

2013

Loyola University Chicago International Law Symposium Keynote Address Towards an African Human Rights Perspective on the Extractive Industry

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Recommended Citation

Pacifique Manirakiza *Loyola University Chicago International Law Symposium Keynote Address Towards an African Human Rights Perspective on the Extractive Industry*, 11 *Loy. U. Chi. Int'l L. Rev.* 1 (2013).
Available at: <http://lawcommons.luc.edu/lucilr/vol11/iss1/2>

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Symposium - Keynote Address

TOWARDS AN AFRICAN HUMAN RIGHTS PERSPECTIVE ON THE EXTRACTIVE INDUSTRY

Pacifique Manirakiza[†]

I. Introduction

I wish to express my sincere appreciation to the organizers for the invitation extended to me to take part in this important symposium. My presence here provides me with an opportunity to promote the African Commission on Human and Peoples' Rights (ACHPR), especially the mandate of the African Commission Working Group on Extractive Industries, Human Rights and Environment (WGEI) to which a prominent faculty member of this Law School, Professor James Gathii, is an Expert member. In this forum I intend to engage with all of you in highlighting the problems and challenges the extractive industry on the continent poses for the promotion and protection of the rights of the more than 830 million Africans on the continent.

Let me begin by some preliminary remarks:

1. Although I am a member of the African Commission, I am here in my personal capacity and my presentation expresses my personal views, which do not necessarily represent the opinion of the Commission or the Working Group on Extractive Industries, Human Rights and Environment.
2. I'm not an expert in natural resources law like other speakers although this area begins to attract my interest, especially given my new responsibilities as a Chairperson of the WGEI.

In my talk, I will highlight the reasons why I think Africa needs a human rights based framework for a humane extraction of natural resources. Within this framework, I argue that local communities' interests and rights should be at the forefront. That is why I explore the legal foundations of community rights in the extractive industry after highlighting the challenges and obstacles of implementing a human rights based perspective in the extractive industry in Africa.

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II. The need for an African human rights perspective in the extractive industry

The continent of Africa is very rich in mineral and natural resources. Several African countries are blessed with some of the world's largest deposits of minerals and oil. To name a few, Angola's natural resources include diamonds, iron ore and oil; Botswana is rich in mineral deposits including diamonds, coal, copper, nickel, gold, soda ash and salt; Nigeria is Africa's largest oil producer and the world's tenth largest; South Africa is the world's largest producer of gold, platinum group metals and chromium, and is the fourth-largest producer of diamonds. The Democratic Republic of Congo (DRC) contains Africa's largest deposits of copper, cobalt and coltan, as well as significant reserves of diamonds, gold and other minerals and forest resources. This country has often been referred to as a geological scandal.

With this abundance of natural resources, the logical presumption would be that the extraction of these vast deposits of mineral and other natural resources would yield a great deal of capital, which would in turn contribute to the development of various countries. However, this is often not the case. According to the Extractive Industries Transparency Initiative (EITI), "3.5 billion people live in resource-rich countries. Still, many are not seeing results from extraction of their natural resources. And too often poor governance leaves citizens suffering from conflict and corruption".¹ Although this is a global reality, the situation is no better on the African continent, as was noted by one of the proud sons of the continent, Mr. Kofi Annan, in an article published in the *New York Times* highlighting Africa's 'resource curse': "Used wisely, [these] natural resource revenues could lead to sustainable economic growth, new jobs and investments in health, education and infrastructure. But sadly, history teaches us that a more destructive path is likely — conflict, spiraling inequality, corruption and environmental disasters are far more common consequences of resource bonanzas. The cliché remains true: striking oil is as much a curse as a blessing."²

The situation is commonly referred to as the "resource curse" or the "paradox of plenty," given that all too often the extraction of these mineral resources has fuelled or aggravated armed conflicts and massive human rights violations. This has been the case in the Democratic Republic of Congo with the illegal exploitation of natural resources by armed groups and, to some extent, foreign States³ such as in Angola and Sierra Leone where illicit diamond smuggling fuelled conflicts, and in Côte d'Ivoire where armed groups used diamonds, cocoa, and cotton to fund their war efforts and for personal gain.

¹ EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://www.eiti.org/eiti> (last visited Oct. 12, 2012).

² Kofi Anan, *Momentum Rises to Lift Africa's Resource Curse*, N.Y. TIMES, Sept. 14, 2012, http://www.nytimes.com/2012/09/14/opinion/kofi-annan-momentum-rises-to-lift-africas-resource-curse.html?_r=4&.

³ Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2003/1027.

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The pervasiveness of human rights violations committed by those involved in the extractive industries sector, including non-state actors, have negatively impacted countries at large, but more specifically the communities who live in resource-rich areas, as they experience forced evictions and relocations, land-grabbing, loss of livelihood, destruction of the environment, health hazards, and contamination of soil and water sources, to name a few. Those negative effects of extractive industry on local communities call upon the African Human Rights Monitoring body to play a corrective role. It is in this context that the WGEI has been created in order to guide the Commission on the proper course of action to alleviate the sufferings of the victims of the extractive industries. In my view, enabling and empowering local communities to assert and protect their rights and interests is undoubtedly one of the means to explore, despite systemic obstacles and challenges ahead.

III. Empowering local communities affected by extractive activities: obstacles and challenges

Local communities affected by extractive activities and projects are currently in an underprivileged situation compared to the dominant and powerful position of extractive companies. Usually, the latter deals with central governments in order to be granted prospection and extractive rights without any significance to local communities. The latter face many legal challenges and obstacles, which hamper any efforts toward conceptualization of the rights of local communities affected or is likely to be affected by extractive and other development projects.

A. Lack of international recognition of rights of local communities

In international human rights law, rights of communities and/or their members are protected. In particular, those of indigenous and tribal communities and populations and minorities are relatively defined, either in human rights instruments⁴ or in case law⁵ This recognition is, in grand part, the result of numerous years of efforts by civil society organizations advocating for the rights of indigenous and minority peoples. Advocacy initiatives in this regard lead to the conceptualization of their rights and, subsequently, the adoption of a legal framework of rights protection.⁶ For instance, the rights protection regime for indigenous populations and communities is founded on their particular needs, their lifestyles, and the systemic injustices they were subjected to in the past.⁷

⁴ Int'l Labor Org., *Indigenous and Tribal Peoples Convention*, No. 169, (1989)[hereinafter ILO Convention No. 169]; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. A/RES/47/135 (Dec. 18, 1992).

⁵ Case of the Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H. R. (Nov. 28, 2007); Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya, Afr. Comm'n H. and Peoples R., Communication 276/03 (Nov. 25, 2009).

⁶ ILO Convention No. 169, *supra*, note 4.

⁷ Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya, Afr. Comm'n H. and Peoples R., Communication 276/03, at para. 149 (Nov. 25, 2009).

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In the extractive industry, it is easier for indigenous peoples to use this framework and claim rights protection for themselves. One particular legal tool available to them is the free, prior and informed consent (FPIC) which entitles them to be substantially consulted on any development projects or extractive activities which may affect them. They are then given an opportunity to express their views on the prospective projects before they are actually implemented. Up to now, it is not yet clear whether or not international human rights law extends this legal tool to other non-indigenous peoples. Therefore, local communities potentially or actually affected by extractive industries are legally disempowered and lack an adequate legal protection in international law.

B. Lack of entitlement to mineral and other natural resources and that are deemed to be state owned to the ignorance of their rights

The lack of proper legal protection of the rights of local communities as such is further complicated by the fact that they also, to some extent, lack entitlement to land and its natural resources. In postcolonial African states, some constitutions and laws provide that land belongs either to the government, the President, or the State. In Zambia, “all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.”⁸ Other legal systems recognize a clear separation of the rights of natural resources from the rights of ownership in the land. While the land belongs to persons, either natural or legal, with a title, natural resources usually belong to the State. In South Africa for instance, section 3(1) of the *Mineral and Petroleum Resources Development Act No 28 of 2002* states that ‘Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.’ In Burundi, mineral and fossil resources belong exclusively to the State.⁹

This post-colonial regime is in sharp contrast with pre-colonial customary land tenure systems by which the owner of land was the owner not only of the surface but of everything legally adherent thereto, and also of everything contained in the soil below the surface. This legal status of mineral resources belonging to the State disempowers local communities in the sense that the State is the only entity entitled to take critical decisions about when and how to extract and use the revenues of natural resources exploitation.

C. Lack of homogeneity of local communities

The other challenge for conceptualizing the rights of local communities affected by extractive-related activities is their lack of homogeneity in the sense that members do not necessarily share the same ethnicity or a minority status. Also, in many cases they have not been historically marginalized or compelled to distinct treatment or injustices as such. Their victimization is purely due to the simple and fortuitous discovery of natural resources on or beneath their lands.

⁸ Lands (Amendment) Act of 1996, Cap. 184, LAWS OF REP. OF ZAMBIA (1996), at art. 3.

⁹ Code minier du Burundi, 2012, at art. 7, 9.

This situation can prejudice their development in the socio-economic, political, and cultural spheres compared to the general population. Of course, under general international human rights law, each affected member of the community is protected as such and he can claim respect of his right to property, his right to a remedy, and his right to housing. However, the nature of the extractive industry has far-reaching effects that go beyond individual concerns and interests. Collective interests such as environment, development, peace, and security come into play. The real challenge here within the extractive sector is how to protect individuals as a group of victims with collective rights, including land rights.

IV. Asserting the rights of local communities in the extractive industry

Contrary to indigenous peoples, where there is a clear recognition in international law of their collective rights and their capacity to mobilize and defend them, other local communities who can face the same fate of evictions, family disruption, and other human and peoples' rights violations are not sufficiently protected. Of course each State is duty-bound to ensure respect and protection of the human rights of its citizens. But the context of the extractive industry poses its own challenges for African states to implement their legal obligations arising from international human rights law. More often, governments are parties to extractive or other investment contracts where they deal with powerful and legally well-protected multinationals. Apart from instances of corruption of government officials by or collusion with extractive industries,¹⁰ governments may not be proactive or show good faith in seeking adequate protection for affected local communities. In fact, state or non-state actors' extractive rights do sometimes conflict with the land rights of communities. How can we then reconcile these competing rights from a human rights perspective? This is the big challenge the Working Group has. In my view, local communities should be empowered so that they can fight for the respect and protection of their rights, which need to be first articulated and conceptualized as such in international law. Given the relatively well-organized protection afforded to indigenous peoples and the similarities of the latter with local communities as far as the relationship to land is concerned, a question arises as to whether or not it is possible to use the indigenous rights framework to extend protection to non-indigenous communities like local communities affected by the extractive activities. In order to answer this question, two elements ought to be taken into consideration: on one hand, the level and nature of the relationship between local communities and their lands and, and on the other hand, the issue of whether local communities can qualify as a "people" in order to claim protection under the African Charter as such.

¹⁰ For instance, the Government of Nigeria has been found complicit to human rights violations perpetrated by oil companies against Ogoni people. *See* Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm'n H. and Peoples' R., Communication No. 155/96, at par. 66 (Oct. 27, 2001); SERAP (Socio-Economic Rights and Accountability Project) v. Federal Republic of Nigeria, Ct. of J. of the Econ. Cmty. of West Afr. St. (Ecowas), Judgment, No. ECW/CCJ/JUD/18/12, par. 109-111 (Oct. 27, 2009).

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A. Relationship between land and local communities in Africa

One of the foundations for the recognition of indigenous rights in international law is their special relationship with land through which they can enjoy and exercise some of their basic rights, including the socio-economic and cultural rights. In today's Africa, mostly composed of unindustrialized or non-urbanized states, the majority of African people live off the land through subsistence farming, cattle raising, fishing, hunting, and gathering. In this context, the ownership of land is important not only for indigenous peoples but also for other communities, especially in rural areas. In the *Ogoni* case, the African Commission held that the survival of the Ogonis (a non-indigenous community) depended on their land and farms that were destroyed by the direct involvement of the government.¹¹ Land is not only essential to their survival, but also to their culture, which depends to some extent on land rights and ownership of it. In this regard, one can draw the conclusion that local communities affected or likely to be affected by extractive-related activities depend much on the land and the access to its resources for food, health, water, and culture. Simply put, land and its resources constitute supermarkets, pharmacies and ritual sites for local communities.

From this perspective, it seems that there should be no major objection to the extension to local communities of a legal protection similar to that provided to indigenous peoples in international human rights law so that they can enjoy and protect their collective rights. For instance, States and companies shouldn't proceed to signing and implementing development and extractive projects unless a free, prior and informed consent (FPIC) process has taken place in order to get the views and concerns of local communities to be affected by the projects. This will allow them an opportunity to assert their interests and needs, but also to agree on alternative areas for relocation in case of evictions.

Therefore, local communities should meaningfully and effectively participate in a way that they can substantially influence the decisions. The right to participate in the decision-making process should not be construed as a right to veto development or extractive initiatives. This is because the African Commission has reiterated at different occasions the right of African states to choose developmental paths in the national interest of their peoples.¹² At the same time, a mere formalistic attempt to consult does not constitute consultation. For a consultation to grant a social license to the extractive or development projects, it has to be "a genuine and effective engagement of minds between the consulting and the consulted parties."¹³ Local communities' voices should be heard and taken seriously. A state can therefore proceed with their views in mind, which will certainly be

¹¹ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm'n H. and Peoples' R., Communication No. 155/96, at par. 67 (Oct. 27, 2001).

¹² Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v. Kenya, Afr. Comm'n H. and Peoples R., Communication 276/03 (Nov. 25, 2009); Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm'n H. and Peoples' R., Communication No. 155/96, at par. 66 (Oct. 27, 2001).

¹³ *S. v. Smit* 2008 (1) SA 135 at 153.

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balanced with the general interest of the nation. In this regard, there is a shared ownership of the decisions and the decision-making process. This is important for the development and success of the extractive industry as consent is an important social license and blessing to the extractive industry.

However, a question may be raised about the capacity and the expertise of the communities to bargain, given that most of the extractive projects are carried out in remote rural areas where people are totally poor, uneducated, and with less assistance from the central government. In order to help them shape their needs, public interest civil society organizations have to play a critical role in the empowerment of the local communities. In this regard, African non-governmental organizations have already set examples and demonstrated their capacity to accompany local communities in the quest for their rights. This has been the case of the *Centre for Minority Rights Development* (CEMIRIDE) with the Endorois indigenous peoples in Kenya and the *Social and Economic Rights Action Center* (SERAC) with the Ogoni people in Nigeria.

The recourse to FPIC in the extractive industry, as far as local communities are concerned, can be legally based on an emerging case law of UN human rights bodies, along with some state practice. For instance, the United Nations Committee on the Convention on the Elimination of Racial Discrimination (UNCERD) has recommended that the State of Israel should enhance its efforts to consult the Bedouin inhabitants of villages, and noted that it should in any case obtain the free and informed consent of the affected communities prior to relocation.¹⁴ This was probably the first time that FPIC has been used outside the indigenous context, given the fact that the Bedouins' traditional occupation and ways of life are linked to the utilization of land and its resources.

Individual state laws also provide for FPIC. For example, according to the *Nigerian Minerals and Mining Act of 2007*, extractive companies bear some duties, *inter alia* the duty to consult (meaningful consultation) and duty to conclude Community Development Agreements.¹⁵ In so doing, this state approach empowers local communities and recognizes that local communities not only have a say in the planning and execution of extractive projects, but some rights as well. It was also the same for South Africa with the *Mineral and Petroleum Resources Development Act No 28 of 2002*, which requires mining companies to formulate development plans for communities and consider social welfare of the affected people.¹⁶

In short, the consultation process to be engaged in with local communities by extractive companies and other "developers" infuses a human rights centered approach to development.¹⁷ Therefore, the current justification of the extractive industry in Africa as a means to achieve economic growth should be revised in order to include the individual and community development as the end goal for

¹⁴ Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel, Feb. 19, 2007 – Mar. 9, 2007, CERD/C/ISR/CO/13, at para. 25 (June 14, 2007).

¹⁵ Nigerian Minerals and Mining Act (2007) Cap. (1), §71(1)(c) (Nigeria).

¹⁶ Mineral and Petroleum Resources Development Act No 28 of 2002, §23(1)(e) (S. Afr.).

¹⁷ Cronjé and Chenga, 417

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extractive industries. This will be in line with the principles enshrined in the African rights charter.

B. Do “local communities” constitute a “people” in accordance with the African Charter?

The African Charter is the only human rights instrument that provides for the rights of peoples, whether indigenous or not. According to Mutua, “the idea of peoples’ rights is embodied in the African philosophy which sees men and women primarily as social beings embraced in the body of the community.”¹⁸ This is exemplified by the Ubuntu philosophy, which purports that an individual is nothing without his/her community or group that he/she belongs to. Unfortunately, no African treaty body, including the Commission, has already clearly interpreted the Charter in order to offer a clear definition of the concept “people,” which of course is also linked to the context of the decolonization movement. However, an overview of the African Commission’s jurisprudence gives some tips. In *Kevin Mgwanga Gunme et al. v. Cameroon*, the concept “people” refers to persons “bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.”¹⁹ So, according to these criteria, especially the territorial or geographical connection as well as other affinities, local communities can claim to be a people and seek protection of some of the collective rights enshrined in the African Charter.²⁰ These include the right to development, peace, a healthy environment, self-determination, and an equitable share of their resources, as this was decided by the Commission regarding the people of Southern Cameroon.²¹ That was also the rationale behind the *Ogoni* case decision when the Commission decided that the destruction of land and farms, along with other brutalities, not only persecuted individuals in Ogoniland but also the Ogoni community as a whole.²² Furthermore, after a careful consideration of the damaging effects of evictions on the lives of the Ogoni people, and a finding that the right to adequate housing encompasses the right to protection against forced evictions, the Commission made a determination that the right to adequate housing is a collective right.²³

¹⁸ Makau W. Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA J. INT’L. L. 339 (1995), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526730.

¹⁹ Kevin Mgwanga Gunme et al. v. Cameroon, Afr. Comm’n H. and Peoples R., Communication No. 266/03, at para. 175 (May 27, 2009).

²⁰ African Charter art. 19-24.

²¹ Kevin Mgwanga Gunme et al. v. Cameroon, Afr. Comm’n H. and Peoples R., Communication No. 266/03, at para. 176 (May 27, 2009).

²² Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm’n H. and Peoples’ R., Communication No. 155/96, at par. 67 (Oct. 27, 2001).

²³ *Id.* at para. 63.

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It is also worth mentioning that the Commission was seized of a communication²⁴ where the Bakweri community protested against the alienation to private investors of large parts of the lands traditionally occupied by them.²⁵ In this case, the complainant alleged numerous violations of Charter rights related to collective rights including the right to property. Unfortunately, the case failed the admissibility test, depriving the Commission of an opportunity to dispose of the issue of collective land rights of local communities within the context of its protective mandate.

Finally, the Commission has had made some important determinations as to the collective rights of local communities, such as those facing evictions in the interests of development or extractive projects. For instance, it has implicitly recognized the right of local communities to be consulted and notified prior to their evictions from their homes and lands. In its *Resolution 231 on the Right to Adequate Housing and the Protection from Forced Evictions*, the Commission emphasized its concerns saying, “that each year hundreds of thousands of people in Africa are forcibly evicted from their homes by States and other non-state actors, without prior consultation and notice, adequate compensation or appropriate alternative housing solution.”²⁶ It therefore concluded that “a minimum degree of security of tenure, including protection from forced evictions, is essential for people to realise their right of access to adequate housing to meet the basic need of a decent livelihood.”²⁷

In conclusion, from the above analysis of the Commission’s practice, it seems that the regional human rights body is open to consider cases involving the collective rights of peoples affected by extractive-related activities, as it held in the Ogoni case, “The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.”²⁸ Therefore, despite the notable differences between local communities and indigenous peoples, the adverse impact of extractive projects on their lifestyles warrants an adequate protection for local communities.

V. Conclusion

While there is a consensus on the urgent necessity to protect and promote indigenous rights of indigenous communities in Africa, given the historical and

²⁴ Bakweri Land Claims Committee v. Cameroon, Afr. Comm’n H. and Peoples R., Communication 260/02 (2004).

²⁵ *Id.* at para. 2.

²⁶ Resolution on the Right to Adequate Housing and Protection From Forced Evictions, Afr. Comm’n H. and Peoples R., Res. No. 231 (Oct. 22, 2012).

²⁷ *Id.*

²⁸ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, Afr. Comm’n H. and Peoples’ R., Communication No. 155/96, at par. 68 (Oct. 27, 2001).

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systemic injustices and discrimination practices they have been subjugated to, it is not clear whether or not this protection can be extended to other local communities. However, technically the latter can seek protection along the same lines as indigenous peoples. Like the latter, African local communities have a strong link to land and its resources, as their livelihoods depend on access to and productive capacity of the lands. Extractive-related activities such as mining, land-grabbing, evictions, and relocations have an impact on these people and their lifestyles. From an analogical perspective, they should therefore seek a protection similar to that other groups like minorities and indigenous peoples enjoy in international human rights law. Fortunately, legal bases for this protection exist within the African human rights system. They only need to be explored and applied to this particular situation.