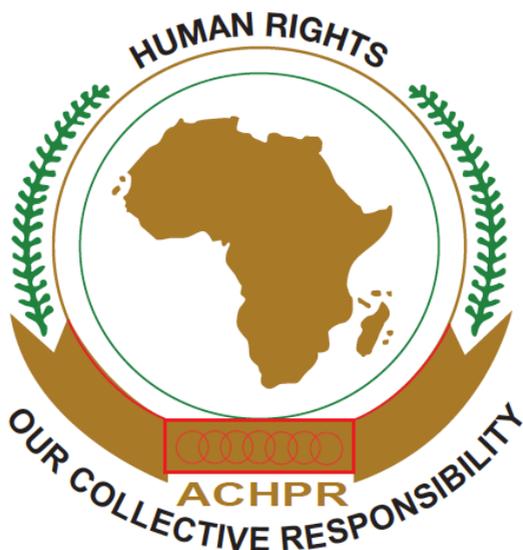


# African Commission on Human and Peoples' Rights



STATE REPORTING GUIDELINES AND  
PRINCIPLES ON ARTICLES 21 AND 24 OF THE  
AFRICAN CHARTER RELATING TO  
EXTRACTIVE INDUSTRIES, HUMAN RIGHTS AND  
THE ENVIRONMENT

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# Foreword by Commissioner Solomon A. Dersso, Chairperson of the Working Group on Extractive Industries, Human Rights and Environment in Africa

## I. Introduction

The extractive industry is a sector that has come to play an increasingly significant role in the economies of a growing number of African countries. Despite its potential and, at times, actual contribution to improved living conditions of citizens, the extractive industries in many parts of the continent is fraught with major issues impacting on the environment and on the wellbeing of people living in their areas of operation. The lack of, or weak national regulatory regimes governing the role of the industry on the continent, as well as the sector's inadequate observance of human and peoples' rights and environmental and transparency standards have meant that the operations of extractive industries often result in various human and peoples' rights issues. These human rights abuses include dispossession of land and accompanying displacement of people in the areas of new discoveries of gas, oil and minerals, weak or poorly beneficial terms of concession, environmental degradation affecting the livelihood and health of people living adjacent to these areas, violation of labour rights, lack of transparency about and egregious abuse by national actors of revenues received from the extractive industries and evasion of taxes.<sup>1</sup> Similarly, as experiences from various parts of the continent show, the extractive industry has contributed to or otherwise prolonged or exacerbated internal armed conflicts.<sup>2</sup>

While there have been reports of serious human rights abuses and violations in the extractive industries in many parts of Africa where they operate, a comprehensive and systematic continental framework for monitoring, reporting on and availing redress for such abuses has yet to be fully developed. At the same time, the human rights concerns are set to increase as the industry continues to grow and countries on the continent seek to use the potential of the extractive industries as a major driver of development. This actual and potential expansion of the sector adds further impetus to the existing need to put in place the requisite mechanisms for addressing the plethora of human and peoples' rights issues arising from the operations of the extractive industries in Africa.

The need for relevant tools in this regard is twofold. On the one hand the African Commission on Human and Peoples' Rights (the African Commission) has to formulate appropriate tools for promoting national standards and processes that guarantee compliance with human rights and environmental standards and ensure that the extractive industries meaningfully contribute to the improvement of the living standards of people. On the other hand, the African Commission should also have at its disposal relevant tools and mechanisms for monitoring and addressing abuses of human and peoples' rights as a result of the extractive industries.

The issues that arise from the operations of the extractive industries concern various civil and political as well as socio-economic rights guaranteed under the African Charter. Unlike other international human rights instruments, the African Charter additionally guarantees peoples' rights. Articles 21 and 24 of the African Charter are the relevant parts of the Charter that specifically concern the extractive industries. Article 21 guarantees the right of all peoples to freely dispose of their wealth and natural resources. Article 24 provides for the right of all peoples to a general satisfactory environment, favourable to their development. These rights of peoples are at the core of the concerns surrounding the protection of rights relating to the operations of the extractive industries in Africa.

Over the years, the African Commission has been called upon to deal with cases of abuses and violations of human and peoples' rights taking place in the context of the extractive industries. Recognizing the gravity of the adverse human and peoples' rights impacts of the operations of the extractive industries in various parts of the continent and the need for addressing them, in 2009 the African Commission established the Working Group on Extractive Industries, the Environment and Human Rights. Within this framework of having a mechanism focusing on this area and as part of the implementation of the Commission's responsibilities of reviewing the reports of States under Article 62 of the African Charter, the African Commission has developed the practice of formulating questions on extractive industries and the environment in the context of the reporting obligations of States on Articles 21 and 24 of the African Charter.

The State Reporting process under Article 62 of the African Charter is one of the most useful mechanisms through which the African Commission monitors the implementation of the rights guaranteed in the African Charter and clarifies what is expected of States under the African Charter. Additionally, while it enables States Parties to the African Charter to introspect and assess their performance vis-à-vis the obligations they have undertaken under the African Charter, it also offers the platform for constructive dialogue on existing and emerging issues affecting the rights guaranteed in the Charter and on how these issues can be addressed. Its effectiveness depends, among others, on the quality of the reporting guidelines and the nature of information that States provide in their reports.

In the course of reviewing state reports in terms of Article 62 of the Charter, a number of issues have been observed. In the first place, while progress has been made in reviewing and monitoring human rights issues relating to both civil and political rights and to a lesser but increasing extent, socio-economic rights, very little, if any, progress has been made in reviewing and monitoring rights issues relating to peoples' rights. Assessment of reports submitted by State Parties to the African Charter shows that usually no adequate or relevant information is provided on legislative and other measures taken for the operationalization of peoples' rights under the Charter, including those under Articles 21, and 24 of the Charter. Additionally, there is no consistent and standardized approach in the provision of relevant information on measures that reporting States have taken towards the promotion and protection of Articles 21 and 24 of the African Charter. State Reports often provide inadequate, irrelevant and/or no information on issues encountered and their experiences in ensuring observance of the Charter rights in the context of extractive industries.

The State Reporting Guidelines of the Commission, adopted in 1998, provide little detail with respect to Articles 21 and 24 of the African Charter. The 1998 Guidelines lack specific reporting guidelines that would enable State Parties to avail the relevant information on the regulatory framework governing extractive industries, issues of human rights in the extractive industries and measures to be taken to address the issues. The guidelines provide no or little guidance on the content of the rights under Articles 21 and 24 and how State Parties should give effect to those rights to ensure that the operation of extractive industries is in accord with the African Charter. This inadequacy of the existing State Reporting Guidelines means that the provision of effective guidelines becomes

an area where the African Commission's human and peoples' rights promotion and protection system needs strengthening.

As part of this effort to strengthen its monitoring role, the African Commission took a decision through its Resolution on Developing Reporting Guidelines with Respect to the Extractive Industries ACHPR/Res. 364(LIX) 2016, mandating the Working Group to elaborate State Periodic Reporting Guidelines on Articles 21 and 24 of the African Charter. This document starts by setting out the context and scope of the Guidelines, followed by the Guidelines themselves, which provide the details of the issues on which states are expected to report in demonstrating their compliance with Articles 21 and 24 of the African Charter. Because these provisions have received so little attention in the past, there was also a need to further elaborate on the content of the obligations under Articles 21 and 24 the African Charter in the context of the extractive industries. To this end, the Guidelines accompanied by an explanatory note on the contents of Articles 21 and 24, providing further reference on the legal basis of and background to the Guidelines.

## **II. Context and scope**

The principal audience that these reporting guidelines target are the State Parties to the African Charter concerning the preparation of the sections of their State Reports that relate to Articles 21 and 24 of the African Charter. The reporting guidelines as well as the explanatory note that accompanies it also aim at facilitating the work of other stakeholders, including non-state actors and particularly civil society organizations in their participation in and contribution to the preparation of State Reports as they relate to Articles 21 and 24 of the Charter. It also aids the African Commission in the consideration and review of Periodic State Reports, particularly as they relate to the themes covered here.

The Reporting Guidelines identify the issues under Articles 21 and 24 of the African Charter on which States Parties should provide information in their Periodic Reports to the African Commission generally and with specific reference to the operations of extractive industries in their territories in particular. As part of and in order to identify the full scope of the issues that should be covered under Articles 21 and 24 of the African Charter, the Reporting Guidelines are accompanied by an explanatory note that elaborate the principles underlying these rights; substantive contents of the rights; and

the obligations arising from these rights in respect of both the State and the companies involved in extractive industries.

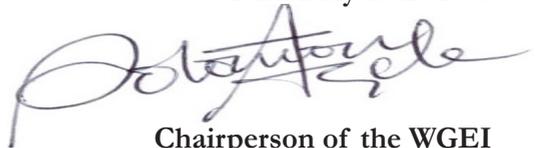
### III. Process followed in adoption of the Guidelines

Following the adoption of Resolution 364 on Developing Reporting Guidelines with Respect to the Extractive Industries during the Commission's 59<sup>th</sup> Ordinary Session, I convened a technical expert meeting on the elaboration of the draft guidelines on 2 to 3 December 2016 in Dakar, Senegal, in my capacity as Chairperson of the Working Group on Extractive Industries. This meeting laid down the parameters and set in motion the process for the drafting of the state reporting guidelines and principles relating to Articles 21 and 24 of the African Charter. Following development of the draft guidelines and principles, a second technical expert consultation was held on 14 to 15 September 2017 in Dakar. This provided an opportunity for reviewing, updating and validating the initial draft on state reporting guidelines and the principles relating to Articles 21 and 24 of the African Charter.

This expert validated draft was thereafter presented for a stakeholder consultation during a panel discussion at the 61<sup>st</sup> Ordinary Session of the Commission in November 2017 and was also placed on the website of the Commission for further input from stakeholders who were not able to attend the Session. The final guidelines and principles were adopted by the Commission at its 62<sup>nd</sup> Ordinary Session in May 2018.

Finally, I wish to acknowledge with appreciation the support of the Organisation internationale de la Francophonie for the printing of this document.

**Solomon Ayele Derso**

A handwritten signature in black ink, appearing to read 'Solomon Ayele Derso', written in a cursive style.

**Chairperson of the WGEI**

# State Reporting Guidelines on Articles 21 and 24 of the African Charter on Human and Peoples' Rights Relating to the Operations of Extractive Industries

## I. Applicable Articles of the African Charter

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### Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

### Article 24

All peoples shall have the right to a general satisfactory environment favourable to their development.

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## II. Definitions

1. The African Commission on Human and Peoples' Rights (African Commission) finds that the elaboration of the Guidelines requires the provision of the definitions of key terms.

2. For purposes of these Guidelines, ‘**artisanal or small-scale mining**’ refers to mining practised by individuals, groups or communities, with low technology, and often informally or outside of the regulations which apply to commercial scale mining.<sup>3</sup>
3. ‘**Environment**’ as used in Article 24 of the African Charter refers to the natural surroundings including the soil, the flora and fauna, the air and water bodies as well as the living species in such water bodies on which people depend not only for their survival but also for the sustenance and improvement of their wellbeing.<sup>4</sup>
4. For purposes of these Guidelines the term ‘**extractive industries**’ refers broadly to the operations by private or State actors, usually at a commercial scale, of mining or extraction of natural resources for economic gain. In the narrow sense it refers to oil, gas and other mining industries and the activities involved in these industries.<sup>5</sup> The scope of the term ‘extractive industries’ is accordingly the activities of the companies or enterprises through which non-renewable resources such as oil, metals, coal, stone and gas are obtained from under the ground, however, to the extent that it is applicable, it also includes other exploitation of resources, such as industrial logging and massive agricultural undertakings for the production of biofuel.<sup>6</sup>
5. ‘**Exploitation**’ in this context refers to all activities that enable actors and stakeholders to engage in business in first, secondary and tertiary sectors in relation to the natural resources and other forms of wealth, and includes extraction, production, commercialization and exports of natural resources.<sup>7</sup>
6. For purposes of these Guidelines, apart from its reference to the entire population of a State,<sup>8</sup> the term ‘**peoples**’ under Articles 21 and 24 of the African Charter refers to a group of individuals having a common identity on account of objective markers of shared language, racial or ethnic makeup, historical experience, religious, cultural or ideological affinity, connection to a particular territory and the subjective manifestations of self-identification and awareness as a distinct group possessing of shared identity.<sup>9</sup> Peoples are therefore not to be equated solely with ‘Nation’ or ‘State’, but include sub-national groups including communities of a particular region exhibiting the above characteristics, or people whose resources are exploited under foreign occupation.<sup>10</sup> Local communities or individuals who are most immediately

affected by activities of extractive industries can claim the rights guaranteed in these articles to ‘peoples’. ‘Communities’ in this context refers to residents of a locality which is organized either as part of an administrative or self-governing unit of a state or on the basis of the customary or religious law/s of the area.

7. **‘Wealth’** as used in Article 21 of the African Charter refer to a people’s tangible and intangible possessions having socio-economic value, including natural resources; and **‘natural resources’** as used in Article 21 refer to both the non-renewable resources including oil, gas and minerals and renewable resources, tangible and intangible, including the sun, soil, water, wind, fauna and flora.<sup>11</sup> Natural resources thus encompass all assets or materials that constitute the natural capital of a nation.

### III. Guidelines for State Reporting under Article 21 and 24

In terms of Articles 21 and 24 of the African Charter, the periodic report that States submit under Article 62 should include information on the issues highlighted below. In preparing the Report, States are encouraged to ensure that their Ministries of Justice, Finance, Trade and Investment, Environment, Mining, their Revenue Collection Authorities, Reserve Banks and Auditors General are involved.

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**In relation to Article 21, the state report should include the following information:**

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#### **Background**

- a) The types of natural resources which are exploited or available within the territory of the State;
- b) The activities being undertaken by extractive industries within the territories of the State;
- c) The list of the transnational or multinational companies and subsidiaries as well as local enterprises involved in these activities, as well as the extent of their involvement;
- d) Information on the size and lifestyle of the populations or communities living in the territories where extractive industries are undertaken;
- e) Information on how the rights under Articles 21 are given

- recognition in the national laws of the country including guarantees for judicial enforcement;
- f) Information on the government body responsible for natural resources development and the scope of its legal authority and responsibility;

### **Land use and ownership**

- g) Legal guarantees to people, and women in particular, to live on, access, develop and use the land, vegetation, water sources and the aquatic resources on which they depend for their survival and livelihoods as per Article 21(1);
- h) Legal frameworks providing guarantees of ownership over land and natural resources to people, including women, in territories affected by extractive activities, as well as relevant redress mechanisms for expropriation, resettlement or other interference with use of the land and lawful recovery of property and adequate compensation as required by article 21(2) of the Charter;
- i) Information on the legal and procedural safeguards to protect people from arbitrary and forcible expropriation of land;
- j) Information on the standards that apply in cases of expropriation of land for ensuring priori consultation, prompt and effective compensation and resettlement support;
- k) The legal and institutional safeguards available to protect the people from foreign economic exploitation including through restricting percentage of foreign ownership and to ensure that the people meaningfully benefit from the operations of multinational companies engaged in extractive industries as per Article 21(5);
- l) The legal framework for sustainable development as it relates to natural resources and the extent to which it makes the realization of human rights a prerequisite for sustainability;

### **Participation and consultation**

- m) Information on legislation regulating local participation, including the extent of compliance with the substantive and procedural guarantees of Article 21, including prior consultation and substantive and rigorous participation of affected people in decision-making processes;

- n) Legislative provisions which ensure equal representation of women in legislative and decision-making fora and consultations;
- o) Information on the applicable procedures for granting of concessions or licenses for exploration and extraction of resources, including consultation with and participation of all affected people in decision-making, prior to and during environmental, human rights and social impact assessments;
- p) Information on legal requirements that ensure to have access to information on all aspects of exploration and extraction plans including the findings of such assessments ahead of the finalization of such plans;
- q) Availability of established mechanisms or approaches for incorporating and addressing the concerns of affected people including the possibility of challenging the decisions in court;
- r) Provision of legal guarantees that enable and support self-organization of affected people for their effective participation including through traditional governance bodies and the advocacy and capacity development support of community based and civil-society organizations;

### **Human rights compliance in relation to large- and small-scale extractive industries**

- s) The availability of transparency, environmental, and labour standards that ensure that companies engaged in the extractive industries operate in compliance with human rights standards;
- t) Provision of data showing measures taken by the State to enforce compliance with these standards;
- u) Requirements for and availability of technically equipped and well-resourced regulatory bodies mandated to undertake monitoring and reviewing of the compliance of the extractive industries with their obligations under the licensing agreement and the governing legal standards particularly those relating to transparency (anti-corruption), labour and fiscal (tax) responsibilities of companies;
- v) Legislation ensuring strict regulation of the use by extractive companies of private security companies which interfere with the responsibilities of national and local security forces and create tension with host communities;
- w) Provisions for regulation, monitoring and providing support for

persons engaged in artisanal and small-scale mining in applying minimum environmental, health and safety standards, as well as steps taken to formalize the sector;

### **Grievance mechanisms**

- x) Provisions laying down administrative, civil and criminal liability for violations of applicable human rights, responsibility on fiscal obligations and transparency and other national legal obligations;
- y) The judicial and non-judicial complaints mechanisms including the extent to which they are equipped and resourced to adjudicate grievances of affected communities or individuals;
- z) Provide data on complaints received and settled through such mechanisms, including statistics on the number of individuals using the grievance mechanisms; on the number of companies found responsible for violations; and on the applicable sanctions or penalties that have been imposed including revoking of licenses;
- aa) Provision of legal aid and other measures that enable persons and affected communities to access grievance mechanisms;

### **Fiscal regulation**

- ab) General financial information, including the percentage of the GDP received from the extractive industry;
- ac) Information on the relationship payments made to market value of prices paid by extractive industries for resources in raw form and refined form;
- ad) Detailed information on any financial or tax incentives provided to companies in the extractive industries;
- ae) Steps taken to address illicit financial flow through amendments to national tax laws and policies, rules on related party transactions, company laws and policies, banking laws and policies and laws and policies governing the financial services sector;
- af) Measures put in place to renegotiate agreements that limit the State's ability to collect adequate revenue from commercial activities within the extractives sector;
- ag) Information on the legislative, administrative and judicial measures put in place to combat corruption in the extractive industries sector;
- ah) Information on the extent to which the State is involved in joint-ventures and the tax implications of such ventures;

- ai) Legislative and regulatory provisions on requirements for reporting to legislative and local council bodies and the public on the profits of extractive industries, the revenues that the authorities collected from extractive industries;
- aj) Information on the mechanisms put in place for the judicious and transparent administration of the revenues collected;
- ak) Information on reporting to parliament and the public on how the revenues received are being managed and utilized;
- al) Establishment of standards that guarantee reasonable revenue sharing arrangement between national government and local authorities in the affected areas, to ensure that the people meaningfully benefit from the operations of multinational companies engaged in extractive industries, and to cooperate with other State Parties in eliminating foreign economic exploitation.

**In relation to Article 24 the state report should include the following information:**

### **Background**

- a) Information on how the rights under Article 24 of the African Charter are given recognition in the laws of the country as required under Article 1 of the Charter
- b) Information on guarantees for judicial enforcement of the right to environment as per Article 1 of the African Charter which requires giving effect to the rights in the Charter;
- c) The applicable laws and regulations, including administrative laws, on the protection of the environment, as well as the nature of environmental issues that the applicable legal regime covers;
- d) The institutions and regulatory bodies responsible for inspection, monitoring and enforcement of environmental laws, as well as their competencies;

### **Implementation**

- e) The mechanisms put in place for undertaking or overseeing the conducting of internationally accepted environmental risk assessment prior to implementation of industrial scale economic projects;

- f) Information on the details on the steps and standards that should be followed in undertaking environmental impact assessment;
- g) Legal provisions on the requirement for instituting appropriate measures for mitigating identified risks arising from the environmental and social impact assessments;
- h) Provisions for monitoring the environment to ensure the conservation and improvement of the environment;
- i) Information on the measures put in place for protecting people from environmental degradation and pollution including the ecologically sustainable use of natural resources and environmentally compatible waste disposal system tailored to various industries;
- j) Information on legal and policy provisions on steps to be followed for the rehabilitation of threatened environment;
- k) The steps to be taken and the roles that responsible actors (state and private actors responsible) bear for responding to and addressing the despoliation or pollution of the environment through scientific inspection of the environmental and social impacts of environmental pollution or despoliation and implementing measures fit for rehabilitation of the polluted land or water body;
- l) Information on legal guarantees for providing effective compensation for those affected by the despoliation of the environment;

### **Consultation and participation**

- m) The avenues available for effective and inclusive public consultation and meaningful participation of affected people in the protection and conservation of the environment;
- n) Provisions guaranteeing the participation of affected communities in environmental and social impact assessment processes,
- o) Provisions legally requiring national and local authorities to provide full and accessible information about proposed and ongoing projects to people in affected people including on the potential impact of such projects;
- p) Provision establishing avenues for people to make oral or written submissions individually or collectively including through civil society organizations and ensuring that their concerns are properly taken onboard.

## **Sanctions and grievance mechanisms**

- q) Applicable administrative, civil and criminal liabilities for breaches of environmental standards;
- r) Locally accessible and effective judicial and non-judicial dispute settlement and complaints adjudication mechanisms for addressing legal disputes over the protection of the environment;
- s) Provide data on complaints received and settled through such mechanisms, including statistics on the number of individuals using the grievance mechanisms; on the number of companies found responsible for violations; and on the applicable sanctions or penalties that have been imposed including revoking of licenses;
- t) Provision of legal aid and other measures that enable persons and affected communities to access grievance mechanisms.

# Explanatory Note to the State Reporting Guidelines on the Contents of the Rights and Obligations under Articles 21 and 24 of the African Charter

## I Underlying Principles

1. **Indivisibility and interdependence** – These are underlying principles of the rights to wealth and natural resources and environment.<sup>12</sup> The rights guaranteed under Articles 21 and 24 of the African Charter are indivisible from and interdependent with the civil and political rights and economic, social and cultural rights as well as other peoples’ rights enshrined in the African Charter.<sup>13</sup> The implementation and the full realization of the rights under these articles depend on and have to be pursued with due regard, as necessary, to all other rights and the duties of persons as provided for in the African Charter.<sup>14</sup>
2. As outlined by the African Commission in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (SERAC case)*, addressing the rights issues arising from the operations of extractive industries notably those involving Articles 21 and 24 of the Charter requires the use of ‘the diverse rights contained in the African Charter’. In this case, the Commission affirmed that the protection of the rights in Articles 21 and 24 requires an integrated and complementary reading and application of civil and political rights (Articles 2 and 4) and economic, social and cultural rights (Articles 14, 16 and 18). The interdependence of rights also means that the use of natural resources, including when undertaken in the pursuit of national development endeavors, has to be done in an environmentally sustainable way and with due respect to all the civil and political, socio-economic and peoples’ rights of the African Charter.
3. **The principle of solidarity** - The rights guaranteed under Articles 21 and 24 are also underpinned by the principles of solidarity and the shared interests of individuals, communities and the peoples’ of a State as a whole. The State has, in accordance with the principle of State sovereignty over natural resources, the main responsibility for ensuring natural resources stewardship with, and for the interest of, the population.<sup>15</sup> Although natural resources under Article 21 are often localized in a particular region, this

does not mean that entitlement to the benefits from the sustainable and human rights compliant use of such natural resources is limited to affected people living on or near such territory - the peoples of the State as a whole are also entitled to benefit from such resources<sup>16</sup> with full respect to the interests specific to the communities living on or near such territory. The protection and preservation of a 'generally satisfactory environment' under Article 24 as a shared property entails that all individuals, communities and legal entities, most notably industrial enterprises such as companies involved in extractive industries, have the duty for the protection and preservation of the environment.<sup>17</sup>

4. **The principle of using wealth and natural resources in the exclusive interest of the people** - Underlying the right of peoples to freely dispose of their wealth and natural resources is the principle that the use of natural resources should be for the exclusive interest and benefit of the citizens of a State in general and host communities in particular. In this regard, the rights of the people of the State as a whole may not detract from the specific rights of affected people who are directly impacted by extractive industries to benefit from the exploitation of natural resources. While this does not confer an absolute right on affected people over the national interest, there is a need for these, at time conflicting, interests to be balanced in a fair and just manner through a cost benefit analysis, which does not prejudice the affected people. Intertwined with this principle are the related principles of transparency and accountability pertaining to the exploration and development of natural resources, particularly where undertaken by foreign owned companies.
5. **Sovereignty and ownership** - Another principle underlying the right to freely dispose of wealth, is the principle of sovereignty and ownership. According to Article 21(1) of the African Charter, in no case shall a people be deprived of the right and its exercise shall be in their exclusive interest. At the very least, as outlined in the *SERAC case*, this bars the non-participation of affected people in the development processes (involving the use of natural resources) and the exclusion of affected people from material benefit accruing to them. The principle of sovereignty is also captured in the provisions of Article 21(5), which require States to eliminate all forms of foreign economic exploitation, and which thus vests the power of economic decision-making in the State and the people themselves,

rather than any outside entities. This also closely relates to the principle of self-determination and the power to pursue their economic and social development according to the policy they have freely chosen, as provided for in Article 20.

6. **The principle of effective participation** - A further principle underlining Articles 21 and 24 of the African Charter is participation of affected people in all decisions relating to the exploration and use of natural resources and decisions with consequences on the environment. As outlined in the *SERAC case*, where people live within the areas of operation of extractive industries or where decisions with environmental consequences are being taken, such affected people should be provided with the necessary information.
7. **Non-discrimination and equality** - The rights under Articles 21 and 24 are also premised on the principles of non-discrimination and equality, rights guaranteed under Article 2 of the African Charter. Any discrimination on any of the listed grounds under Article 2 of the Charter in access to or enjoyment of the rights in these Articles is proscribed. Similarly, the rights guaranteed in these articles should be applied and operationalized with particular regard to the most marginalized and socio-economically excluded members of society, including most notably women, but also children, persons with disabilities and older persons. In the implementation of these rights, policy measures should aim at rectifying existing inequalities based on gender, ethnicity, religion and race and other similar grounds.

## II Content of the rights guaranteed in Articles 21 and 24

### 8. Article 21 of the African Charter stipulates

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international

economic co-operation based on mutual respect, equitable exchange and the principles of international law.

4. State parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. State parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.
9. First and foremost, the right to freely dispose of wealth and natural resources is an inviolable right of all peoples (Article 21(1) last sentence), an extension and central element of the right to self-determination provided for in Article 20 of the Charter. The right and the entitlements arising from it belong to peoples. As per the second sentence of Article 21(1) & (4), States only have a delegated role entailing the exercise of this right. Article 21 is emphatic that this role of States has to be executed in the exclusive interest of the people. The last provision of Article 21(5) explicitly affirms that peoples of States party to the African Charter are entitled to ‘fully benefit from the advantages derived from their national resources’.
10. The essence of this right entails that people have secure access to, use of and benefit from their wealth and natural resources. ‘Peoples’ and individuals are thus entitled to live on, access, develop and use the land, vegetation, water sources and the aquatic resources on which they depend for their survival and livelihoods.<sup>18</sup> Integral to the right to property, which is guaranteed under Article 14 of the Charter, such entitlement to live on, develop or use land and such other resources does not depend on whether such entitlement arises from custom and hence historically acquired or the formal laws of the country.<sup>19</sup> This right also entitles peoples and individuals to be provided with requisite support that enables them to access, develop and use these resources in a way that is sustainable and improves their standard of living.
11. With respect to natural resources that require industrial scale development, Article 21 entails that local people and nationals are provided with the legal guarantee to participate in the prospecting and development of such resources.<sup>20</sup> It also entitles them to acquire a stake in the project for the

prospecting and developing of such resources. Article 21 also entitles affected people living in the areas where industrial development of resources takes place to benefit from the proceeds of the extraction and sale of such resources. The benefit to be accrued to affected people should be on the basis of internationally acceptable and legally established schemes for equitable sharing of revenues from operations of extractive industries between national government, regional authorities and local affected people. Furthermore, beneficiation for affected people should extend beyond revenues alone, and should include other forms of beneficiation, such as minimum local content requirements in extractive industries and contribution to local development projects. Not only that the activities of extractive industries should not lead to make the conditions of life of people living in the territory worse off (such as through limiting access to or spoiling the land and water on which they depend for their livelihoods) but also contribute to the improvement of their standard of life both measured both objectively and subjectively.

12. The right to share in the benefits derived from the development or sale of natural resources extends to all peoples of a state.
13. Where local people are engaged in artisanal or small-scale mining, they are entitled to the protections that should be provided for in the necessary human rights, safety and environmental regulatory measures. Specifically, the minimum safety measures required to safeguard the health and life of artisanal miners should be put in place. Steps should be taken to raise awareness of artisanal miners regarding their rights and responsibilities, and support them in building their capacities to safeguard against environmental damages and health hazards.
14. The protections and entitlements expounded in the foregoing paragraphs constitute the positive guarantees and substantive elements of Article 21 of the African Charter. Article 21 additionally provides negative guarantees. Article 21 (1) particularly guarantees that in no way should any people be deprived of the protections, entitlements and benefits arising from the right to dispose of wealth and national resources. Further, Article 21 protects nationals of a state and local communities against acts or conditions or arrangements that interfere with or impede their right to the disposal of wealth and natural resources. Similarly, as outlined in the *SERAC case*, with

respect to access to and use of land, fauna and flora, the state should, at the minimum, ensure that its agents or any third party does not interfere with the right of communities and individuals to access and use these resources. Most notably, this protection extends against activities of extractive industries or other commercial activities that not only impede local peoples' access to and use of the land, fauna and flora in the territories they live on, but also contravene other rights of the Africa Charter, such as the right to the best attainable state of health under Article 16, which may be affected by activities polluting the air.

15. Another substantive right that gives enforcement to both the positive rights guarantees and the negative protections that arise from Article 21 (1) is the right to remedy in case of violations. Understandably, the right to remedy is inherent in and central to all human rights and is also embedded in the right to access to justice. Additionally, this right to remedy includes reparations. Indeed, Article 21(2) stipulates that the reparation in 'case of spoliation' for the 'dispossessed people' takes the form of restitution or compensation. Any dispossession of land shall be on the basis of law and undertaken solely in the public interest and should be reasonable and proportionate. Peoples affected by land dispossession should be provided both with full, effective, fair and adequate compensation and support for rehabilitation. Such compensation has to be made available prior to the removal of such peoples from their land and has to be determined in consultation with the affected people and should not in any way make their living conditions worse off. Compensation should also take account of the additional vulnerability of certain groups, such as female-headed households.
16. One qualification to the right of people to freely dispose of their wealth and natural resources is international cooperation. Most specifically, the exercise of this right should not prejudice obligations arising from international cooperation, including those obligations arising from agreements relating to trans-boundary resources. The most notable implication of this is that the disposal or extraction of natural resources should have a developmental purpose and should be environmentally sustainable. The obligations arising from such international trade or investment agreements and/or bilateral investment agreements will not be acceptable under Article 21(3) unless they are based on 'mutual respect, equitable exchange and principles of international law'. Additionally, obligations arising from such agreements

that substantively negate or restrict the essence of the right of peoples to dispose of their wealth and natural resources shall not be protected under Article 21(3).

17. It is important to note that the qualification on the right of peoples to freely dispose of their wealth and natural resources under Article 21(3) is itself circumscribed under Article 21(5). This latter provision imposes a pre-emptory obligation on the State to ensure the protection of their people from all forms of foreign economic exploitation. States should thus prevent the abuse of natural resources by foreign or international economic actors. The implication of this is that the terms between a State and extractive industry investors on financial revenues arising from exploitation of natural resources should not be much lower than international standards and hence exploitative. Similarly, the terms on the tax break and duty free privilege benefits to extractive industries, as well as concessions arising from joint-ventures, should not be of such a nature that it deprives the people of the benefits to which they are entitled.
18. Existing bilateral and multilateral agreements between states, or with international financial institutions, that are not in line with Article 21(5) should be revised or renegotiated. The negotiation of such agreements should include the minimum guarantees under Article 21 of the African Charter including responsibility of international economic actors for the human and peoples' rights consequences of their activities and for fully meeting all fiscal obligations and respecting internationally acceptable labour and environmental standards. Any clause in such agreements that protects such entities from liability, or grants them immunity from accountability for the adverse human and peoples' rights or environmental consequences of their activities would be deemed contrary to the guarantees under Article 21 of the African Charter.
19. State parties are also obliged, under Article 21(4) to "individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity". While this is an obligation imposed on State Parties vis-à-vis other African States, the benefit of such cooperation would also accrue to the people of the States, and citizens should thus be able to require that their governments comply with this provision.

20. In addition to the substantive entitlements provided for in the foregoing paragraphs, Article 21 also entails procedural guarantees for its effective realization. The first procedural guarantee is effective and genuine consultation and substantive and rigorous participation in decision-making on plans regarding the exploration and extraction of natural resources. This entails that affected people living in the territories where such exploration and extraction works are planned are provided with all the information on all aspects of such plan, including the findings of environmental, human rights and social impact assessments, ahead of the finalization of the plan. Such information should be easily accessible, and should be provided at the conception, as well as throughout the life-span of the project.
21. Effective enjoyment of and access to the entitlements and protections under Article 21 also require that awareness creation and capacity building support is provided to affected people. In the context of the operations of extractive industries, such awareness creation and capacity building support should be not only about the legal entitlements and protections to which the affected people are entitled but also the obligations of the extractive industries and thereby enabling local communities to monitor the operations of extractive industries.
22. Provision of all the necessary information as negotiations for exploration and development starts and in an accessible manner as well as substantive and rigorous participation is particularly peremptory where exploration and extraction of resources necessitate expropriation of land from affected people (and hence their resettlement) or such other restriction to resources that they depend on for their livelihood. People who may be affected by plans for exploration and extraction activities should in particular be provided with not only the relevant information in terms of how they may be affected in the language that they understand but also the opportunity to participate meaningfully and have their views incorporated in any decision on the measures to be taken to limit and rectify the impacts. All steps should also be taken to ensure that the impact of expropriation and resettlement is minimized. Consultation and participation should take account of all affected persons, at the local, regional, national and international levels, where decisions are made about the extractive industry and ensure that their concerns are fully integrated in decisions.

23. Fundamental to full and informed participation in decision-making processes, the right to information, arising from Article 9 of the African Charter, and rigorous consultation presupposes and is predicated on internationally acceptable human rights, environmental and social impact assessments. As the African Commission pointed out in the *SERAC case*, environmental impact assessments have to be conducted in compliance with internationally acceptable standards. Such assessment should involve communities and individuals in the territory of proposed extractive operations and take account of local knowledge systems related to the environment. Similarly, there should be human rights and social impact assessments, which should be conducted with the free and full participation of prospective affected people and having regard to indigenous knowledge and information as well as the needs of vulnerable groups such as children, indigenous peoples, older persons and migrant workers.
24. The other procedural guarantee relates to the provision of effective mechanisms for redress or remedy. This entails that judicial and non-judicial grievance mechanisms are put in place and that such mechanisms are adequately equipped and resourced for handling cases involving extractive industries. Such mechanisms should also be accessible to affected people. Accessibility entails not only physical proximity but also importantly familiarity and flexibility of the processes to allow affected people to easily bring their complaints. Effective access to courts also requires that statutes of limitations or other excessively onerous procedural requirements (such as production of title deed) should not be used to impose restrictions on the ability of people to bring complaints where their rights have been violated. Human rights defenders who speak out and advocate for measures to ensure the respect of human rights of affected people must be able to assist affected people without fear of reprisals from the government or the company involved in extractive industries and the State should ensure that there is not impunity for threats, attacks and acts of intimidation against those advocating for the rights of affected communities irrespective of their designation as human rights defenders, including women human rights defenders.
25. Additionally, within the framework of Article 21(2), people whose land, water or source of livelihood have been disrupted or spoiled by dispossession are entitled to measures for restoration of their property and to full, effective

and adequate compensation not only for the socio-economic impacts of the interference including opportunity costs but also to adverse social impacts. All measures that are necessary for supporting the resettlement and full rehabilitation of the livelihood of affected people should be put in place.

26. The other right that is also the subject matter of the reporting guidelines is Article 24. This article states that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.'

27. Central to this right is the recognition of the importance of a clean and safe environment to the quality of life of people. As its terms make clear, what is guaranteed under Article 24 is not the right to an ideal environment that is completely unaffected or completely clean. It is rather an environment that is clean enough for a safe and secure life and development of individuals and people.

28. With regard to the requirement of being favourable to their development, this entails that the environment should be used in a sustainable manner, which fulfills the needs of the present generation, without compromising the ability of future generations to meet their own needs. In this context sustainability is understood as encompassing all aspects of their lives and livelihoods, including identity, culture, religion and other aspects having regard to plurality of interests and the delicate balance that should be struck. In terms of specific legal entitlements that this right gives rise to, people are first and foremost entitled to protection from environmental degradation and pollution. This would entail that people are protected from activities having the effect of degrading or spoiling the soil, water, fauna and flora and the air of the physical environment.

29. Protection from environmental degradation or pollution entails that people are provided with the space (including the right to form community based associations) and the necessary support not only to employ ecologically sustainable use of natural resources for their development but also to conserve their environment. People are also entitled to the enabling legal and institutional frameworks and technical provisions for engaging in awareness creation and capacity development works necessary both to help them avoid practices inimical to their environment and pursue locally adaptable methods of conservation and improvement of their environment.

30. The right to clean environment under Article 24 requires that appropriate environmental risk assessments be undertaken prior to industrial development or the initiation of small-scale/artisanal mining. As corollary to this, it is imperative that the necessary measures for mitigating identified risks are instituted as part of building industrial plants or setting up the small-scale operations.
31. Equally, there is a need for putting in place a waste disposal system that conforms to acceptable standards of environmental safety. Specifically, the acceptable waste disposal standards appropriate to various sectors or industries should be legally established and strictly enforced. States should put in place the necessary mechanisms for monitoring compliance with the established standards and ensuring that illegal disposal of waste by companies is penalized.
32. As with Article 21, Article 24 is predicated on and significantly constituted by the right of people to timely and accessible information. People have the right to be provided with and to share information regarding all industrial activities or projected natural events that may cause damage to the environment and thereby threatening the life, health and livelihood of people. People should be consulted about all the activities or conditions that may affect the soil, water, fauna and flora and air of the territory in which they reside and their views should be duly taken into account in all decision-making relating to their environment and development activities in the areas of their residence. Consultations have to be adequate and inclusive. There should be legal and institutional avenues that afford people the opportunity both for receiving information and being heard. People should be able to make oral or written submissions individually or collectively and directly by themselves or through the support of autonomous community organizations including civil society groups.
33. In case of despoliation of the environment resulting from the activities of extractive industries, people residing in the affected areas are entitled to a number of protection measures. As the African Commission pointed out in the *SERAC* case, such despoliation also entails that scientific inspection/assessment of the nature and scale of environmental, health and socio-economic impact of oil spillage, gas flare ups, leakage of dangerous chemicals into land, water and air is promptly conducted. Affected

communities should be provided with all information on the nature of the despoliation, on its actual and potential environmental and health impacts and on measures to be taken.

34. People are also entitled to full, adequate and effective compensation for the consequences of environmental damage arising from industrial activities. Specifically, they should be compensated for material loss, livelihood disruptions including opportunity costs and illness as well as emotional distress resulting from such environmental damage. Where environmental damage causes irreparable harm to the health of affected people, they should have access to affordable health care and sustainable support and assistance for as long as their conditions require it. They should also be provided with support for the rehabilitation of their livelihoods.
35. Similarly, in such cases of environmental despoliation or pollution from industrial activities, people are entitled to the measures necessary for the cleaning up and restoration of the affected environment. Despoliation of the environment may continue after mine closure or when the extractive processes have come to an end. The protective measures for affected persons continue to apply equally in such cases.
36. Under Article 24, people are also entitled to the right to justice. They should therefore have access to appropriate judicial and non-judicial mechanisms for raising their grievances and seeking appropriate remedy, similar to that discussed under paragraph 24 above.

### **III Obligations of States**

37. Under the African Charter, States Parties to the Charter bear both general obligations and specific duties with respect to the rights set out in the African Charter. As stipulated in Article 1 of the Charter, the general obligation requires States Parties to “recognise” the rights, duties and freedoms enshrined in the Charter, and “to adopt legislative or other measures to give effect to them.” These obligations apply to Articles 21 and 24 of the African Charter as well. States are accordingly duty bound to give legal application to these rights. To this end, State Parties should incorporate the rights in these Articles into their national law. This is the first part of the general obligation of states.

38. Apart from incorporating the rights into national legislation, legislative measures further include laying down effective and adequately resourced mechanisms and institutions to supervise and enforce the necessary fiscal, environmental, labor and human rights protection standards that give effect to these rights. The “other measures” that States should take under Article 1 to give effect to these rights additionally include provision of relevant administrative and judicial mechanisms for seeking remedies in cases of violations. States are required to adopt national policies, strategies and plans geared towards the realization of all the rights. These should be accompanied by budgetary measures. These are the measures that make available the required resources for the implementation of the legislative and policy measures.
39. Complementing the obligations under Article 1, States are also regarded as having the general obligation of advocating for the rights guaranteed. This is stipulated under Article 25 of the African Charter. In this context, the measures of relevance for purposes of Articles 21 and 24 are advocacy works involving educational and awareness-raising activities, for example through the incorporation of specific topics into the curriculum of law studies, development studies, and international relations/political science studies at tertiary level. In this regard, States should enable advocacy for rights and that there should be protective measures in place for human rights defenders and members of affected communities to exercise and advocate for their rights, without fear of harassment, restriction, or barriers to justice.
40. In the *SERAC case*, the African Commission identified the specific obligations arising from the provisions guaranteeing the rights in the Charter as entailing duties of respect, protection, promotion and fulfillment. The duty to respect imposes negative obligations on the State to refrain from interfering in or causing interference in the rights guaranteed under Articles 21 and 24. This means that State agents or anyone acting on behalf of the State or exercising public authority should avoid actions restricting or curtailing the rights in these articles. In essence, these actors should exercise care in the discharge of their responsibilities or in undertaking their activities to avoid causing harm.

41. The legislative measures for the realization of the duty to respect should include internationally acceptable expropriation rules with the necessary safeguards to protect individuals and local people from arbitrary State actions or decisions that may lead to arbitrary land dispossession or deprivation, which should include the prohibition of expropriation for uses other than a public purpose. In addition, legislative measures should provide for the process to be applied and the standards to be followed in cases of expropriation or resettlement including consultation with affected members of society, provision of due notice, the payment of adequate compensation and support for rehabilitation. Furthermore, it should ensure that the standards, which apply to compensation to be paid by local companies, should not in any way be to the detriment of the affected people.
42. Derived from the right of peoples to live on, access, develop and use the land, vegetation, water sources and the aquatic resources on which they depend for their survival and livelihoods, there is a corresponding duty on the State to ensure that there is a legal framework in place which ensures protection of land and resource ownership rights by the people, even if they do not have formal title over the land or in the case of collective ownership. In this regard it is necessary to also take account of the often more precarious nature of land ownership by women in Africa.
43. Also in relation to the duty to respect is the obligation on States to respect the ability of other African States to deliver the same to their people, as derived from the obligation of States to *collectively* exercise the right to free disposal of wealth and natural resources.
44. With respect to the right to a general satisfactory environment, the duty to respect entails that the State should not interfere unnecessarily with the enjoyment by people of this right. In this context again, the issue of consultation and participation of the affected persons is crucial. In addition, the State should have due regard to the cultural and natural heritage and sacred sites of peoples and communities.<sup>21</sup>
45. The second is the duty to protect. In the context of Articles 21 and 24 of the African Charter, the obligations of the State include putting in place internationally acceptable standards on environmental protection, on financial responsibilities in relation to the development of natural resources,

and on guarantees against abuse of human rights and labour standards throughout the operation cycle of the extractive industries. Such legislation and policies should mandate the establishment or legal empowerment of existing institutions to monitor and ensure compliance with fiscal or other transparency initiatives, and provide them with the necessary authority and resources to enforce compliance. Such legislation on applicable standards should further ensure the application of human rights and relevant safety and environmental standards for protecting individuals and communities involved in and dependent on artisanal mining with particular attention to the rights of children, women, indigenous populations/communities, people with disabilities, migrant workers and other vulnerable groups. Measures should be put in place to combat corruption linked to Government entities in charge of ensuring the implementation of the relevant laws. States should adopt legislation and put in place measures particularly on restriction of extraction in conflict-affected areas and criminal liability for involvement of companies in human rights abuses in conflict situations.

46. In terms of Article 21 of the African Charter, the duty to protect entails that the State adopts comprehensive and beneficial fiscal legislation covering the revenue regime by which extractive industries are bound including license fees, profits taxes, royalties, dividends, bonuses, customs duties and capital gains tax.<sup>22</sup> Such legislation should impose legal obligations on companies in extractive industries to declare profits derived from their operations and reporting obligations on compliance with all applicable tax obligations, and in this regard should provide for the way in which as well as the frequency with which such declarations should be made. Such legislation should also provide for rules and inspection/investigation avenues that ensure strict application of tax breaks and duty free privileges and address the exploitation of any lacuna that exist in the monetary regulatory regimes including the tax breaks and duty free privileges. Apart from tax and incentives regimes, such legislation regulating the fiscal framework should also take account of fiscal transparency of the whole processes of management of extractive concessions, for instance in cases of joint-ventures. In addition, States should develop and implement robust and efficient tax collection systems in order to address the challenge of illicit financial flow.

47. States should further adopt the required institutional measures for monitoring and enforcing the fiscal, environmental, labour, health and human rights observance standards by third parties including business establishments particularly in the extractive industries and joint-ventures where the State is a partner in the economic activity. In this regard the State should create conditions for the effective role of National Human Rights Institutions in promoting and protecting human rights at the national level. States should lay down the administrative, civil and criminal liabilities that result from the failure of non-state actors including businesses such as those in extractive industries to comply with these standards and any harm or violations arising from such non-compliance. In this regard, States should not limit company liability for environmental clean-up costs or continuing violations once the extractive activities come to an end or pending claims at the time when ownership is transferred. States thus bear the obligation to investigate and, as necessary, apply the legally established penalties in compliance with duly established procedures. In case of breaches of applicable standards, States have obligation to ensure that those operating in the extractive industries are held to a high standard of civil and criminal liability both for their own actions and for the actions of those acting on their behalf or to their benefit.
48. The duty to protect encompasses the laying down of the standards on the process and criteria for the granting of concession or licenses to extractive companies for exploration and extraction of natural resources. This in particular means that licences to extractive industries should be negotiated and granted in accordance with internationally accepted rules and standards, based on transparency and human and peoples' rights. Such standards not only create opportunities for public participation but also ensure that the general public and local people are protected from licensing terms that are exploitative and limit the liability of extractive industries.
49. An important element of the duty to protect is also the provision of effective, well-resourced and technically equipped judicial and non-judicial mechanisms for receiving complaints and adjudicating disputes. These mechanisms should have the requisite jurisdiction to adjudicate cases including those arising from alleged non-compliance with relevant standards and from disputes involving extractive industries and local people. The relevant legislative act establishing such judicial mechanisms should allow citizens to sue companies. The right of citizens to challenge the actions or

the impacts of the activities of extractive industries should not be restricted in any way, including through statutes of limitations in accessing the courts.

50. Under Article 24 of the African Charter, in case of a threatened environment, the duty to protect entails that proper scientific monitoring and relevant corrective measures are undertaken by the State. Similarly, in cases of despoliation or pollution of the environment, the relevant legislative and regulatory rules should lay down the standards and processes to be applied for a) assessing the despoliation or pollution, b) the clean-up and restoration of the affected environment, and c) the compensation of the affected persons/peoples.
51. The third duty is the duty to promote the rights. As the African Commission puts it, this entails that the State should make sure that individuals are able to exercise their rights and freedoms. This they should do, for example, by promoting tolerance, raising awareness, and even building infrastructures. In the context of Articles 21 and 24, the duty to promote involves enacting the relevant implementing legislation and elaborating policies and action plans for enabling the general public and particularly potentially affected local people to have advance and continuous access to all the relevant information on natural resources and the environment. It also entails that the relevant regulatory bodies are equipped with and duly mandated to disseminate such information, and undertake awareness creation and public education activities. In the current reality of limited resources and institutional capacity, one way of realizing the duty to promote is to create the conducive legal conditions that would enable members of society, local communities and civil society actors to organize and engage in promotional activities particularly those relating to public education and awareness creation as well as effective participation in decision-making processes.
52. In addition to and related to information is the provision of guarantees for undertaking consultations with and ensuring the participation of the wider public in general and local people in particular, including vulnerable groups and children. As part of the duty to promote, States are accordingly required to ensure that the public is availed adequate opportunities for consultation about and rich and rigorous participation in decision-making processes on plans for both industrial exploration and extraction of natural resources and other large-scale activities with potential environmental and social impacts.

All concerns raised by affected people should be fully incorporated into the final decision. Such consultations and participation should start prior to (and should continue during) the implementation of such projects.

53. The fourth and final duty is the duty to fulfil. This requires in the context of Articles 21 and 24 that steps are taken to create the necessary conditions that make it possible for people to benefit from these rights. These are the steps that enable the right holders to develop, have access to and use natural resources, including provision for avenues that enable members of the public and local people to have shares in extractive industries. With specific reference to Article 21 and in relation to the operations of extractive industries, these steps include the collection and judicious investment of the revenues and proceeds from the exploitation of natural resources.
54. These in particular may include investment in the establishment of the necessary social services and physical infrastructure and provision of support for the improvement of the sources of livelihood of local people particularly in the areas of operation of extractive industries, as well as investment in benefits to future generations. This would further include the duty to ensure that where irreparable harm has been done to the health of a person due to damage that the operation of extractive industries cause to the environment that such person is provided with the necessary health service and other support. The application of the duty to fulfil should be applied with due regard to the need to prioritize the interests of vulnerable sections of society. For example, legislation should provide for the regulation of the artisanal/small scale mining sector, in order to increase their access to loans tailored to their capacity and conditions and other financial assistance from financial agencies as well as the necessary technical support that improve their safety and enhance their capacity and development.
55. With respect to Article 24, the duty to fulfil entails that States make the necessary investments for the conservation and improvement of the environment. Where the environment is endangered as a result of natural developments, this also entails that States, within their available means, should initiate works for the rehabilitation of the endangered environment including through collaboration with local and international actors that have the technical capacity for such works.

## IV Obligations of companies

56. While States are the primary obligation bearers under the African Charter, it is also legally recognized that corporations, particularly multinational ones, have obligations towards right holders.<sup>23</sup> This obligation arises from the recognition that lack of such obligations may result in the creation of a human rights vacuum in which such entities operate without observing human rights. Under the African Charter, obligations of such entities towards rights holders have a clear legislative basis. Article 27 of the African Charter provides for the duties of individuals and its sub-provision 2 lays down the obligation to exercise rights ‘with due regard to the rights of others’. Clearly, if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies.
57. The first of these obligations is a direct negative obligation based on the principle of do no harm or in its positive formulation the principle of due care. This entails that companies and corporations should ensure that their actions or operations do not result in or trigger the occurrence of harm or the curtailment or deprivation of the rights guaranteed under the African Charter.<sup>24</sup> They should not only refrain from deliberate acts that constitute or result in such violations but also ensure continuously that their acts or operations are in full compliance with internationally accepted human and peoples’ rights, labour and environmental standards to avoid any incident producing harm or curtailment of rights of people, including in conflict situations.<sup>25</sup>
58. In applying the duties in the African Charter to companies, and on account of the huge extent of power that companies, particularly multinational ones, exercise in comparison to individual persons, they have a resultant and corresponding higher level of duty of both due diligence and care.<sup>26</sup> They should be vigilant in having a clear understanding of the nature and impact of their activities, take the required measures for preventing their activities from having adverse human rights impacts and put in place mechanisms for rectifying any negative human rights impacts arising from their activities or actions. In this regard they should also ensure responsible supply chain management to ensure that their actions and decisions do not have negative repercussions further down the supply chain. In order to ascertain the extent

of the impact of their activities, companies should do, with the participation of local communities, human rights impact assessments and ensure that these assessments are appropriately consultative and take account of the rights of vulnerable persons and groups.

59. Where breaches occur on account of the activities or actions of companies, various administrative, civil and criminal responsibilities ensue. Where activities of extractive industries result in despoliation of the environment, they bear responsibility for paying due compensation to affected people for all material and non-material damages suffered, including compensation in the case of irreparable harm to health, and for the cleaning and rehabilitation of the affected environment.<sup>27</sup> In administrative terms, they will be responsible for any fines or administrative measures laid down in law or in the licensing agreement.

60. In terms of criminal liability, the kind of acts for which companies may be held responsible are, for example, laid down under the AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted during the June 2014 AU summit held in Malabo, Equatorial Guinea (the Malabo Protocol).<sup>28</sup> These acts include:

- a) Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources;
- b) Concluding with State authorities an agreement to exploit natural resources in violation of the legal and regulatory procedures of the State concerned;
- c) Concluding an agreement to exploit natural resources through corrupt practices;
- d) Concluding an agreement to exploit natural resources that is clearly one-sided;
- e) Exploiting natural resources without any agreement with the state concerned;
- f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
- g) Violating the norms and standards established by the relevant natural resource certification mechanism.

61. ‘Security of people and the staff’ as provided for under (f) above, should be understood in the broad sense and include both physical safety and security as well as financial security.
62. Companies also bear indirect negative obligations. They thus bear responsibility for the activities or actions of those that act on their behalf or to their benefit including the private security companies they use for securing their facilities and personnel. Accordingly, they should ensure that such activities or actions undertaken on their behalf or to their benefit do not cause harm or result in interference in the enjoyment of protected rights. Where such activities or actions result in curtailment or interference with the rights protected in the African Charter, the company on whose behalf or to whose benefit those activities or actions have been taken should bear administrative, civil and/or criminal responsibility as applicable.
63. In addition to the negative obligations, in certain circumstance companies also bear certain positive obligations arising from the human and peoples’ rights of the Charter in general and Articles 21 and 24 in particular. The first set of obligations in this regard relate to the various fiscal and transparency requirements arising from the operations of their activities.<sup>29</sup> These include all applicable fiscal responsibilities and transparency obligations including disclosure of identities of owners, shareholders and local partners; fully declaring profits they make from their operations in the host country; disclosing financial terms of agreements relating to license fees, national and local taxes, custom duties, royalties and shares due to the government in terms of the contract and applicable laws of the country; and adopting measures to comply with requirements against illicit financial flow.
64. The second set of positive obligations is that arising from the social and economic impacts of the operations of extractive industries or other companies on the host community including on the land and natural resources rights of affected people.<sup>30</sup> In conducting their operations, these business entities should adequately inform and substantively consult with the affected people on any of their activities or on decisions that may materially affect the people and implement such activities having regard to the concerns of the people and the requisite cautionary measures for mitigating such impacts.<sup>31</sup> In this regard, companies should also do, with the participation and representation of affected local communities,

the requisite environmental, social and human rights impact assessments before undertaking any actions, which may have negative implications for the affected people.

65. Also arising from the social and economic impacts of the operations of companies and the nature of the power that they exercise are obligations of companies to contribute to the development needs of the host communities.<sup>32</sup> These obligations are legal obligations rather than just matters of social responsibility of companies.<sup>33</sup> These obligations in particular include supporting community-based employment and economic diversification to reduce reliance on the extractive industries as the sole source of income, educational, health, agricultural or pastoral development projects, as well as providing access to mine facilities and infrastructure. It also entails an obligation, once the extractive operations have come to an end, to support the transition of affected people to reliance on alternative livelihoods.

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## Endnotes

- 1 See the Resolution of the African Commission on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector, ACHPR/Res. 367 (LX) 2017, available at <http://www.achpr.org/sessions/60th/resolutions/367/>.
- 2 Examples include the conflicts in the eastern region of the Democratic Republic of the Congo; western Sudan as well as in the Niger Delta in Nigeria.
- 3 T Hentschel *et al* (2002); *Global Report on Artisanal & Small-Scale Mining* 4.
- 4 See Communication 155/96 – Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (2001) (the SERAC case).
- 5 Extractive Industries Transparency Initiative ‘EITI Glossary’, available at <https://eiti.org/glossary>; Cambridge dictionary definition of ‘extractive industry’ available at <https://dictionary.cambridge.org/dictionary/english/extractive-industry>.
- 6 Financial Times ‘Financial Times Lexicon’ available at <http://lexicon.ft.com/Term?term=extractive-industry>.
- 7 See 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.
- 8 Communication 75/92 - Katangese Peoples’ Congress v. Zaire.
- 9 Communication 75/92 - Katangese Peoples’ Congress v. Zaire; Communication 211/98 – Legal Resources Centre v Zambia; Communication 279/03-296/05 – Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v. Sudan; Communication 276/03 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. the Republic of Kenya (the Endorois case).
- 10 See ACHPR, Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights.
- 11 Definition similar in content to the definition provided for ‘natural resources’ in Article V(1) of the African Convention on the Conservation of Nature and Natural Resources (Revised edition) 2003. This definition is also in line with the exposition of natural resources as provided for in paras 123, 124 and 254 of the Endorois decision.
- 12 See Para. 6 of the Preamble to the African Charter ‘recognizing on the one hand that human rights stem from the attributes of human beings [...] and on the other hand, that the reality and respect of peoples’ rights should necessarily guarantee human rights’.
- 13 Also see the UN Draft Principles on Human Rights and the Environment (produced as attachment to the 1994 Report of the UN Special Rapporteur).
- 14 The rights and duties of persons are provided for in Articles 1 to 29 of the African Charter on Human and Peoples’ Rights.

- 15 See *Resolution ACHPR/Res.224 (LJ) 2012 on a human rights-based approach to the governance of natural resources*.
- 16 See the SERAC case.
- 17 See para 7 of the Preamble to the African Charter and Chapter II of the African Charter on duties.
- 18 AfCHPR, Application No. 006/12, *The African Commission on Human and Peoples' Rights v. The Republic of Kenya*, paras. 200-201.
- 19 See the Endorois case.
- 20 Existing State Reporting Guidelines on Article 21 and best practices.
- 21 See for example ACHPR/Res. 372 (LX) 2017 Resolution on the Protection of Sacred Natural Sites and Territories.
- 22 Existing State Reporting Guidelines.
- 23 Speech delivered during the inaugural General Assembly of African Coalition for Corporate Responsibility - Commissioner Solomon Ayele Dersso, Chairperson of the Working Group on Extractive Industries, available at <http://www.achpr.org/news/2016/07/d226/>.
- 24 The duty to respect and consider others and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance is provided for in Article 28 of the African Charter. The United Nations Guiding Principles on Business and Human Rights (the Ruggie Principles) confirm in Principle 11 that businesses 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'. See also ACHPR/Res. 367 (LX) 2017 Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector.
- 25 Articles 27(1) and (2) and 28 of the African Charter.
- 26 Flows from the logic of applying the duties in the African Charter to legal persons.
- 27 See note i above.
- 28 While the Malabo Protocol has not yet entered into force, it is one example of the growing consensus between African States on the kinds of acts for which companies may be held criminally liable. The International Criminal Court in A Policy Paper on Case Selection and Prioritisation adopted in September 2016 also announced that '[t]he Office will also seek to cooperate and provide assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, and grabbing or the destruction of the environment'
- 29 In the Extractive Industries Transparency Initiative, these are formulated as voluntary obligations of transparency.

30 Article 27 of the African Charter; see also ACHPR/Res. 367 (LX) 2017 Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector.

31 Article 9 of the African Charter; Ruggie Principles, Principle 11; ACHPR/Res. 367 (LX) 2017.

32 See Article 27; This is also demonstrated through best practice in South Africa, where the Mineral and Petroleum Resources Development Act 28 of 2002 provides in terms of sections 23 (h), 24 (3), 25 (2), 28 (2) and 85 (3) amongst others, that a mining company has to submit a social and labour plan when applying for mining rights. Social and labour plans are regarded as forming part of corporate social responsibility.

33 In the context of the African Charter, which imposes duties on all persons, and given the resources at the disposal of extractive industries, as well as the extent and nature of the communities who are reliant on the extractive industries sector, the provisions of the African Charter, particularly Article 27 to 29 should be read to also impose duties on companies.

### **Resolution 364: Resolution on Developing Reporting Guidelines with Respect to the Extractive Industries ACHPR/Res. 364(LIX) 2016**

*The African Commission on Human and Peoples' Rights (the Commission), meeting at its 59<sup>th</sup> Ordinary Session held from 21 October to 4 November 2016 in Banjul, Islamic Republic of The Gambia;*

*Recalling* its mandate to promote and protect human and peoples' rights in Africa under the African Charter on Human and Peoples' Rights (the African Charter);

*Recalling* its Resolution ACHPR/Res.148 (XLV1) 09, establishing the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (the Working Group), adopted during the 46<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 11 to 25 November 2009;

*Further recalling* Resolution ACHPR/Res.321(LVII)2015 appointing Commissioner Solomon Dersso as the new Chairperson of the Working Group and the extension of the term of its members, adopted at the 57<sup>th</sup> Ordinary Session of the Commission held from 4 to 18 November 2015 in Banjul, Islamic Republic of The Gambia;

*Recognising* the importance of the Working Group in contributing to the work of the Commission towards an improved protection of human rights and the environment within the context of extractive industries;

*Further recognising* that the lack of reporting guidelines on extractive industries undermines the monitoring of compliance by State Parties with Charter standards;

#### **The Commission:**

*Decides* to mandate the Working Group to elaborate reporting guidelines that adequately guide State Parties on the information they should incorporate in their periodic report.

**Done in Banjul, Islamic Republic of The Gambia, on 4 November 2016**

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**Resolution 367: Resolution on the Niamey Declaration on  
Ensuring the Upholding of the African Charter  
in the Extractive Industries Sector  
ACHPR/Res. 367 (LX) 2017**

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*The African Commission on Human and Peoples' Rights, meeting at its 60<sup>th</sup> Ordinary Session held from 8 to 22 May 2017 in Niamey, Republic of Niger;*

*Recalling* its mandate to promote and ensure the protection of human and peoples' rights in Africa under the African Charter on Human and Peoples' Rights (African Charter);

*Recalling* its Resolution ACHPR/Res.148 (XLV1) 09 establishing the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (Working Group) adopted during the 46<sup>th</sup> Ordinary Session held in Banjul, The Gambia, from 11 to 25 November 2009; Resolution ACHPR/Res.224 (LI) 2012 on a human rights-based approach to natural resources governance adopted during the 51<sup>st</sup> Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia; Resolution ACHPR/Res.236 (LIII) 2013 on illicit flight of capital from Africa adopted during the 53<sup>rd</sup> Ordinary Session held from 9 to 23 April 2013;

*Underscoring* that the right to freely dispose of wealth and natural resources is an inviolable right of all peoples guaranteed under Article 21 of the African Charter;

*Acknowledging* that in many African countries extractive industries constitute a source of revenue representing a substantial part of foreign direct investment which, if managed in a viable, sustainable and transparent manner respectful of charter-based rights, can contribute to broad-based and inclusive socio-economic development;

*Reiterating* the primary responsibility of States Parties to prevent and provide redress in accordance with the African Charter for all forms of violations of human and peoples' rights, including violations involving non-state actors;  
*Affirming* that extractive industries have the legal obligation to respect the rights guaranteed in the African Charter;

*Concerned* by the lack of transparency prevailing in relation to the negotiation and terms of concessionary contracts and the receipt and use of revenues;

*Alarmed* by the low respect of human and peoples' rights in the extractive industries sector resulting in extensive individual and collective human rights violations;

*Concerned* by the exploitative terms on the basis of which the extractive industries operate in many parts of the continent depriving the populations of the benefits to which it is entitled and often causing adverse environmental and social impacts further exacerbating poverty in the host communities;

*Noting with deep concern* the loss of a considerable amount of revenues due to weak governance and tax regimes as well as bargaining capacity resulting in unduly long tax holidays, disadvantageous duty-free privileges and the exploitation by extractive companies and individuals of the loopholes in such legal regimes and licensing contracts;

*Further concerned* by the increasing destruction with impunity of the environment and ecosystems resulting from poorly regulated activities of the extractive industries in Africa;

*Convinced* of the need for transforming the national legal and regulatory framework of the activities of the extractive industries, in line with the African Charter, to the development needs of society and the benefit of local communities, indigenous populations/communities, women, children, mine workers and other vulnerable groups living in the areas of operation of extractive industries;

## **The Commission:**

1. *Requests* States Parties to ensure that relevant legislation is adopted or existing ones reviewed in order to:
  - a. Stipulate provisions for sharing revenues from operations of extractive industries between national government, regional authorities and local communities;
  - b. Require that licences to extractive industries are negotiated and granted in accordance with internationally accepted rules and standards, based on transparency and human and peoples' rights;
  - c. Guarantee that all the financial terms of agreements with extractive companies including those relating to licence fees, national and local taxes, custom duties, royalties and shares due to the State are not exploitative;

- d. Require that communities and individuals residing in areas earmarked for prospection and development of natural resources are properly consulted, provided with all information relating to exploration and development activities from the very inception and are assured that exploration and development activities are undertaken with due respect to the agreed terms protecting their rights;
  - e. Ensure that concessionary contracts are negotiated with active participation of representatives of affected communities and community-based organizations and that their terms are made known to the public in accordance with the requirements of transparency and respect for all the human and peoples' rights in the African Charter;
  - f. Require that all revenues received by the State from the activities of extractive companies and the use to which they have been put are independently audited, made known to the public in the local languages and subject to parliamentary scrutiny;
  - g. Put in place regulatory bodies vested with the relevant powers for ensuring that human rights, environmental and labour standards are duly respected and environmental and social impacts are mitigated;
  - h. Impose criminal and administrative accountability for all those involved in corrupt practices and misappropriation of public funds accruing from the operations of the extractive industries;
  - i. Provide non-judicial and judicial grievance mechanisms accessible to affected communities and adequately equipped and resourced for handling cases involving extractive industries; and
  - j. Ensure the application of human rights and relevant safety and environmental standards for protecting individuals and communities involved in and dependent on artisanal mining with particular attention to the rights of children, women, indigenous populations/communities and other vulnerable groups.
2. *Calls* on States Parties to institute laws where these do not exist, or reform existing laws to recognize and enshrine the obligations of extractive industries to respect the rights in the African Charter throughout their operation cycle, including for:
- a. Implementing exploration and development activities with due respect to the terms agreed in consultations guaranteeing the rights and interests of host communities;

- b. Paying due compensation to affected communities for all material and non-material damages suffered and for the cleaning and rehabilitation of affected environment in cases of despoliation of the environment;
  - c. Bearing civil and criminal responsibility and paying compensation for human and peoples' rights violations and/or abuses arising from their extractive industrial activities or from activities of those operating on their behalf or for assisting or abating such violations by state or non-state actors including private security companies;
  - d. Contributing to the development needs of the communities in the areas of their operations including through supporting community-based employment, educational, health, agricultural or pastoral development projects; and
  - e. Disclosing the identity of shareholders and local partners, fully declaring profits they make from their operations in the host country and for publicizing all payments that they make to government in terms of the contract and applicable laws of the country.
3. *Urges* States Parties to adopt laws and regulations aimed at easing the transition of affected communities from economic dependence on extractive industries to reliance on other livelihoods when activities of extractive industries are closed down, in line with regional and international human rights laws and principles;
4. *Calls* on States Parties to enforce such requirements where sufficient legislation currently exists including the provision of grievance mechanisms for all cases of violations of rights guaranteed in the African Charter;
5. *Urges* States Parties to establish regional mechanisms for:
- a. Cooperation and the exchange of good practices between States Parties to strengthen capacities and develop the necessary institutional and legal framework to ensure that mining contracts are negotiated to the benefit of and in consultation with affected individuals, local communities and indigenous populations/communities;
  - b. Developing capacities for value addition and beneficiation;
  - c. Building regional marketing platforms for assessing the commercial value of the resources exported from their territories; and
  - d. Fighting illicit financial flights common in the extractive industries.

**Done in Niamey, Republic of Niger, on 22 May 2017**