the public hearings, arose.

In 2017, the Federal High Court delivered a judgment in favour of the plaintiff oil companies, thereby upholding the Federal High Court's exclusive jurisdiction over matters regarding minerals, oil, and so forth. The Commission appealed this ruling to the Court of Appeal, arguing, among other things, that the Commission was not investigating environmental degradation or oil spills *per se*, but rather the human rights consequences of the oil companies' activities, which are clearly human rights concerns within the mandate of the Commission (e.g., adverse impact on lives and livelihoods of affected persons and communities).

Overall, the case has not received a lot of media attention and public reactions to the case have reportedly been mixed, with rights-holders and CSOs supporting the role of the Commission. Some of the negative public comments centred on the view that the Commission should focus on civil and political rights cases, rather than environment and pollution, as there are other state agencies established specifically to deal with these topics.

On 17 April 2019, the Court of Appeal quashed the Federal High Court's decision and entered judgment in favour of the Commission, thus affirming its powers to investigate the human rights aspects of these complaints. However, the oil companies, if dissatisfied with the Court of Appeal's judgment, may appeal to the Supreme Court.

### **2.3.1.2 Types of remedies and their effectiveness**

The 2010 amendment Act of the Commission includes the power to make determinations, recommendations and awards. Decisions or awards of the Commission are binding on parties and enforceable. Pursuant to Section 22(1) of the NHRC Amendment Act and Rule 89(3) of the Standing Orders and Rules of Procedure of the Commission, in the event of non-compliance, such award shall,

upon application in writing to the High Court, be enforced by the Court as a decision of the High Court. Furthermore, by virtue of Section 7(4d) of the Act, it is an offence to refuse to comply with lawful directives, determination decisions or findings of the Commission.

Exercise of the Commission's mandate in this area is, however, currently being tested in the judicial channels, as shown in the Akwa Ibom Investigation Panel matter. It is instructive to note that the NHRC, in the discharge of its routine functions, receives and deals with complaints on alleged human rights abuse against corporate organisations. Therefore, the Commission has been handling BHR-related cases over time, though without expressly labelling them as such.

Despite challenges, the Commission has been able to remedy infractions in the area of BHR ranging from reinstatement, payment of compensation, preventing forceful acquisition of property or eviction, review of obnoxious administrative policies and procedures injurious to enjoyment of human rights, etc., relating to business operations.

Beyond the NHRC, it can be reflected that court remedies for business-related matters might include: compensation; adjustments in operations (e.g., regular checks regarding oil pipe functionality, use of best available technologies). However, overall there have been few advocacies ordering clean-up (the Ogoni case is notable exception<sup>29</sup>), pointing to the importance of the Commission's work in this area.

In the case of inquiries, the Commission on its own may decide to authorise or conduct an inquiry on such terms and conditions as it may determine. The decision of the Governing Council shall have the same effect as any other decisions, determinations or directions by the Governing Council on cases and complaints. Additionally, the NHRC on its own initiative or when requested by the federal, state or local government reports on actions that should be taken by the government agencies in order to comply with provisions of any relevant international human rights instrument.

Against the background of the foregoing, the Commission may adopt findings on such inquiry as its own, and these become binding. Where necessary, the findings may be issued as an advisory or as recommendations that are submitted to the government for implementation.

### **2.3.1.3 Accessibility, gender-responsiveness and vulnerable groups**

To facilitate accessibility in the Akwa Ibom Panel, letters of invitation were sent to impacted communities. Many community members attended. Some of them

were represented in the panel process through representative organisations or lawyers, while others represented themselves. While men comprised the majority, women community members were also involved in the panel, as were human rights defenders and CSOs.

#### **2.3.1.4 Cross-border dimensions**

The Commission's mandate applies to Nigeria. Some interviewees commented that parent-subsidiary relationships present particular challenges, as it is frequently parent companies that have the greatest financial resources, but these are harder to reach as they are based in home countries. This means that to challenge parent companies, first the subsidiary must be challenged and then a relationship established.

#### **2.3.1.5 Other measures taken to facilitate access to remedy, including collaboration with other actors**

In addition to complaints, investigations and inquiries, the NHRC uses its promotional mandate to facilitate access to remedy, for instance through the education and advisory functions.<sup>30</sup>

Human rights education was noted by interviewees as particularly important. For example, collaboration with the judiciary to build capacity in the legal profession on improved human rights understanding as well as understanding of the NHRC mandate to work on BHR. For instance, the decision of the High Court regarding the Akwa Ibom Panel discussed above presents a good example of this need, where the court had upheld oil company arguments that setting up the investigation panel was *ultra vires* powers of the Commission. Hence, building the judiciary's understanding on the links between environmental degradation and the right to life, livelihood and right to health is particularly important and needed.

Advocacy and constructive engagement between the NHRC and regulatory authorities with remedial functions would also enhance access to remedy in the context of BHR. For example, the Ministry of Labour, the Consumer Protection Council, the Ministry of Environment, the National Oil Spill Detection and Regulation Agency (NOSDRA), and the National Environmental Standard Regulatory Enforcement Agency (NESREA) could be key collaborators. Monitoring developments in areas regulated by these agencies will also enable evidence-based advisory to them and will bring to their attention the effectiveness (or lack thereof) of Nigeria's human rights and treaty obligations on these topics.



The Commission also has Memorandums of Understanding (MOUs) in place with pro bono lawyers to assist with taking cases to court and collaborates with the Nigerian Bar Association. The NHRC has a Legal Aid Programme supported by the Nigerian Bar Association and law firms with which the NHRC has an MOU to render pro bono cases to indigent victims of human rights infraction. Based on demand, civil and political rights cases seem much more prominent. This indicates the need for robust awareness raising to communities, so they know that they could avail themselves of such legal aid in BHR contexts as well.

In terms of civil society actors, the NHRC engages with both national and international CSOs and NGOs. Mixed views were shared on these relationships. For instance, while some interviewees noted that collaboration with international NGOs (e.g., Amnesty International or Human Rights Watch) is important because this can create global pressure that influences the government, other interviewees held the view that collaboration with local NGOs holds greater promises, as this addresses local issues more directly and can take a more dialogue-based, rather than hard advocacy, approach. Concretely, the NHRC collaborates with NGOs working on environment, security and empowerment issues, such as the African Centre for Corporate Responsibility, Oxfam, Global Rights and the Citizens Advocacy for Social & Economic Rights. The NHRC also has established relationships with trade unions and other relevant labour organisations, which could be utilised to promote access to remedy in BHR.

Beyond collaboration with these actors, the NHRC does not have specific collaboration in place with other BHR remedy mechanisms, such as NCPs (noting that there is no NCP in Nigeria), project-level grievance mechanisms, the remedy mechanisms of international financial institutions or the like.

Furthermore, the NHRC is a member of the national working group on BHR for the development and implementation of the NAP. Taking a key role in this process has involved engagement with other relevant government agencies and ministries and other actors, as well as facilitating a workshop on BHR for the NAP process. Through these processes, the Commission can work to strengthen remedy-related aspects of BHR.

### **2.3.2 CHALLENGES AND LIMITATIONS**

One key challenge noted through NHRC experience is that citizens and organisations have limited knowledge of access to remedy avenues, including those that can be utilised to address business-related human rights abuses. Human rights sensitisation of the general public – for example through seminars, dialogues, conferences, town-hall meetings and similar can help to increase

public knowledge and understanding around human rights – and this can have a flow-on effect to also encompass businesses. It was also noted, for instance, that there is a common perception among the general public that human rights relate to government actors, rather than businesses, pointing to the need for sensitisation specifically on BHR. BHR knowledge and capacity challenges were noted not only in relation to rights-holders and the general public, however. In relation to businesses, it was pointed out that many businesses do not have the internal processes in place to be UNGPs compliant and are not implementing human rights due diligence. Likewise, the capacity of the judiciary to appreciate the NHRC mandate and business effects on human rights was noted as a challenge, including that legal authorities may be more focused on civil and political rights, rather than ESC rights.

A further challenge is funding. Human rights assessment and monitoring of business activities, for instance, entails rigorous fieldwork but funding for this is not available. Likewise, NHRC staff capacity building on BHR requires resources. Lack of financial resources also presents challenges in specific instances, for example, court processes are long and require significant resources, for which companies involved will be much better positioned than the NHRC.

There is also a challenge around distinctions made between different types of rights. As noted above, many business-related remedy issues relate to ESC rights. These, however, are not as easily justiciable under the Constitution and there is also a general perception among many that civil and political rights are more established. This creates challenges when arguing for remedy for business abuses of ESC rights.

A further challenge lies in the full implementation of the NHRC's amendment Act. The 2010 amendment to the law of the Commission has made it very powerful, it can now investigate virtually anything. However, there is a need to fully utilise the mandate to address BHR, including to ensure enforcement. There is also a need to reconstitute the NHRC Governing Council to enable full discharge of the Commission's mandate. Tenure of the last Council expired in 2015 and is yet to be reconstituted. Notably, however, unlike the repealed Act, the amendment Act guarantees security of tenure for the Governing Council of the Commission, including the Executive Secretary who is a member.

Implementation can be a challenge due to funding and capacity reasons noted above. But also due to factors such as corruption risks, the power of business actors and government interests in maintaining an open investment climate. All interviewees noted that companies are very powerful actors, for example the oil or telecommunications industry, and that actors may be reluctant to challenge

the powerful position of these business actors in society. Some differences between local and international companies were perceived in this regard, with some interviewees noting that large international companies were particularly powerful due to their financial resources and government interests in their investment in the country. For instance, it was noted that taking on international companies might be seen as being hostile to investment. This may not be viewed favourably by government, in particular where industries that constitute significant investment in the country are concerned, such as the oil and gas industry. Corruption risks, political intimidation and politics of interest were noted as common manifestations of these challenges. The subsidiary-headquarters dynamics in terms of seeking accountability of such companies for human rights abuses described above was also noted as a particular challenge.

Weighing the pros and cons between a more dialogue-based approach and taking stricter measures for holding companies accountable were also discussed. Some interviewees commented, for example, that one drawback of the Akwe Ibom Panel has been that companies misunderstood the purpose of the panel, sending lawyers to represent them, rather than coming to participate in dialogue – suggesting that perhaps taking a preliminary dialogue route as a first step before the Panel might have enhanced participatory and dialogue-based resolution finding. Other interviewees held the view that the NHRC takes too much of a conciliatory approach, rather than focusing on holding companies accountable through cases and sanctions. Either way, interviewees pointed to the need for increased dialogue between rights-holders, businesses and government actors as part of ensuring effective access to remedy for business-related abuses.

In addition, interviewed NGOs insisted that documentation and transparency of actions taken by the Commission on BHR issues are lacking and constitute an important objective for remedial processes, but also for reference, research and policy formulation. One NGO further pointed to delays in the treatment of complaints, out of three BHR-related complaints submitted by this NGO, two were not yet dealt with, including one dating from 2013. The NGO posited that the absence of the Governing Council prevented the NHRC from adjudicating on complaints. An NGO interviewee also pointed out the rapid and serious deterioration of the space for civic engagement (with regular incidents involving arbitrary arrests of human rights defenders, law proposals to limit NGOs' activities, etc.) and expressed the hope that the NHRC would be more publicly supportive and relay the voices of NGOs on these matters.

**2.3.3 RECOMMENDATIONS TO STRENGTHEN THE ROLE OF THE NHRC**  
Opportunities to strengthen the role of the NHRC noted include the following:

- **Capacity building of NHRC staff on BHR:** Given that BHR is an evolving area the need to ensure capacity building for Commission staff on BHR was noted.
- **Increased funding:** Many activities to support access to remedy for business-related abuses require significant financial resources, for example, court cases, human rights assessment and monitoring of business activities involving rigorous fieldwork, investigation panels, etc., and funding for this is not available. To ensure application to support access to remedy in BHR, funding sources could be tied to specific activities to prompt that delivery is ensured.
- **Sensitisation activities:** Sensitisation activities to enable all stakeholders to see the connection between business and human rights should be undertaken on a periodic basis. Specifically, such activities should include targeting the judiciary to appreciate human rights and business linkages and the rights of citizens to enjoy ESC rights where these are abused by business actors. It should also include activities to promote general knowledge of the NHRC mandate, including how this relates to BHR, which is not necessarily well understood among the general public.
- **Collaboration with sister NHRIs:** Peer learning and exchange forums for NHRIs on how to support access to remedy in BHR was noted as a key opportunity. This could involve collective activities to remind both home and host states of their human rights duties regarding BHR; or addressing challenges associated with the corporate veil.
- **Prompt appointment of the NHRC Governing Council:** As a key governance function of the NHRC, there is a need to promptly appoint the Council in order to enable the Commission to fully exercise its mandate, including with regard to BHR.
- **Increased collaboration with relevant government actors:** Increased collaboration with relevant government agencies and ministries – e.g., labour, environment, institutions set up to address oil spill matters – was noted as a key opportunity. This includes an opportunity to work with relevant government actors to address systemic issues, for example labour rights violations.
- **Increased collaboration with civil society and other BHR remedy mechanisms:** Increased collaboration with both international and domestic civil society actors on specific BHR issues was noted as a way to prompt remedy for business-related abuses. Including through associated media coverage. Such activities could also be linked to collaboration with other types of BHR remedy mechanisms, e.g., remedy mechanisms of international financial institutions, project-level grievance mechanisms operated by companies or other non-judicial mechanisms.

- **Ensuring a collaborative approach for NAP development and implementation:** Ensuring a cooperative approach to the NAPs process going forward was noted as a key opportunity for generating public attention on the NAP, as well as to promote access to remedy issues noted in the NAP and beyond. Making the implementation working group effective and efficient to enable the document to become a reality, and peer NHRI exchange on NAPs, were noted as opportunities to make this happen in practice.
- **Advising government on relevant laws and policies:** The NHRC could increase application of its advisory mandate to provide input to government on BHR-relevant laws and policies. For example, reviewing the EITI law to assess human rights compatibility, or ensuring that state-investor contracts include clauses that recognise the mandate of the NHRC regarding complaints handling of business-related human rights abuses.
- **Collaborate with the Senate Human Rights Committee:** An opportunity for the NHRC to increase collaboration with the Senate Human Rights Committee to promote access to remedy in BHR was noted. For example, the NHRC could bring challenges to the fore, to promote attention in the senate on BHR matters.
- **Monitoring implementation of recommendations of regional and international human rights bodies:** The Commission has an opportunity to improve involvement in implementation of recommendations of regional and international human rights monitoring mechanisms by focal ministries, departments and agencies of government. This includes monitoring UPR recommendations applicable to BHR, to ensure that those that have been accepted are implemented. Promoting BHR, including access to remedy, in treaty reporting more widely could also be facilitated through strengthened in-house collaboration on BHR.

## 2.4 UGANDA HUMAN RIGHTS COMMISSION

### 2.4.1 MANDATE

#### 2.4.1.1 Complaints, investigations and inquiries regarding BHR

Article 52 of the 1995 Constitution of Uganda provides for the Uganda Human Rights Commission's (UHRC) mandate.<sup>31</sup> The Constitution's Chapter 4 on Human Rights and Freedoms secures a number of rights that play a role in the conduct of business: freedom from discrimination (Article 21), protection from slavery and forced labour (Article 25), protection from deprivation of property (Article 26), freedom to join trade unions (Article 29) and other labour rights (Article 40) or the right to a clean and healthy environment (Article 39). Together with courts

(Article 50), the Constitution foresees the competence of the UHRC to investigate human rights violations.

In line with the Constitution, Section 7 of the Uganda Human Rights Commission Act of 1997 foresees that the UHRC has the mandate to receive and investigate violations of any human right. Accordingly, the UHRC's mandate to handle all human rights issues and complaints is interpreted to also include issues and cases on business and human rights.<sup>32</sup>

Anyone may lodge a complaint with the Commission. It could be the victim of an alleged human rights violation, friend, relative or any concerned party. The Commission on its own initiative may also register and investigate alleged violations. Complaints may be received by the UHRC when lodged in person (complainants walk into any of the UHRC offices to tell their stories), by letter, email, fax or phone call (toll-free lines for all offices), community barazas<sup>33</sup> or where referrals are made to the Commission. No fees are charged for lodging a complaint since all UHRC services are free of charge. The UHRC attends to all people who contact the institution for its intervention into their matters. Where matters are not within the Commission's jurisdiction or mandate, such matters are referred to the appropriate institution(s).

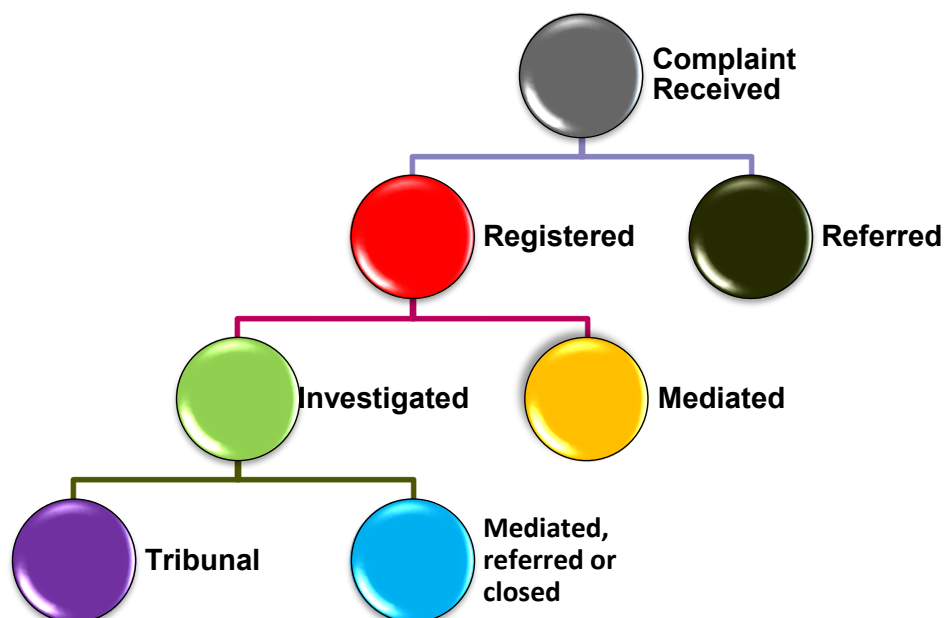
The Commission receives, investigates and resolves complaints about human rights violations as part of its routine functions. The UHRC uses admissibility criteria to determine the admissible cases which raise human rights issues. These admissibility criteria are elaborated for staff in the Commission's complaints-handling handbook, which clearly stipulates that to be admissible, complaints must relate to human rights matters (i.e. rather than pure criminal matters or non-human rights related issues). Complaints which do not meet the admissibility criteria are either referred to other institutions or the complainants are advised accordingly. For complaints which meet the admissibility criteria, they are either mediated, or investigated and later sent for human rights tribunal hearing (the role of the Commission's tribunal is explained further below). Complainants have an option of settling their matters through mediation as an alternative dispute resolution mechanism. Where the parties settle the matter during mediation, an MOU is drawn up. In the event of non-compliance with the MOU, it is sent to the human rights tribunal of the Commission, which issues an order making the MOU binding upon the parties. Frequently, business and human rights matters are resolved through mediation, rather than progressing to litigation. However, where the parties fail to settle the matter amicably during mediation the complaint is investigated to its logical conclusion and set for hearing by the tribunal. Where complaints are investigated, and it is established

that there is a possibility of a human rights violation, the matter is referred to the tribunal for a hearing.

On a regular basis, the Commission investigates all the cases it registers which are not mediated and thereafter forwards them to the tribunal for a hearing. The Human Rights Tribunal is a function of the UHRC and is specifically designed to hear and resolve human rights related matters in a court-like way. The tribunal is presided over by the UHRC Members of the Commission, and tribunal hearings are held in each of the 10 UHRC regional offices. Compared to ordinary courts, however, the human rights tribunal procedure is more informal and often quicker. This is because legal technicalities are reduced to the barest minimum so as to enable the parties to fully understand what is going on. The tribunal is therefore more innovative and not limited to the orthodox statutory or common law limitations, which may tie complaints resolution to a rigid style of adjudication.

The paths that can be taken to resolve a complaint can be schematised as illustrated in Figure A, below.

**Figure A: Stages of the UHRC complaints-handling process**



Under Article 53 of the Constitution, the UHRC has powers of a court in the performance of its functions of protecting and promoting human rights. It gives the UHRC the powers of a court to issue summons or other orders requiring the attendance of any person before the UHRC and the sharing of any document or record relevant to any investigation by the UHRC; to question any person in

respect of any subject matter under investigation before the UHRC; to require any person to disclose any information within his or her knowledge relevant to any investigation by the UHRC; and to commit persons for contempt of its orders. Article 53(2) also stipulates that the Commission may, if satisfied that there has been an infringement of a human right or freedom, order: the release of a detained or restricted person; payment of compensation; or any other legal remedy or redress. Furthermore, pursuant to Article 53(3), a person or authority dissatisfied with any of the above orders made by the Commission has a right to appeal to the High Court. While this has occurred on some occasions, business and human rights matters are most frequently addressed through mediation, rather than going to the tribunal (and possibly to appeal to the High Court).

In 2018, the UHRC received<sup>34</sup> a total number of 4926 complaints, marking a 2% decrease from the 5021 received in 2017. Out of the total number of complaints received, 746 complaints were registered as complaints raising alleged human rights violations as guided by the Commission's admissibility criteria. This was an 8.5% increase from the 682 that were registered in 2017. For complainants whose matters did not fall within the Commission's jurisdiction, they were given advice accordingly or referred to other institutions for the appropriate management of their complaints.

In 2018, most of the complaints registered were against the Uganda Police Force with a total of 466 complaints (54.1%). Complaints against private individuals were 207 (24%) complaints most of which concerned the denial of child maintenance. Complaints registered against the Uganda Peoples Defence Forces were 66 (7.6%) and the Uganda Prisons Service had 36 (4%) complaints against them while those against private businesses were 24 complaints. Issues related to BHR in the year 2018 were mainly concerning the denial of remuneration by employers and the deprivation of property.<sup>35</sup>

To date, most of the complaints received on BHR have been categorised into the following rights violations:

- Rights to remuneration and unfair dismissals (*Labour rights and working conditions*)
- Right to property or protection from unlawful eviction (*Land*)
- Denial of the right to a clean and healthy environment (*Stone quarries, pollution by industries*)
- Denial of just and fair treatment in administrative decisions
- Human trafficking
- Rights of ethnic minorities
- Corruption and accountability of companies



Some specific BHR cases that the UHRC has been involved in include:

- a) Stone quarry case: Residents complained of the dust from the quarry as well as the destruction of homes due to the blasting of stone. Women in the community also complained of miscarriages due to the blasts, as well as noise pollution and debris which killed some residents. The UHRC intervened and the residents were compensated by the company and most were relocated to other areas.
- b) Hotel policy against women: One of the hotels had a discriminatory policy that prohibited female waitresses from getting pregnant while still working at the hotel, failure of which they would be dismissed. The UHRC intervened and the policy was changed.
- c) Oil and gas drilling: Communities in the project-affected areas complained of forced evictions and non-compensation for land; some had been promised to be reallocated but were fearful of where to be taken. The UHRC intervened and the government compensated the communities. The UHRC intervention also contributed to better communication and information sharing between the communities and the people, which helped to address the suspicion and mistrust between the different parties involved.
- d) Commuter taxi: A commuter taxi of 12 passengers refused to carry a person with disabilities. He reported to the UHRC and his case was investigated and sent to the tribunal. Unfortunately, at the tribunal the evidence was insufficient and the matter was dismissed.

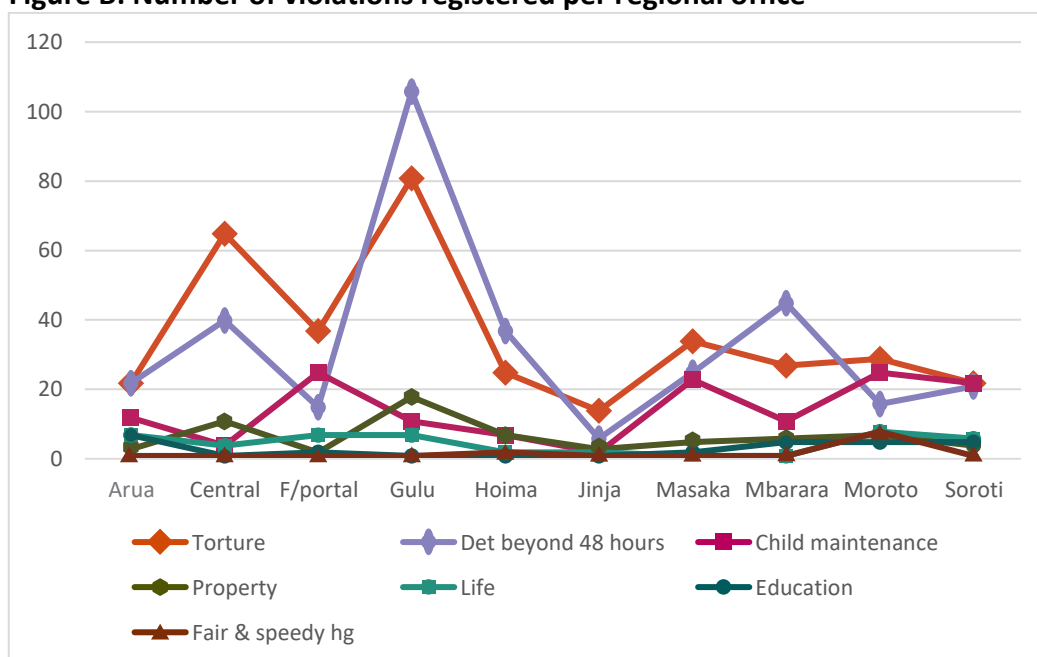
Where there are multiple victims, the UHRC usually conducts an investigation into the allegations to establish the facts. A number of these have addressed business and human rights matters, for example, in the oil and gas, agriculture, farming or artisanal mining sectors. Details regarding the investigations are usually provided in the annual reports, or separately issued thematic reports (e.g., on oil and gas, see further below).

**Table 1: Nature of alleged human rights violations registered in 2018**

Alleged violation	ARU	CTR	FPT	GLU	HMA	JJA	MSK	MBR	MRT	SRT	Total
Torture, cruel, inhuman or degrading treatment or punishment	21	64	36	80	24	13	33	26	28	21	<b>346</b>
Detention beyond 48 hours	21	39	14	105	36	05	24	44	15	20	<b>323</b>
Denial of child maintenance	11	03	24	10	06	01	22	10	24	21	<b>132</b>

<b>Alleged violation</b>	<b>ARU</b>	<b>CTR</b>	<b>FPT</b>	<b>GLU</b>	<b>HMA</b>	<b>JJA</b>	<b>MSK</b>	<b>MBR</b>	<b>MRT</b>	<b>SRT</b>	<b>Total</b>
Deprivation of property	02	10	01	17	06	02	04	05	06	03	<b>56</b>
Deprivation of Life	06	03	06	06	01	01	-	-	07	05	<b>35</b>
Denial of basic education	06	-	01	-	-	-	01	04	04	04	<b>20</b>
Denial of remuneration	-	-	02	-	02	-	06	-	-	02	<b>12</b>
Violation of the right to a fair and speedy trial	-	-	-	-	01	-	-	-	07	-	<b>08</b>
Denial of social and economic life	-	02	-	-	-	-	-	-	-	-	<b>02</b>
Access to Information	-	01	-	-	-	-	-	-	-	-	<b>01</b>
Unlawful administrative decisions	-	-	-	-	-	-	-	-	01	-	<b>01</b>
<b>TOTAL</b>	<b>67</b>	<b>122</b>	<b>84</b>	<b>218</b>	<b>76</b>	<b>22</b>	<b>90</b>	<b>89</b>	<b>92</b>	<b>76</b>	<b>936</b>

**Figure B: Number of violations registered per regional office**



In 2018, the Commission addressed a total number of 850 complaints, out of which 108 were successfully mediated; 648 fully investigated; and 94 going to the tribunal level. As at 31st December 2018, the tribunal caseload stood at 1,039, which marks a 7% increase from the annual closing case load of 967 in 2017. The backlog was as a result of the issues experienced in reaching the quorum of Members of the Commission necessary for the tribunal to operate. Of the 1,039 complaint files, 398 were pending allocation to Presiding Commissioners for hearing, 257 were pending hearing while 384 were part-heard.

Special investigations may also be conducted by the Commission, including own motion investigations. Specifically in the area of business and human rights, own motion investigations are frequently adopted to initiate the Commission's engagement on a specific topic. The Commission keeps abreast of possibly relevant issues through monitoring the media, human rights monitoring of the Commission, engagement of communities through the regional UHRC offices and by identifying trends and patterns in complaints, letters and other communications received by the Commission from the general public. One example of an own-motion investigation on business and human rights has been in relation to the oil and gas sector. In 2013, following the discovery of oil in Uganda, the UHRC monitored the Albertine Graben region and made recommendations regarding human rights concerns that arose relating to oil and gas industry activities. Complaints received from local communities included issues of displacement of persons, for example, in one district a total of 7118 people in 13 villages were displaced. Some of the other issues noted included: delayed compensation, loss of property, lack of information, infringements of the right to participation, sexual harassment and infringements of the right to a clean and healthy environment. A report presenting the UHRC's methodology and field research undertaken, findings and recommendations, was released in December 2013.<sup>36</sup>

Interestingly, persons external to the UHRC that were interviewed for this case study, noted that own motion inquiries and situational analysis conducted by the Commission could be particularly effective, as these are perceived as demonstrating independence. It was also noted that investigations could be effective given the systemic nature of many Ugandan BHR issues, as well as because individual complaints handling through the tribunal can take time and resources. However, it was also pointed out that BHR is still a comparatively new area for the Commission.

#### **2.4.1.2 Types of remedies and their effectiveness**

The UHRC has resolved the majority of complaints, including those related to business and human rights, through mediation, conciliation and other alternative methods of dispute resolution, which are free, simple and without technicalities. Some of the complaints, especially serious ones about torture and deprivation of liberty, are resolved through tribunal hearings. Determining what type of approach to use to resolve a particular complaint is a decision taken through discussion between the Commission and the complainant. Frequently, mediation is adopted as this is faster than a tribunal hearing. Compensation and other forms of remedies are awarded to victims of human rights violations. Complaints received that do not involve human rights issues are referred to other relevant institutions.

According to Article 53(2) of the Constitution, the Commission may, if satisfied that there has been an infringement of a human right or freedom, order: the release of a detained or restricted person; payment of compensation *or any other legal remedy or redress*. Article 53(2)(c) of the Constitution is couched in such broad terms as to give the Commission a wide latitude to do what ordinary Courts are enjoined to do by providing that the Commission can order “any other legal remedy or redress”.

In most of the business-related matters handled, the most common remedy has been compensation, reinstatement or specific actions to remediate the harm caused where respondents are ordered to undertake particular lawful acts or orders. According to the UHCR, businesses often comply with such recommendations.

The remedies given by the Commission are based on principles of fairness, the law, the facts of the case, an evaluation of the damage or effect of the violation and other mitigating factors. According to UHCR personnel interviewed, the solution provided under a case depends on the preference of the complainants, which may seek different types of remedies depending on their needs. For example, for labour matters some seek reinstatement or compensation, for land disputes many seek compensation. However, most victims in human rights violations seek compensation as redress.

#### **2.4.1.3 Accessibility, gender responsiveness and vulnerable groups**

The Commission has a Vulnerable Persons Unit that is concerned with ensuring the protection of vulnerable groups in the country, including people living with HIV & AIDS, persons with disability, refugees, internally displaced persons, conflict-affected people, widows and other disadvantaged persons, women, orphans, children and the elderly. This unit is responsible for: monitoring

policies, programmes, laws and any other matter affecting vulnerable persons; assisting the Commission to identify vulnerable persons/groups that need special attention; monitoring the human rights issues affecting vulnerable persons/groups; and monitoring the observance of rights of vulnerable persons/group. The Vulnerable Persons Unit is specifically relevant to business-related matters because, for example, ethnic minorities are present in those areas impacted by natural resource development.

During interviews undertaken by the UHRC in the course of its work, it is a requirement to consider the needs of the different vulnerabilities of specific rights-holders, and in case of children also to take into consideration the child's age and maturity as well as the characteristics and surrounding environment during the interview to ensure that it is friendly. Vulnerable groups such as children, women, persons with disabilities, ethnic minorities and others are encouraged to lodge their complaints. Victims and witnesses are interviewed by UHRC staff in a language they understand. It is a requirement for UHRC staff to ensure that the victims or witnesses are not intimidated or re-traumatised. This is ensured through, for example, the details provided in the Commission's complaints-handling manual and investigator's handbook that guides UHRC staff in their work, as well as through periodic training for Commission staff on these issues.

To enhance accessibility, all investigations conducted are at the expense of the Commission and all the complainant is required to do is check on the progress of his or her matter. The Commission, for instance, pays for the public transportation of the complainants, victims and their witnesses whenever they are summoned for a hearing or for additional information. This facilitation has been useful because vulnerable individuals who are often very poor can access the Commission without limitations caused by transportation costs.

Every year, the Commission produces a brail copy of the annual report for persons with visual impairments.

With regard to physical accessibility, the Commission has ten regional offices with its head-office in the country's capital city, Kampala. All the UHRC's regional offices are located in towns and are near public transport routes to enable vulnerable individuals, especially the poor, minors and persons with disabilities, to easily reach the Commission. Most of the UHRC offices are at ground level with easy access for persons with disabilities and provisions for wheel-chair access. The UHRC offices endeavour to be user friendly and non-intimidating, for example, they are not in close proximity with any government, military or police buildings which could deter the public from coming forward with complaints.

The Commission has both male and female investigators and lawyers and is keen to receive and address gender-related issues, including matters regarding sexual harassment and sexual exploitation, also when it comes to BHR. In such cases, women are required to interview the female victims. However, the victims are also free to request for a person of another gender to interview them.

In addition, the UHRC promotes the elimination of gender discrimination and advocates for full participation of women in development and for increased contribution by women in the economic, social, and political development of the country.

#### **2.4.1.4 Cross-border dimensions**

Pursuant to Article 53(4), the Commission does not handle any matter involving relations or dealings between the Government of Uganda and the government of any foreign state or international organisation. This means that the Commission's interventions are limited to the boundaries of Uganda.

#### **2.4.1.5 Other measure taken to facilitate access to remedy, including collaboration with other actors**

The Commission implements its mandate on business-related matters through a number of additional activities and strategies.

First, the UHRC monitors and reports on business and human rights in its annual reports and makes appropriate recommendations to Parliament. When need be, special reports or position papers are released. For instance, the UHRC has been at the forefront of advocating for a minimum wage, by releasing a detailed analysis and recommendations in the context of legislative reforms before the Parliament in 2017.<sup>37</sup>

The UHRC has also trained stakeholders on BHR, including investors, companies and factories. These trainings took place in 2015, 2016 and 2017, where the Commission invited representatives of business enterprises and companies and trained them on human rights, with specific focus on the UNGPs, the Ten Principles of the UN Global Compact, the Uganda Constitution, national laws and other relevant UN treaties and regional instruments. The participant evaluations undertaken after the training indicated that a key outcome was the better understanding and appreciation of human rights by the business enterprises and appreciation of the linkage between business and human rights. To support business engagement on BHR, the UHRC also published a "Human Rights and Business Country Guide" in 2016, providing a comprehensive overview of the ways in which companies do or may impact human rights in Uganda.<sup>38</sup> However,

to date the UHRC has not engaged with business-related remedy mechanisms, such as operational-level grievance mechanisms.

The UHRC is also currently working together with CSOs engaging on BHR, particularly the Uganda Consortium on Corporate Accountability and the Initiative for Social and Economic Rights. For example, together with these groups the UHRC annually organises a conference on BHR. The collaboration also includes a referral pathway, where cases are referred to the UHRC by CSOs; joint advocacy, media presentation and trainings are also undertaken with CSOs.

The UHRC is also developing a human rights compliance checklist and is conducting unannounced visits to companies and business enterprises to monitor their human rights compliance. These human rights compliance checklists are tools used by Commission staff when investigating different types of business industries. In addition, the UHRC is working to develop an in-depth monitoring guide for Commission staff, which will be more broadly applicable to business activities. The Commission is also looking into possibilities and options for developing self-assessment tools for business actors in Uganda, to enable businesses to evaluate their human rights due diligence and performance.

The UHRC works in partnership and collaboration, coordination, and communication with government institutions and CSOs. Some of these include Parliament where the UHRC make recommendations on laws and bills; the executive where the UHRC make recommendations; and CSOs with which the UHRC undertakes advocacy, sensitisation, lobbying, education and other human rights promotional activities. The Commission also works closely with the private sector, companies, the media, and the general public. The Commission has a partnership strategy which is a key tool for promoting partnerships and alliances, including on the topic of BHR. For instance, together with the Ministry of Gender, the UHRC is currently contributing to the development of a NAP, which will include content on access to remedy.

In terms of collaboration with the judicial system, given that the UHRC has its own human rights tribunal, engagement with the judicial system is somewhat more limited than it may be for other NHRIs that do not have such a tribunal function. While it is possible to appeal tribunal decisions to the High Court, the Commission does not otherwise broadly refer cases to the courts, unless such complaints fall outside the jurisdiction of the Commission. In terms of *amicus curiae*, while the Commission has the authority to file submissions as a friend of the court and has done so on occasions, this provision has not been utilised thus far for business and human rights matters. With regard to legal aid, access to the Commission's tribunal is free of charge and Commission staff represent rights-

holders before the tribunal, as well as during mediation conducted by the Commission. Beyond this the Commission does not provide general legal aid services but it does collaborate with the Uganda Law Society, which provides legal aid to rights-holders.

#### **2.4.2 CHALLENGES AND LIMITATIONS**

A key challenge noted in terms of being able to effectively address BHR and access to remedy was financial constraints and the workload of the Commission. Due to limited funding, activities relating to the promotion, advocacy and monitoring of BHR are limited. A further key challenge is lack of human rights awareness among the general public of their rights and responsibilities. For instance, due to high levels of unemployment, people are often willing to compromise labour rights safeguards just to be employed. Furthermore, business and human rights matters are often treated as civil, rather than criminal, matters. Gaps in terms of company knowledge and understanding regarding their responsibilities to respect human rights were also noted by some interviewees.

Interviewees also noted that business connection to state actors and limited regulation in the informal sector can pose challenges to the ability of the UHRC to effectively discharge its mandate when acting on BHR matters. Some interviewees pointed to the connection between state and business actors as the key challenges, whereas others pointed to a conflation between the roles of regulatory agencies and businesses or the resource disparities between the Commission and business actors. The perception by some Ugandan stakeholders that human rights actors are “anti-development”, was also noted by interviewees as a challenge. Lastly, interviewees noted that enforcement of recommendations can be challenging due to such factors.

Further challenges noted centred around BHR specificities. For example, interviewees noted that in some areas it is not clear exactly what standards businesses are expected to adhere to, for example, on consultation and consent, which makes it difficult for all parties concerned to meet their respective obligations and be held accountable. One interviewee also pointed out that given the complex supply chains of businesses, it can be challenging to trace particular abuses and attribute accountability for these. Overlaps in the mandate of different accountability institutions was also noted – i.e. the Commission but also other ministries and institutions, e.g., those responsible for environment, labour etc. – can pose challenges in determining which institution is best placed to address different types of BHR matters and how effective coordination between them can be ensured.



### 2.4.3 RECOMMENDATIONS TO STRENGTHEN THE ROLE OF THE UHRC

Opportunities to strengthen the role of the UHRC noted include the following:

- **UHRC capacity and resources for BHR:** Enhanced sensitisation of staff on BHR, including in regional offices, and supporting the development of BHR monitoring tools, could significantly enhance the UHRC's ability to effectively contribute to access to remedy in BHR.
- **Multi-stakeholder dialogue on BHR:** Dialogue with the state, judiciary and legal profession on particular topics related to judicial remedies, such as complicity and extraterritorial application of laws relating to business-related human rights abuses.
- **Guidance to business:** Developing guidance material for business on the development and implementation of project-level grievance mechanisms.
- **Increased application of the NHRI mandate to BHR:** Increasingly applying the NHRI complaints-handling, investigative and mediation function to BHR-related cases. In particular, tracking and analysing the types of BHR matters dealt with and considering the application of own motion investigation to address systemic BHR matters identified.
- **Outreach, education and referral:** Facilitating access of victims of business-related human rights abuses to available non-judicial mechanisms through outreach, education and referral.
- **Advising government:** Advising government on addressing barriers to access to judicial remedy.
- **Engagement and collaboration with relevant regulatory bodies:** Engagement with other relevant state regulatory bodies, e.g., those with responsibilities for environment, labour, consumer protection or the like, to enhance complementarity with regard to BHR and remedy matters.
- **Community outreach and capacity building:** Providing community outreach programmes and advice to victims of corporate human rights abuse on how to access judicial remedies in home and host countries. This could also include increased information sharing about the mandate of the UHRC with regard to their role to facilitate access to remedy in BHR.
- **Engagement and collaboration with judicial actors:** Encouraging or providing education and training for legal professionals on access to judicial remedies for business-related human rights abuses.
- **Collaboration with regional and international human rights mechanisms and actors:** Submitting independent reports to the regional and international human rights mechanisms. The UHRC might also engage and collaborate with organisations such as the World Bank or IMF to promote accountability in BHR.

## 3 COMPARATIVE ANALYSIS

This Chapter of the report provides a short comparative analysis of the four case studies presented, the questions that arise from them, and how these may feed into further academic and policy-oriented research.

### 3.1 COMPARISON OF THE FINDINGS

The case studies confirm that the NHRIs of Kenya, Niger, Nigeria and Uganda form a relatively homogenous group and unit of analysis. The institutions share important organisational features (e.g., being set up as commissions and having the ability to handle individual complaints) and all have a wide mandate. All four NHRIs have asserted that human rights abuses relating to business activities necessarily fall under their mandate and all choose to prioritise BHR in their activities, especially around issues recognised by the human rights chapters of all four countries' constitutions (labour rights and the right to a healthy environment).

Nonetheless, nuances appear in their legal mandates and institutional design, but even more so in the operationalisation and understanding of these mandates. The organisational principle adopted in this report to structure the case studies' findings, presenting first the NHRIs' mandates and roles, and second the challenges and limitations in operationalising the mandates, highlights the discrepancy that exists between mandates and actual operations. The findings have been schematised in the following Table 2, comparing mandate (in black) with practice (in blue/*italics*), for each of the four case studies.

<b>Table 2: Cross-analysis of case studies: comparing mandate with practice</b>				
	<b>Kenya</b>	<b>Niger</b>	<b>Nigeria</b>	<b>Uganda</b>
<b>Mandate on BHR (incl. private businesses)</b> <i>Accepted in practice?</i>	Explicit (“private institutions”) <i>Mostly accepted</i>	Implicit <i>Accepted</i>	Implicit <i>Disputed (in court)</i>	Implicit <i>Accepted</i>
<b>Handling of individual cases</b> - <i>Can receive complaints Used for BHR issues?</i> - <i>Can initiate cases Used for BHR issues?</i> - <i>Accessibility measures</i>	Yes <i>Limitedly (labour rights only)</i> Yes <i>Once</i> Not specific to BHR	Yes <i>Limitedly (labour rights only)</i> Yes <i>Occasionally</i> Not specific to BHR	Yes <i>Yes (evictions, pollution, labour...)</i> Yes <i>Occasionally</i> Not specific to BHR	Yes <i>Yes (evictions, pollution, labour...)</i> Yes <i>Occasionally</i> Not specific to BHR
<b>Decisions on cases</b> - <i>Legal strength includes compensation and reparations?</i> - <i>Decisions respected?</i> - <i>Alternative dispute resolution includes human rights guarantees (non-recurrence, systemic changes, publicity, etc.)<sup>39</sup></i>	Non-binding No (may be part of a settlement decided by parties) <i>Mixed outcomes</i> <i>Not demonstrated</i>	Non-binding No (may be part of a settlement decided by parties) <i>Mixed outcomes</i> <i>Not demonstrated</i>	Binding Yes ( <i>but no awards against business yet issued</i> ) <i>Mixed outcomes</i> <i>Not demonstrated (but multiple complaints on single issue led to special inquiry)</i>	Binding Yes (determines damages or compensations) <i>Yes</i> <i>Not demonstrated (but multiple complaints on single issue led to special inquiry)</i>
<b>Investigation powers</b> - <i>Powers</i>	Partly as a court (summon, request information, etc.), partly as subpoena powers (enter any premises, etc.)	As a court (summon, request information, etc.)	May seek a court order to enter premises, obtain evidence and summon persons	As a court (summon, request information, etc.)

	<b>Kenya</b>	<b>Niger</b>	<b>Nigeria</b>	<b>Uganda</b>
<p>- <i>Consequence of non-adherence?</i></p> <p><i>Consequences triggered?</i></p>	<p>For failing to honour summons, legal sanctions (incl. fine and imprisonment); For others: options for contempt proceedings</p> <p><i>No</i></p>	<p>Legal sanctions (including fine and imprisonment) and police coercion if need be</p> <p><i>Partly (police coercion)</i></p>	<p>Legal sanctions for refusal to provide evidence (including fine and imprisonment)</p> <p><i>No</i></p>	<p>Commission has the power to commit persons for contempt of its orders</p> <p><i>Yes (but not for BHR matters)</i></p>
<p><b>Public inquiries and investigations</b></p> <p>- Mandate - <i>Use of mandate on BHR</i> - <i>Composition</i></p> <p>- <i>Site visits</i> - <i>Public call for submissions</i> - <i>Public reports on inquiries</i> - <i>Overview in annual report</i> - <i>Follow-up visits</i></p>	<p>General mandate <i>Occasional</i> <i>Special panel incl. external experts</i> <i>Yes</i> <i>No</i> <i>Yes</i> <i>Yes</i> <i>Yes (audits)</i></p>	<p>General mandate <i>Yearly &amp; extra</i> <i>Internal by NHRC (invite NGO)</i> <i>Yes</i> <i>No</i> <i>For extra inquiries</i> <i>Sometimes</i> <i>Partial</i></p>	<p>General mandate <i>Once</i> <i>Special panel (internal)</i> <i>Yes</i> <i>Yes</i> <i>N/A (interrupted)</i> <i>Yes</i> <i>N/A (interrupted)</i></p>	<p>General mandate <i>Once</i> <i>Special monitoring team (internal)</i> <i>Yes</i> <i>No</i> <i>Yes</i> <i>Sometimes</i> <i>No</i></p>
<p><b>Relations to judicial system</b></p> <p>- <i>Appeal of NHRI's decisions in courts</i> - <i>Referral of cases to prosecutors</i> - <i>Public interest litigation</i> - <i>Amicus curiae to courts</i></p> <p>- <i>Legal Aid</i></p>	<p>Not possible <i>Yes</i> <i>Yes (not used)</i> <i>Yes (at least one)</i>  <i>No (but does it if possibility to set a precedent)</i></p>	<p>Not possible <i>Yes</i> <i>No</i> <i>No</i>  <i>Yes (but not used on BHR issues)</i></p>	<p><i>No (but NHRC contested in courts)</i> <i>Yes</i> <i>Yes</i> <i>Yes</i>  <i>No (but MoU with pro bono lawyers)</i></p>	<p>Possible <i>Yes</i> <i>No</i> <i>Yes (but has not been used in BHR matters)</i> <i>Yes (for appearance before the Commission tribunal)</i></p>

The overview provided in Table 2, above, offers a sense of uniformity and variation across the four institutions. As such, it can also constitute a stepping-stone to move from an exploratory to an explanatory research approach. It first points to what could be variables in legal mandate/institutional design impacting NHRIs' effect on access to remedy in relation to BHR. The main difference between the studied NHRIs is the binding nature of decisions and ability to order compensation. The Nigerian and Ugandan NHRIs enjoy this mandate, however, the other two do not. This may explain the higher number and thematic spread of complaints the Nigerian and Ugandan NHRIs receive. Such potential correlations would deserve more granular research – indeed, it is worthwhile to note that the Nigerian Commission has actually not yet ordered compensation to be awarded by businesses.

### **3.2 ANALYSIS: NAVIGATING THE LAW, PRACTICE AND HUMAN RIGHTS**

The findings illustrated in Table 2 clearly demonstrate the contrast between mandates and operations. The case studies suggest that practical redefinition of mandates depends on exogenous and contextual factors, as well as structural parameters such as resources. Yet the comparative approach also underlines that it depends on NHRIs' own choices. Most activities entail costs and prioritising one action may therefore be at the expense of another. This could be a variable explaining why Niger's NHRC has invested in regular monitoring visits to extractive industries sites (yearly missions) yet is less alert on the preparation, dedicated reporting and follow-up to these visits. In contrast, other NHRIs are more selective in the running of such inquiries but also more attentive to the processes surrounding these public inquiries. Having said that, the case studies also identify a number of activities that may not be resource intensive and are therefore a matter of internal strategic and organisational choices. For instance, own-initiative investigations seem under-used. This is a missed opportunity, as some of the most stringent powers of NHRIs relate to investigations rather than decisions (summoning, request of documents, etc.) with costs partly borne by targeted companies. Organisational choices could also enhance the delegation of activities to staff and be less reliant on centralised and collective decision-making by Commissioners/Councils.

Closer scrutiny of the divergence between mandate and operations further reveals that it entails a practical dimension (what powers the NHRIs use or not, what the performed activities are, etc.) but also a normative element. In other words, what distinguishes a human rights-based approach to BHR and remedies from merely ensuring the respect of, e.g., the mining law and the granting of compensation in line with the national law, e.g., in case of evictions? This is a question that manifests itself in various ways. One example relates to the award

of compensation in BHR cases by the Ugandan Commission. According to the UHCR, the complainants' wishes are central to the types of remedy that are preferable during mediation and most victims of human rights abuses are satisfied with compensation as redress. This may lead NHRIs to substitute, rather than complement or fix, official institutional mechanisms for compensation, when the latter are inoperative. It also seems that the NHRIs examined do not ensure human rights guarantees as part of mediated settlements (e.g., non-recurrence measures, or ensuring that victims do not forfeit rights for the purpose of receiving compensation), nor is there transparency in settlements records that could help assess the trade-offs that might be at stake during mediation. The risks are therefore to misread (mostly financial) impact on a series of individual situations with systemic change and a higher protection of rights, or to contribute to a status quo in which the structural causes of the human rights abuses are not addressed.

One way of ensuring systematic impact has been to set up a special inquiry mechanism in response to the high number of complaints on a similar set of issues, as illustrated in the Nigeria and Uganda case studies. This enables the review of the situation leading to recurring abuses and moves the debate to a public and transparent forum. However, the question as to whether public inquiries seek to apply the national legislation relevant to the theme in question or the NHRIs' human rights mandate, remains essential. In Nigeria, this is the central question that formally underpins the claim made by private companies against the NHRC in the courts: according to the companies, if the NHRC's Special Investigatory Panel acts as a judicial body overseeing compliance with the environmental laws, then the exclusive jurisdiction of the Federal High Court over those issues, foreseen by the Constitution, applies.

NHRIs seem to experience difficulties in identifying (for themselves) and demonstrating (to others) exactly what a human rights approach adds to the judicial review of existing law. Their establishing laws adopt a judicial undertone without necessarily granting them judicial authority, which is unsettling for NHRIs. The Kenyan case study illustrates this well, with the KNHRC Act foreseeing that the "Commission shall have power to [...] adjudicate on matters relating to human rights" (Article 26) while not conferring a binding and enforceable power to its decisions. The Niger's NHRC Act summarises the complex mandate of the Commission in these terms: "The decisions of the Commission are guided by the imperative of respecting the law and by equity in the spirit of protecting and promoting human rights" (Article 46).

Another important finding that emerges from the analysis of the case studies – but is less easily rendered by the overview presented in Table 2 – is that the

potential for NHRIs to exert influence on BHR issues precisely lies in the space between mandates and practices. In other words, it is the margin of manoeuvre in interpreting its mandate and adjusting its practice that may be a condition for an NHRI to maximise its positive role in a given context made of multiple state and non-state actors. Much of the attention of NHRIs and their supporters have been focused on enhancing NHRIs' legal standing (e.g., making NHRI decisions binding), and effectiveness based on linear causality assumptions, according to which an NHRIs' ability to fulfil its mandate will foster impact, by itself. However, the case studies, and especially the interviews with external stakeholders, invite assessment and further analysis of NHRIs' contribution in relation to other actors. Rather than substituting failing state actors (that should allocate compensations after evictions, settle labour disputes or inspect extractive industries sites based on the law), NHRIs play complementary and transformative functions that are best identified in context and as part of wider governance structures and social forces.

The case studies put to the fore the analytical puzzle posed by NHRIs' indirect effects, that relies on the mobilisation of various actors and structures, both national and international. They offer examples of NHRIs helpfully mobilising the external expertise and influence of other actors. This includes international mobilisation – for instance, the KNHRC underlined the impact of the UNWG country visit report on an international company operating in Kenya. The same NHRI noted how the findings of its public report on mining activities served as evidence utilised by activists in support of claims they raised in courts.

However, these examples are limited. The four NHRIs themselves report that cooperation with regional or international actors is quasi-inexistent. None reported cooperation with project-level grievance mechanisms, for instance. Interviews conducted with external stakeholders from human rights groups, trade unions or even state actors (e.g., the Mining Ministry) point to the potential for a higher degree of cooperation. They identify the added value of NHRIs in the field of BHR not so much as relating to their ability to settle individual cases, but rather in exploiting their powers where other actors are limited, in particular to access information, enhance transparency and publicly advocate for human rights. Social mediation in large group cases (e.g., involving mass dismissals) is also pointed out as an area where NHRIs may be particularly helpful.

Accordingly, NHRIs' investigatory powers may be as – or more – important than adjudicative functions. This hypothesis may in part explain the attempts by extractive industries to stop the very process of collecting information put in motion by the Nigerian NHRI through its Special Investigation Panel. Although

the impact of transparency on human rights enjoyment is difficult to measure, recent studies suggest that cultivating the highest possible standards of transparency in business operations in fact minimises the need to resort to redress avenues.<sup>40</sup>

This echoes a larger academic debate regarding the tension that might exist between the systemic ambitions of NHRIs and the handling of individual complaints. The question, in short, is whether the comparative advantage of NHRIs lies in their ability to be a conduit for effective remedy in individual cases, or elsewhere. Notably, Tom Pegram and Katarina Linos have underlined the importance of complaints handling,<sup>41</sup> while Richard Carver has contended that complaints handling may undercut the strategic work of NHRIs to target structural violations.<sup>42</sup> The possibility of individual case decisions focusing on the “output” end of the problem may have problematic effects if it crowds out more strategic action or leads to compensation measures derived on a minimum of human rights guarantees.<sup>43</sup> How NHRIs’ functions play out specifically in the field of BHR therefore warrants further investigation and analysis.

### **3.3 REFLECTIONS ON NHRIS’ STRATEGIES**

The above analysis invites NHRIs to think about their potential for impact in ways that are not linear, and to position themselves in connection with a multitude of other actors. This requires adjusting NHRIs’ activities to context, and considering the importance of NHRIs mobilising other actors, and reversely other actors’ reliance on NHRIs’ powers – including those of mediating between actors, obtaining information, accessing sites and summoning actors to testify. Much of this can be done within the range of existing powers of the four NHRIs taken as case studies. The creativity that these NHRIs exercise in operationalising their mandates, as summarised in Table 2, should not be assessed as a problematic deviation to the mandate but as offering an occasion to adjust NHRIs’ activities to generate impact.

In other words, the discrepancy that exists between the legal mandate of NHRIs and their operations, as underlined in the case studies, might not be a challenge but an opportunity, and the variables explaining impact might lie in these choices as much as on institutional design and legal mandates. NHRIs might consider investing more in ensuring that their operationalisation of their mandate is relevant and tailored to the context in which they evolve, rather than blindly attempting to fulfil all aspects of their legal mandates as an ideal blueprint for impact.

There seems to be a constant risk that NHRIs may lean towards a rather legalistic orientation. For instance, in the case studies, many of the recommendations



made by the interviewees to reinforce NHRIs' impact focus on raising their legal profile, notably ensuring that their decisions are legally-binding. This legalistic tendency is shared by many NHRIs around the world, which might consume their political capital in promoting legal reforms of their status and may resolve the ambiguity of their institutional position (as administrative position independent from other state actors and as a loosely defined "cornerstone" of the human rights system) by emulating the judicial systems. Many reasons may explain this inclination. These may include the fact that their legal bases or own organisation borrows from jurisdictional terminology (for instance several of the NHRIs in the case studies have investigatory powers "as of a court", and the Ugandan NHRI calls one of its own sub-structures a "Human Rights Tribunal"). NHRIs may perceive themselves on safer grounds to decide on a matter based on national legislation and might consider that notions of equity or general rights phrasings are more easily amenable to contestation. The bureaucratic organisation of administrations, which most NHRIs have, by definition favour rule-based activities, relying on formalities and legal grounds.<sup>44</sup>

The pursuit of an overly legalistic track might not only lead to missing out on opportunities for impact, the case studies have also shown that this path entails a certain number of risks for NHRIs. In Nigeria, approaching human rights issues as a matter of abiding to existing legislation on extractive activities and pollution has offered ammunition to companies to contest the role of the Commission on the basis of lack of material jurisdiction. In Uganda, the Commission's closeness with judicial forms (and its formation as a "Human Rights Tribunal") comes at the price of the possibility for appealing its decisions in front of higher courts.

This legalistic tendency has long been shared by scholars and international organisations analysing or supporting NHRIs. Notably, they have tended to equate effectiveness with the adherence to a set of rules and standards, and primarily the Paris Principles.<sup>45</sup> A prime example is the accreditation system organised by GANHRI and the reliance on a legalistic way of measuring compliance to the Paris Principles. GANHRI's Subcommittee of Accreditation reports are saturated with demands placed upon NHRIs to advocate vis-à-vis their governments for a reinforcement of their standing.

However, both in GANHRI's work and the literature, there are signs indicating that attention is increasingly being paid to issues of practical use of legal mandates. On GANHRI's side, since 2015, occasional mentions appear in the Subcommittee's reviews assessing the willingness of NHRIs to exercise their mandates in practice. In 2017, the Subcommittee consolidated this practice and published a practice note on assessing the performance of NHRIs, in which the Subcommittee signals that it will consider "whether the NHRI demonstrates

independence in practice and a willingness to address the pressing human rights issues.”<sup>46</sup>

On the scholarship side, the volume edited by Ryan Goodman and Tom Pegram in 2012 on human rights, state compliance and social change provides multiple case studies that inform such dynamics.<sup>47</sup> However, these go in diverging directions. Pegram’s contribution on Latin America suggests virtuous circles with NHRIs further underpinning social mobilisation, and Okafor’s review of English-speaking African countries shows how social actors may consider NHRIs to be allies within the state. By contrast, Rosenblum demonstrates how NHRIs at times divert resources and funding away from NGOs or drain NGOs’ personnel. For Meyer, in certain contexts NHRIs invade a space within national systems that displace other actors and discourage them from advancing human rights – with the idea that human rights work is increasingly “professionalised” through NHRIs.<sup>48</sup> The two editors call for more systematic research on these dynamics.

The findings presented in the present report invite scholars and NHRIs supporters to continue approaching the roles of NHRIs more holistically, not only on legal mandates.

### **3.4 OPTIONS FOR FURTHER RESEARCH**

As explained in the methodology section (see Part 1), the approach taken in this report is primarily exploratory, and is a first dent into the understanding of the identification of the variables that explain NHRIs’ ability to effectively facilitate access to remedy in the context of business-related human rights abuses. This short comparative analysis of the case studies yields interesting insights for future research, notably in terms of identifying key questions that would deserve further attention in this broad field of inquiry. This includes the question of mobilisation of social forces and indirect effects of NHRIs, the understanding of the processes of mediation and conciliation processes in the field of human rights, or a better grasp of the non-judicial or non-legalistic approach to human rights issues.

In terms of research methods and reflecting on both the nature of the issues to be further explored and the experience of collecting and analysing them, the present authors would invite future academic research to consider the following three suggestions.

First, the case studies have demonstrated, perhaps unsurprisingly, the importance of moving beyond the legal analysis of mandates to get a sense of the actual work of NHRIs. The law but also much of the publicly available documentation (e.g., NHRIs’ reports) do not depict the granularity of NHRIs’

work. Interviews and field work helped in that regard, as did the innovative approach adopted consisting in co-producing the case studies. The more resolute use of **ethnographic methods**, notably embedded research and participant-observation, would probably yield even better insights, and may be indispensable regarding specific issues at stake.<sup>49</sup> This would notably enable researching important sites and documentary data that eludes desk-based analysis and in part elite interview-based research methods. It would be particularly crucial to access the closed-doors mediation and conciliation meetings and attempt to understand the mechanisms of influence of NHRIs in their direct interactions with businesses during on-site visits and trainings.

Second, and related, the above analysis shows how a **comparative research** approach serves well to reveal the variables that influence the gap between mandates and practice, and how NHRIs may navigate a similar mandate in different ways, or how a fault-line in the mandates may influence outcomes. A comparative approach focused on more in-depth testing and explaining of selected variables could bear interesting results. The cases explored in this report prove to be a fruitful selection of cases for future comparative work based on the “most-similar systems” research design.<sup>50</sup> For instance, the ability to organise public inquiries, a shared feature among the four NHRIs, leads to different choices and agency in implementing this formal power. A second example could be to select two NHRIs among the four with a different variable – e.g., one with binding decisions and the ability to determine damages and compensation and one that does not, and seek to trace the impact of such variable on the NHRIs ability to impart change. The above Table 2, in that sense, can facilitate the selection of cases and variables on which to build future comparative research projects. Undertaking comparative analysis involving different types of NHRIs, for example commissions and ombuds institutions, might yield further interesting results.

Third, the analysis has revealed how the engagement of NHRIs in the co-production of knowledge about themselves is key to gather data that reflects better the reality of their interventions. At the same time, self-reflexivity is not without its limits and challenges. The interviews conducted with stakeholders external to the NHRIs has proven invaluable to enrich the perspectives and understanding of how NHRIs exert influence, notably in terms of social mobilisation and finding the most impactful practical role within a complex multi-actor landscape. The emphasis placed in the recommendations on maximising the added value of different institutions in creating a network of access to remedy for business-related human rights abuses, further emphasises this as an area that researchers might usefully explore further. Additional research on NHRIs’ role in facilitating access to remedy in the field of BHR **from**

**the perspective of other actors** – judicial and other state-based remedy mechanisms, businesses, NGOs, trade unions, ministries, and mostly importantly rights-holders – would be a crucial complement to NHRI-centered research methods. Such perspectives include not only analysing how NHRIs mobilise other actors, but also how NHRIs may be mobilised by social forces. This focus on “popular agency” in the work on NHRIs’ effectiveness is the innovative research approach that Okafor and Agbakwa suggest to adopt, and applied to the Nigerian Human Rights Commission in 2002.<sup>51</sup>

Additional research could help NHRIs resolve the difficult questions identified in the four case studies explored in this report and provide a basis for further guidance from international and regional organisations and peer networks. In the meantime, NHRIs may be inspired by a range of theoretical considerations as well as experiences by their peers, as identified in the UNWG survey and discussed in Part 1 of the present report.

# ENDNOTES

- <sup>1</sup> United Nations General Assembly (UNGA) (2018). Business and Human Rights: Improving Accountability and Access to Remedy. Resolution 38/13, UN Doc. A/HRC/RES/38/13.
- <sup>2</sup> For a summary of this inquiry, see: German Institute for Human Rights (DIMR) and Danish Institute for Human Rights (DIHR) (2019). Remedy in Business and Human Rights Cases: The Role of National Human Rights Institutions, Report from the October 2018 Berlin NHRI Workshop. For the full report, see: Kenya National Commission on Human Rights (KNCHR) (2016). Public Inquiry Report on Mining and Impact on Human Rights: Taita Taveta County.
- <sup>3</sup> KNCHR (2006). The Malindi Inquiry Report 2006: Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi.
- <sup>4</sup> KNCHR (2018). The Malindi Public Inquiry Audit Report: An Audit of 2006 KNCHR Public Inquiry on Salt Harvesting in Magarini, Malindi.
- <sup>5</sup> KNCHR (2006). The Malindi Inquiry Report 2006: Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi.
- <sup>6</sup> KNCHR (2018). The Malindi Public Inquiry Audit Report: An Audit of 2006 KNCHR Public Inquiry on Salt Harvesting in Magarini, Malindi.
- <sup>7</sup> Ibid.
- <sup>8</sup> Mazera Ndurya, Poverty rises as Malindi salt mines expand, Daily Nation, 4 November 2009: <https://www.nation.co.ke/news/1056-686438-jk22g0z/index.html>
- <sup>9</sup> KTN News Kenya, Magarini residents accuse salt mining firm of land grabbing, 6 January 2018: <https://www.youtube.com/watch?v=o9MxPF6-uk>
- <sup>10</sup> Nehemiah Okwembah, Squatters told to vacate land belonging to salt firms or face eviction, Standard Digital, 21 August 2018: <https://www.standardmedia.co.ke/article/2001292755/squatters-told-to-vacate-land-belonging-to-salt-firms-or-face-eviction>
- <sup>11</sup> KNCHR (2017). A Report on Gender Audit of the Situation of Women & Other Vulnerable Human Rights Defenders in Kenya: Work Done, Work Emerging and Work Needed: A Human Rights Perspective to Holistic Protection.
- <sup>12</sup> The case can be found here: <http://www.bailii.org/ew/cases/EWHC/QB/2017/371.html>  
For more discussions on the same, see: Business & Human Rights Resource Centre, Unilever lawsuit (re ethnic violence in Kenya): <https://www.business-humanrights.org/en/unilever-lawsuit-re-ethnic-violence-in-kenya>
- <sup>13</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR), Statement at the end of visit to Kenya by the United Nations Working Group on Business and Human Rights, 11 July 2018: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23356&LangID=E>
- <sup>14</sup> The text of the Constitution is available at: <https://www.wipo.int/edocs/lexdocs/laws/fr/ne/ne005fr.pdf> (in French).
- <sup>15</sup> Article 149 of the Constitution.
- <sup>16</sup> Article 151 of the Constitution.
- <sup>17</sup> Article 153 of the Constitution.
- <sup>18</sup> The remaining cases concerned, e.g., alleged discrimination in the choice of the company's agent to go on pilgrimage to Mecca, and a case of compensation for eviction in the context of road construction.
- <sup>19</sup> In total, between 2013 and 2019, the CNDH conducted inquiry fieldwork and visits to the following companies and gold panning sites: in 2013, the Arlit mining companies (COMINAK and SOMAIR); in 2015, SOMINA Société des mines de l'Azélik [Azelik Mining Company] which

operates a uranium mine) on two occasions; and SORAZ (Société de raffinage du pétrole de Zinder [Zinder Oil Refining Company]); in 2016 and 2017, the Arlit uranium companies (COMINAK and SOMAÏR), the gold panning sites in the department (Arlit), the Djado gold panning site (mission by the CNDH chairperson) and Agadem société d'extraction du Pétrole [Agadem Oil Extraction company] (Diffa region). In December 2019, the CNDH Working Group on economic, social, cultural and environmental rights carried out a nine-day investigation mission, targeting four extractive companies (SOMINA, COMINAK, SOMAÏR, SONICHAR).

<sup>20</sup> Box 2 is based on the CNDH Annual Report 2015-16.

<sup>21</sup> Réseau des Organisations pour la Transparence et l'Analyse Budgétaire (ROTAB) Niger, Publish What You Pay and Oxfam (2019). *Etat des lieux sur la rétrocession des 15% des revenus miniers et pétroliers de l'Etat vers les communes des régions concernées: Etude de référence sur les redevances minières et pétrolières au Niger*; ROTAB Niger, Publish What You Pay and DIHR (2014). *Etude de référence sur les Entreprises et les Droits de l'Homme: cas des industries extractives au Niger*; ROTAB Niger (2014). *Business and Human Rights: The Case of Extractive Industries in Niger, Baseline Study*.

<sup>22</sup> ROTAB Niger (2018). *L'impact des industries extractives sur les droits à un niveau de vie suffisant et à la santé au Niger: Soumission au Comité des droits économiques, sociaux et culturels dans le cadre l'examen du rapport initial du Niger*, p. 11.

<sup>23</sup> *Ibid*, p. 108.

<sup>24</sup> ROTAB Niger, Publish What You Pay and DIHR (2014). *Etude de référence sur les Entreprises et les Droits de l'Homme: cas des industries extractives au Niger*, p. 89.

<sup>25</sup> Global Alliance of National Human Rights Institutions (GANHRI) (2017). *GANHRI Sub-Committee on Accreditation Report*.

<sup>26</sup> See section 5(a) of the National Human Rights Commission Act 1995 (refers to constitution, UDR, ICCPR, other national and regional instruments to which Nigeria is a party).

<sup>27</sup> The investigatory powers of the Commission are set out in the National Human Rights Commission Act 1995, sections 5 and 6.

<sup>28</sup> Based on: DIMR and DIHR (2019). *Remedy in Business and Human Rights Cases: The Role of National Human Rights Institutions*, Report from the October 2018 Berlin NHRI Workshop. For specific cases see, e.g., *Oriental Energy Resources Limited v National Human Rights Commission FHC/ABJ/CS/628/2016*; *Addax Petroleum Development (Nig.) Limited v National Human Rights Commission FHC/ABJ/CS/431/2016*; *Addax Petroleum Development (Nig.) Limited v National Human Rights Commission FHC/ABJ/CS/431/2016*; *National Human Rights Commission v Addax Petroleum Development (Nig.) Limited FHC/ABJ/CS431/2016*.

<sup>29</sup> Business & Human Rights Resource Centre, Shell lawsuit (re Nigeria – Kiobel & Wiwa): <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa>

<sup>30</sup> The promotion safeguards of the Commission are set out in the NHRC Amendment Act, 2011, section 5.

<sup>31</sup> In relation to remedies, Article 52(1) of the Constitution foresees that: "The Commission shall have the following functions: (a) to investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right; [...] (d) to recommend to Parliament effective measures to promote human rights. including provision of compensation to victims of violations of human rights, or their families."

<sup>32</sup> According to Article 20(2) of the Constitution, "the rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons." While the Constitution does not explicitly mention private companies, it also does not exclude abuses they might be responsible for from the purview of the UCHR. As per Article 53(4) of the Constitution, only excluded are: "(a) any matter which is pending before a court or judicial tribunal; or (b) a matter involving the relations or

dealings between the Government and the Government of any foreign State or international organisation; or (c) a matter relating to the exercise of the prerogative of mercy.”

<sup>33</sup> A human right baraza is a community public meeting conducted to discuss issues of human rights as well as other governance issues including democracy, service delivery, peace and conflict management, and rule of law which have an impact on human rights. See: [https://www.ug.undp.org/content/uganda/en/home/library/crisis\\_prevention\\_and\\_recovery/publication\\_2.html](https://www.ug.undp.org/content/uganda/en/home/library/crisis_prevention_and_recovery/publication_2.html)

<sup>34</sup> The complaints received represent all matters reported to the UHRC, whether admissible or not.

<sup>35</sup> For full disaggregation of complaints registered (by regions, themes, gender, age, etc.), see annual reports. For 2018, the report is available at: <http://www.uhrc.ug/wp-content/uploads/2019/06/UHRC-21st-Annual-Report.pdf>

<sup>36</sup> UHCR (2013), Oil in Uganda: Emerging Human Rights Issues – Special Focus on Selected Districts in the Albertine Graben.

<sup>37</sup> See the position of the UHRC on the Minimum Wage Bill in 2016, at: <http://www.uhrc.ug/wp-content/uploads/2019/06/UHRC-position-on-the-Minimum-Wage-Bill-2016.pdf>

<sup>38</sup> Available at: <http://www.uhrc.ug/wp-content/uploads/2019/06/Uganda-Business-and-Human-Rights-Country-Guide.pdf>

<sup>39</sup> Guarantees discussed in sub-section 4.3, based on the criteria proposed and analysed by McGregor, Murray and Shipman (2019).

<sup>40</sup> A large study on cases of human rights abuses related to the activities of extractive industries in Asia and Africa, conducted by Tricia Olsen, Kathleen Rehbein, Michelle Westermann-Behaylo led to insightful findings regarding the nexus between transparency and the need to seek remedy for abuses. “Some scholars note that industry-specific initiatives, such as the Extractive Industry Transparency Initiative (EITI), may make firms easy targets for human rights allegations. The logic is that it is easier for activists to point out shortcomings for those firms that have publicly committed to specific standards. The study finds the opposite: those firms that comply with EITI requirements are less likely to face judicial activity. The insight from this study is that firms must meet certain standards to yield the benefits of certain voluntary initiatives and, as a result, are less vulnerable, rather than more, to judicial claims against them” (quote presenting the study extracted from: Laura Bernal-Bermudez, L., Olsen, T.D. and L. Payne (2016). Allegations of Corporate Human Rights Abuse in Latin America, 2000-2014: Insights from a New Dataset.

<sup>41</sup> Linos, K. and T. Pegram (2017). What Works in Human Rights Institutions?, *American Journal of International Law*, 111(3), pp. 628-68.

<sup>42</sup> Carver, R. (2005). Assessing the Effectiveness of National Human Rights Institutions, International Council on Human Rights Policy.

<sup>43</sup> The authors are grateful to Tom Pegram for articulating the point made in this paragraph.

<sup>44</sup> Lorion, S. (forthcoming in 2020). The Institutional Turn of International Human Rights Law and its Reception by State Administration in Developing Countries, PhD dissertation, University of Copenhagen, Chapters 5 and 10.

<sup>45</sup> For an overview of the evolution of scholarship on NHRIs, see, e.g., Jensen, S. (2018). Lessons from Research on National Human Rights Institutions: A Desk Review on Findings Related to NHRI Effectiveness, pp. 17-18.

<sup>46</sup> Global Alliance of National Human Rights Institutions (GANHRI) (2017). Subcommittee of Accreditation, Practice Note 3: Assessing the Performance of NHRIs.

<sup>47</sup> Goodman, R. and T. Pegram (Eds.) (2012). Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions. New York: Cambridge University Press.

<sup>48</sup> Ibid.

<sup>49</sup> For a discussion on how such methods may be applied to research on human rights institutions, see: Sano, H.-O. and T.M. Martin (2018). Inside the Organization: Methods of Researching Human Rights and Organizational Dynamics. In Andreassen, B.A., Sano, H.-O. and S. McInerney-Lankford (Eds.), Research Methods in Human Rights: A Handbook, pp. 253-81. Cheltenham: Edward Elgar Publishing.

<sup>50</sup> della Porta, D. (2008). Comparative Analysis: Case-oriented Versus Variable-oriented Research. In della Porta, D. and M. Keating (Eds.), Approaches and Methodologies in the Social Sciences, pp. 198-222. Cambridge: Cambridge University Press.

<sup>51</sup> Okafor O. and S.C. Agbakwa (2002). On Legalism, Popular Agency and “Voices of Suffering”: The Nigerian Human Rights Commission in Context, Human Rights Quarterly, 24(3), pp. 662-720.



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