Dear Readers, as we look back on the year 2020 we are provided with an opportunity for reflection. This year has seen the worst health crisis in a century, which will also have far-reaching and long-term repercussions for all aspects of our lives. We should see this pandemic not only as a crisis, but as a wakeup call for the way in which we structure our societies nationally and internationally, our relationships within our communities and our relationship with the natural environment on which human wellbeing and existence rely.

In relation to the environment and extractive industries, the COVID-19 pandemic has provided us with an opportunity to reflect on the challenges that come with an overreliance on extractive modes of production, but also for reflection on how the natural wealth of the African continent can be used to create more prosperous and equal societies where everyone can enjoy a life in dignity.

In this third edition of the WGEI Newsletter, we look at the impact of the COVID-19 pandemic on the extractive industries and related human rights concerns. We also take a look at some of the most important developments and trends in the extractive industries in the last year, and note in particular a growing trend and awareness by African States of the need to ensure that they and their people receive the full value of resources extracted by multinational corporations operating on the continent. We consider the challenges of illicit financial flows more in depth in an article that in particular focuses on the new insights from the Economic Development in Africa Report 2020 and how it links to existing human rights norms. We also consider some of the best practices in resource governance from Botswana, from the High Level Lecture of the President of Botswana during commemoration of the African Human Rights Day 2020.

I am further happy to take this opportunity to congratulate the newly elected Expert Members of the WGEI. Together with the other Commissioner Members, I am delighted to have such a select group of experts working with us, and wish to express my appreciation for their enthusiasm and initiative, which will enable us to take the work of the WGEI to new heights. I conclude by thanking the outgoing WGEI Members for their many years of service and the unique contribution that they each made through their dedication, expertise and commitment.

I wish you all happy reading!

Solomon Ayele Dersso, PhD
Chairperson, WGEI
The Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI) was established by the African Commission on Human and Peoples’ Rights (African Commission) in 2009, in response to the growing concerns on the continent about the negative human rights consequences of unregulated or poorly regulated extractive industries on the continent.

The WGEI Strategic Priority areas are as follows:

(a) Examine the impact of extractive industries in Africa within the context of the African Charter on Human and Peoples’ Rights;

(b) Research the specific issues pertaining to the right of all peoples to freely dispose of their wealth and natural resources and to a general satisfactory environment favourable to their development;

(c) Undertake research on the violations of human and peoples’ rights by non-state actors in Africa;

(d) Request, gather, receive and exchange information and materials from all relevant sources, including Governments, communities and organizations, on violation of human and peoples’ rights by non-state actors in Africa;

(e) To inform the African Commission on the possible liability of non-state actors for human and peoples’ rights violations under its protective mandate;

(f) Formulate recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples’ rights by extractive industries in Africa;

(g) Collaborate with interested donor institutions and NGOS, to raise funds for the Working Group’s activities;

(h) Prepare a comprehensive report to be presented to the African Commission.

MANDATE OF THE WGEI UNDER RESOLUTION 148:

COMPOSITION OF THE WGEI

Chairperson:
Honourable Commissioner
Solomon Ayele Dersso

ACHPR Members:
Honourable Commissioner
Mudford Zachariah Mwandenga (Vice Chairperson);
Honourable Commissioner
Rémy Ngoy Lumbu;

Expert Members:
Ms. Seynabou Benga;
Professor Damilola Sunday Olawuyi;
Professor Georges Ivo E Ekosse;
Dr. Evelyn Happy Katono; and
Mr. Brigadier Siachitema.

ISSUE 3

About the WGEI: Who we are and what we do
Introduction to our new WGEI Members

During its 66th Ordinary Session, held virtually from 13 July to 08 August 2020, the Commission decided to reappoint Commissioner Solomon Ayele Dersso as Chairperson of the WGEI, appoint Commissioner Mudford Zachariah Mwandenga as Vice-Chairperson of the WGEI and reappointed Commissioner Rémy Ngoy Lumbu as a Member. The Commission also appointed five (5) new Expert Members of the WGEI, with due regard to regional, gender, language and legal systems representation.

We are proud to take this opportunity to introduce the newly elected Commissioner and Expert Members of the WGEI:

Commissioner Mudford Zachariah Mwandenga - Vice Chairperson WGEI

Ms. Seynabou Benga

Ms Benga is a lawyer with 20 years of professional experience. She is the Founder and Director of Human Dignity, a non-profit association engaged in the promotion and defense of economic, social and cultural rights in sub-Saharan Africa. She is also a Lecturer at the Paris Dauphine University since 2018 and an Assessing judge in the French National Court of Asylum since December 2016. She is a Senegalese national.

Professor Georges Ivo E Ekosse

Prof. Ekosse is the Director of Research and Innovation at the University of Venda in South Africa. He has expertise in a range of fields, including environmental studies, soil mineralogy, environmental health, waste management in...
Update on WGEI Activities

Since the last newsletter appeared in October 2019, and despite the continuing challenges posed by COVID-19 on the undertaking of in-person activities, the WGEI has been able to continue with its work. The following provides a summary of activities undertaken:

1. An Advocacy Visit was undertaken to the Republic of Niger from 09 to 10 December 2019, to sensitize State institutions concerned with human and peoples’ rights and extractive industries, including relevant Ministries and the National Human Rights Institution, as well as Civil Society Organizations on the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter (Reporting Guidelines and Principles).

2. A second Advocacy Visit with a similar mandate was undertaken to the Federal Democratic Republic of Ethiopia, with the additional aim of engaging with the Ministry of Mining and Petroleum in the preparation of its ten-year Mineral and Petroleum Policy to ensure its compliance with the provisions of the African Charter on Human and Peoples’ Rights (the African Charter). The WGEI Chairperson during this visit also met and held fruitful deliberations with a representative of the Natural Resources Management Section.

We would like to welcome them all on board and wish them every success during their term.

Dr. Katono is a Ugandan lawyer. She holds PhD in Law from the University of Dar es Salaam and is an alumni of the Tanzanian-German Centre for Eastern African Legal Studies and a beneficiary of the DAAD scholarship. She was awarded the Woman Achievers Award by the New Vision Newspaper in 2010 for her role in rehabilitating street children in Uganda. She has experience in international and regional human rights, refugee law, humanitarian law, women’s rights, children’s rights and economic analysis and policy.

Dr. Evelyn Happy Katono

Mr. Brigadier Siachitema

Mr Siachitema is a Consultant in the Women’s Land and Property Rights Programme and the Business and Human Rights Programme at the Southern Africa Litigation Centre (SALC). He has experience of both private and public practice in the area of extractive industries, environment and human right, including successfully using human rights and civil remedies to hold corporations accountable for violating human rights in Southern Africa and other human rights issues in the extractive sectors. He has previous experience working with the WGEI through participation in Expert Consultative meetings and serving as a resource person during panels and workshops.

We would like to welcome them all on board and wish them every success during their term.
of the United Nations Economic Commission for Africa (UNECA).

3. In relation to the impact of the COVID-19 pandemic on the rights of mine workers in South Africa, the WGEI Chairperson issued a statement on the need to protect the human rights of mine workers and mining affected communities from the health consequences of COVID-19 by adoption of relevant regulations to prescribe health measures in mines.

4. Given the importance of the mandate of the WGEI, the Commission during the 66th Ordinary Session adopted Resolution 459 to renew the mandate of the WGEI and appoint new Members. In its Resolution 449 on Human and Peoples’ Rights as central pillar of successful response to COVID-19 and recovery from its socio-political impacts, adopted during the same Session, the Commission stressed the need for States to “Institute natural resources governance policies that facilitate value addition, eradicate illicit financial flows in the extractive industries sectors, and ensure ecologically sustainable and socially uplifting industrialization.”

5. The WGEI Chair issued two statements on environmental challenges not related to extractive industries, in relation to the oil spill off the coast of Mauritius in August 2020 and the threat to the rights to a general satisfactory environment posed by petro-chemical lobby groups aiming to influence agreements between the US and Kenya on import of plastic waste.

6. Because of the impact of the COVID-19 pandemic, the induction meeting for the new WGEI Members, which also served as a strategic planning meeting, took place virtually on 25 September 2020, providing the opportunity for Members to meet each other, understand the workings of the WGEI and exchange ideas for a bi-annual workplan.

7. A letter of concern was sent to the Central African Republic in early November 2020 regarding reported pollution, environmental degradation and range of human rights violations resulting from gold mining operations in the country.

8. The WGEI Chairperson in his Inter-Session Activity Report included a report on the Status of Extractive Industries in Africa, a shortened version of which is included in this Newsletter.

COVID-19 and its impact on the extractive industries sector

African governments responded in different ways to the threat of the COVID-19 pandemic when the first cases started to be recorded on the continent around February 2020. Many countries responded with stringent measures, including widespread border closures, especially in relation to countries which were considered hotspots. Apart from restricting movement of persons, the pandemic also caused delays in movement of goods, lowered demands for resources and caused devastation in international supply chains. African States heavily reliant on natural resource exports were consequently hit the hardest. This article considers how a range of human rights under the African Charter were impacted by the pandemic, and provides some initial thoughts on the lessons learnt from the pandemic in improving human rights in the extractive industries.

Right to health

The African Charter in Article 16 provides for the right of every individual to the best attainable
state of health. As one of the industries most at risk from the COVID-19 pandemic due to circumstances which are likely to increase the risk of transmission, many precautions were taken in relation to safeguarding the right to health in the mining sector. Some of the challenges include travelling and working in close proximity, physical activity with high level of contact with people, machinery and equipment, cross-border travel of migrant workers, and closed working environment in the case of underground operations. For these reasons testing and isolation of mine workers was much higher in countries like South Africa than the national average. This resulted in many people who did not even have symptoms being picked up through frequent scanning and testing. Mines were also in many countries required to reduce their workforce for the duration of lockdown or emergency timeframes, which decreased the health risk.

In a positive development in South Africa, the Department of Mineral Resources and Energy was ordered by the Courts to gazette coronavirus-specific health and safety guidelines for the mining industry following a broad consultative process. The South African government further ordered mines to close for the duration of the national lockdown, with only care and maintenance allowed as well as continued provision of services to communities, such as water supply to maintain sanitation in the communities, thereby also protecting the health rights of mining affected communities. In the DRC the Government elected not to close down mining, including artisanal mining, for fear of creating social unrest, but put in place health and sanitation campaigns to raise awareness. 

Mining industries also contributed money to the procurement of Personal Protective Equipment and other health necessities in communities and in the absence of strict government regulations put in place their own health and sanitary measures. This has been criticised by some as a Public Relations stunt, aimed at ensuring future goodwill towards their continued operations, and these contributions should thus be viewed with circumspection.

**Freedom of movement**

While the African Charter provides for a right to freedom of movement, this is one right which has been extensively curtailed during the COVID-19 pandemic, through curfews, lockdowns and a prohibition of travel between cities or regions. In South Africa this has impacted on miner workers from neighbouring countries, who could not work during lockdown, and many of whom went home. They experienced some challenges in returning to work when mining activities reopened earlier than other sectors and border crossing remained limited.

A very serious limitation on the right of movement was imposed by mining companies themselves in the DRC. According to reports, thousands of workers were confined to mining sites by multinational cobalt and copper mining companies, and were informed that they would lose their jobs if they left. They in some cases reportedly did not receive adequate food and water,
and stayed in overcrowded quarters with insufficient sanitation facilities. While this was done to limit the health risks of miners returning to their communities, this is a serious limitation of the right of movement and not justified by the circumstances. The Government responded by declaring a moratorium granting companies one month to return to normal. While this limited the time, given the untenable conditions under which the workers were living, a more serious response may have been more appropriate.

**Right to work**

Under the African Charter, every individual has the right to work under equitable and satisfactory conditions and to receive equal pay for equal work. In relation to the example described above of the mine workers who were confined to mining sites in the DRC, it is additionally stated that in some cases people were forced to work overtime, without additional pay. This is in clear violation of the right to work under equitable and satisfactory conditions.

Workers in all sectors suffered during the pandemic as a result of lockdown and social distancing measures. However, in mining which takes place in remote parts, the mining company is often the main, if not only employer of the community and loss of jobs in such circumstances can leave thousands of households without any income. Many mines downsized their workforce. In a few instances, companies only stood down employees on full pay while keeping the operations running with core staff.

In Zambia, the Government reportedly advised Glencore mining company that the reasons they gave for wanting to put its Mopani Copper Mines under “care and maintenance” was not justified under the circumstances, and was a roundabout way of laying off workers, with 11 000 jobs at risk. The backlash from the Government resulted in Glencore deciding against closing the mine, despite the challenges that COVID-19 posed to the markets.

In relation to the right to work, artisanal miners are often experiencing the worst impacts. Due to lower global demands, artisanal miners, particularly in the gold sector were unable to sell their stock, or were only able to do so at a very reduced price. The COVID-19 pandemic has resulted in gold trading houses shutting down and price cuts of between 30 to 50 percent in some cases. There are also projections that these additional hardships faced by families relying on artisanal mining is likely to result in higher levels of child labour in the sector.

“Due to lower global demands, artisanal miners, particularly in the gold sector were unable to sell their stock, or were only able to do so at a very reduced price”

Artisanal miners who work illegally have also been significantly impacted by strict lockdown regulations. More than a hundred illegal gold miners in South Africa were stuck underground when the lockdown began on 27 March 2020, afraid to be arrested if they surface to buy food. The pandemic has therefore accentuated the need to legalise and regulate artisanal mining across the continent.

A positive action in relation to the right to work was the support to the #Khomani San community, an indigenous group in Southern Africa, by Glencore mine, to alleviate their suffering from a loss of tourism income due to lockdown restrictions.

**Right to freely dispose of wealth and resources and right to development**

According to Article 21 of the African Charter, all peoples have...
the right to freely dispose of their wealth and natural resources, and States should eliminate all forms of foreign economic exploitation. The COVID-19 pandemic in this regard particularly impacted on the artisanal mining sector, including gold and diamonds, where illicit actors have bought these minerals at heavily reduced prices with the intention to sell it at large profits later. This not only impacts directly on the artisanal miners as discussed above, but also has economic repercussions for the country as a whole which loses the income from these illicit sales.

Mining companies facing losses due to the pandemic have also been requesting States to cut mining taxes, thereby further reducing the income bases for governments, and limiting the ability of their peoples to fully benefit from the disposal of their natural resources.

Right to receive information

The African Charter in Article 9 provides that every individual has the right to receive information. In relation to the extractive industries during the COVID-19 pandemic, a good and a bad example have been recorded in the DRC. On the one hand the miner workers confined to the camps reported that they were not informed of the duration of the confinement. This is in clear violation of the right to information. On the other hand, the government of the DRC also rolled out extensive awareness programmes throughout the country, including in artisanal communities to ensure that everyone is aware of the necessary health and sanitary practices.

This proved to be a challenges in many cases where governments use radio, television and print media to disseminate information about the pandemic, but where mining communities are either too remote, or do not have the resources to access these sources of information, even if it is made available in local languages, the absence of which could pose further challenges.

Ways to build back better in the extractive industries

The DRC, like many other countries on the continent saw lower exports of mineral resources, which account for 95 percent of export revenue and 20 percent of the national budget. This has thus also impacted on government tax collection. The COVID-19 pandemic has also impacted on the economy of other countries, including Sierra Leone, which gets 80 percent of its export revenue from mining, which by April 2020 faced a 85 percent decline year on year. For some African countries like South Sudan and Nigeria, which rely heavily on oil for foreign revenues, the collapse of oil prices also holds serious financial implications. The lesson in this regard is that there is a need for African States to diversify their economies and move away from an overreliance on extractive...
industries, which is not resilient to economic shocks at the international level.

Closely related to this is the challenge of an overreliance on export markets to Asia and Europe. This emphasises the need for more intra-African trade, as envisioned under the African Continental Free Trade Area (AfCFTA) which should be operationalised together with free movement of people.

Another important challenge which was intensified by the COVID-19 pandemic is the lack of regulation of artisanal mining.

There are a range of benefits that would come from regulating this sector more fully, including a lowering in smuggling of illegally mined resources without contributing to the state coffers, better working conditions for workers, workers would not have to access mining areas illegally, where they are currently often brought into conflict with security companies employed by mining companies, leading to injuries and loss of life, and the government would also be able to better police and enforce provisions prohibiting child labour.

There is also an important role for companies in realising human rights. There has been a surge of support coming from mining companies for communities and governments to assist with financial contributions and equipment in response to the COVID-19 pandemic. This has in a way given us a glimmer of the positive impact that mining companies can have on the wellbeing of their host communities, if they feel compelled to do so, and should be a core focus of efforts to build back better.

As part of efforts to monitor the developments in relation to human and peoples’ rights in relation to the extractive industries, the WGEI Chairperson is continuously tracking developments and reporting on the status of extractive industries and human rights on the continent in selected Inter-Session Activity Reports to the Commission. The following is a summary highlighting some of the most pertinent developments from the November 2020 Report.

Normative developments in State Parties

Mali adopted a new Mining Code which “eliminates mining companies’ value added tax exemptions during production and shortens the period during which they are protected from fiscal changes to 20 years”, from the previous 30 years;

The Government of Equatorial Guinea in May 2020 published a new regulatory framework for mining operations, which applies to exploration and exploitation of mineral resources;

Egypt, in a bid to attract more investment in mining, which remains an underdeveloped sector, introduced new regulations in January 2020 that limit state royalties to a maximum of 20 percent and removed the requirement that miners form joint ventures with the government;

Sudan, in order to address the majority of its gold being smuggled from the country due to regulations that required all miners to sell gold at a discounted price to the central bank, adopted new regulations in January 2020;
Best practices in upholding human rights in the extractive industries

In Tanzania, mining company Barrick Gold settled 90 percent of outstanding land disputes which it inherited from its subsidiary Acacia Mining in 2019, and it is reported that the committee overseeing the compensation process includes local authorities and affected communities;

Investment group Armadale Capita employed Tanzania-based, registered and certified environmental consultants to conduct the environmental- and social-impact assessment for a graphite project in the country;

South African miner Sibanye-Stillwater set a high standard for corporate environmental transparency by being one of only 179 companies globally and the only South African company to achieve an 'A' rating for its climate change disclosure;

The SA Minerals Council in August 2020 launched a National Day of Women in Mining to focus on the advancement and representation of women in mining;

As a consequence of better health and safety practices and more regular testing, it is reported that the incidence in the South African mining industry of tuberculosis has decreased by 63 percent, and silicosis by 56 percent since 2008;

Mozambique is in the process of adopting a fully online system for licence processing, submission of reports and making payments, a move which is anticipated to result in greater transparency and enhance revenue collection;

Nigeria has identified seven strategic minerals in which it aims to boost investment in order to diversify the economy, but has indicated that based on the lessons learned in the oil industry, they would require mining companies to sign agreements with local communities;

The Zambian government reportedly announced that as part of efforts to curb illicit financial flows resulting from “deliberate undervaluation of mineral exports”, instead of samples being submitted to the government laboratories for valuation, mines ministry officials will visit mining sites and collect samples directly;

The governments of Sierra Leone, Côte d’Ivoire, Liberia and Guinea are jointly implementing the Mano River Union project to support artisanal diamond miners to gain better access to the legitimate mining supply chain, while receiving fair value for their work;
Human rights concerns and violations in extractive industries

A South African community activist, Fikile Ntsangase who was involved in a number of cases before the South African courts to halt expansion of mining by Tendele Coal Mining, and to ensure that they comply with all relevant environmental laws, was shot dead on 21 October 2020;

Cases have been filed by Tanzanian citizens in British courts in relation to injuries and death from security forces employed by mines to respond to illegal artisanal mining;

In Mozambique, the Montepuez ruby mine in the Cabo Delgado province has similarly been accused of abuses by security officers in response to artisanal miners illegally gaining access to the mine;

In Sierra Leone, the largest iron-ore mine owned by SL Mining, “laid off almost all its workers due to a legal dispute with the government”, reportedly resulting in hundreds or even thousands of people leaving the town;

According to Oxfam and FIDH in two separate reports published in September 2020, the East African Crude Oil pipeline which will traverse Uganda and Tanzania and the oil extraction in Uganda would have serious social, environmental, cultural, and human rights risks which are not addressed by current mitigation measures;

A report issued in October 2020 by the National Opinion Research Center at the University of Chicago (NORC) found that approximately 1.48 million children work in “cocoa-related hazardous” working conditions in the cocoa producing regions of Ghana and Cote d’Ivoire;

According to a report by a UN Group of Experts, gold production and export in the DRC is “systematically underreported”, with tonnes of gold exported illegally through neighbouring countries and resulting in loss of millions of dollars of revenue for the government;

Unregulated artisanal mining in South Africa continues to result in police abuses, human rights violations, health, safety and environmental issues;

Research by the Stakeholders Democracy Network shows that “international refined petroleum traders are exploiting Nigeria’s weak and poorly enforced fuel regulations to dump toxic petroleum products in the country”;

In Zimbabwe, a number of illegal gold miners have died when mines collapsed, and eleven people died in Mozambique when a part of a pit collapsed on them while they were conducting illegal mining, highlighting the precarious conditions under which they work;

A class action was filed in South African Courts against Anglo America for its alleged failure to prevent widespread toxic lead pollution in the Zambian town of Kabwe. The town hosted one of the world’s biggest lead mines for many decades and scientists have reported “alarming” levels of lead in people’s blood;

A new report by the Natural Resource Governance Institute (NRGI) has confirmed that “resource-backed loans have contributed to crippling debt levels in Africa and are shrouded in secrecy.”

Conclusions

This year has seen numerous legislative and judicial decisions, the majority of which aim to strengthen the benefit that African peoples gain from extractive industries, having a greater say in how their resources are used and also aimed at strengthening environmental protection;
The role of human rights norms in addressing the challenges arising from illicit financial flows

The African Commission through the WGEI as well as the Working Group on Economic, Social and Cultural Rights has for many years been concerned about the challenges of illicit financial flows (IFF) from the African continent, particularly in relation to the impact that it has on the realisation of fundamental rights of African peoples. The Commission in 2013 adopted Resolution 236 on illicit flight of capital from Africa, drawing attention to this challenge from an African human rights perspective and has since adopted a number of normative declarations on how to address IFF from a human rights perspective. This article considers the Economic Development in Africa Report 2020 of the United National Conference on Trade and Development (UNCTAD) which contains some of the most recent research on the challenges of IFF from Africa, and considers how the Commission’s soft law instruments can assist in stopping some of the gaps that allow IFF to continue.

Economic Development in Africa Report 2020

Africa” highlights the extent of the challenge of IFF from the African continent. According to the Report, Africa annually loses $50 billion through IFF, which in turn “strip government treasuries of needed resources for development expenditure.” It defines IFF as “financial flows that are illicit in origin, transfer or use; that reflect an exchange of value (instead of a pure money transaction); and that cross country borders.” The term “illicit” reflects that it goes beyond that which is illegal. In the view of the WGEI as expressed in the working draft of its Study on IFF, this would also include flows that facilitate, effect or arise from aggressive tax avoidance and tax evasion.

The Report identifies “inadequate regulation of the financial system and capital account; trade openness in the context of weak regulation and poor governance; and poor institutional quality and excessive dependence on commodity exports” as some of the main causes of IFF. Importantly, according to the report, IFF does not only undermine the tax revenue of the government which it would use for development, but additionally also undermine systems of governance and transparency and ultimately the foundations of democracy. According to the report “institutions are the primary channel through which IFFs negatively impact prospects for social and environmental sustainability.”

“IFF DOES NOT ONLY UNDERMINE THE TAX REVENUE OF THE GOVERNMENT WHICH IT WOULD USE FOR DEVELOPMENT, BUT ADDITIONALLY ALSO UNDERMINE SYSTEMS OF GOVERNANCE AND TRANSPARENCY AND ULTIMATELY THE FOUNDATIONS OF DEMOCRACY.”

The African Charter on Human and Peoples’ Rights in Article 21 recognises the right of all peoples to dispose of their wealth and natural resources, and that this must happen in the exclusive interest of the people. States are also enjoined to eliminate “foreign economic exploitation particularly that practiced by international monopolies.” There is thus a clear recognition in the African Charter of the human rights challenges associated with an undermining of peoples’ resource ownership.

The Commission has adopted two normative statements on the sectors most affected by IFF in Africa, and it is reported that $40 billion of IFF is linked to extractive commodities. In identifies trade mis-invoicing as one of the major forms that IFF takes, with gold accounting for 77 percent of “under invoicing”. The Report notes that “[s]ome sources of IFFs, such as illegal logging, fishing and mineral extraction are closely connected with substantial environmental costs, as well as the impoverishment of individuals and communities that rely on those resources to sustain their existence.”
Human rights norms and IFF

responsibilities of States and other stakeholders to address the scourge of illicit financial flows from the extractive industries.

The first of these was its Resolution 367 on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - ACHPR/Res. 367 (LX) 2017. Resolution 367 expressed concern about the lack of transparency in terms of concessionary contracts, the exploitative basis on which the extractive industries operate and the loss of considerable amounts of revenue through IFF. It identified some of the channels of IFF as including “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.”

The Commission requested States to take a number of steps to address IFF, including adopting or reviewing legislation in order to (a) require that licences are negotiated in line with international human rights and transparency standards; (b) ensure that financial terms of agreements are not exploitative; (c) that concessionary contracts are transparent and negotiated with the participation of communities; and (d) impose criminal and administrative accountability for corruption and misappropriation of public funds from the extractive industries.

Importantly, the resolution further required States to impose obligations on companies operating in the extractive industries to disclose “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.” Finally, the Commission called for regional cooperation among States to assess the commercial value of resources being exported and to fight IFF.

The Commission also adopted State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter related to extractive industries. These Guidelines provide a framework for States not only to report to the Commission on their compliance with the African Charter, but also for structuring their national laws and regulations to ensure that their people benefit fully from the country’s resource wealth. In relation to IFF, the Guidelines provide a whole section on financial regulation of the extractive industries sector, requiring States to provide

“Resolution 367 expressed concern about the lack of transparency in terms of concessionary contracts, the exploitative basis on which the extractive industries operate.”

updates on financial or tax incentives given to companies, measures taken to renegotiate contracts that limit the ability of the State to collect adequate revenue, measures to combat corruption (which enables IFF).

The Guidelines also explicitly addresses IFF by providing for States to report on “steps taken to address illicit financial flow through amendments to national tax laws and policies, rules on related party transactions, company laws and banking laws and
The Guidelines also drew on the Resolution 367 in requiring States to report on “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.”

The Guidelines additionally set out the responsibilities of companies, as including a positive duty on companies to comply with “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.”

Because the African human rights system provides for collective rights including in relation to the disposal of wealth, and in that it “The Guidelines additionally set out the responsibilities of companies, as including a positive duty on companies to comply with fiscal responsibilities and transparency obligations.”

Application of a human rights approach

The Commission’s normative instruments also link the challenge of IFF to other human rights under the African Charter, including the issue of transparency, which is closely related to access to information as well as the participation of affected people. According to the UNCTAD report only 45 out of 54 African countries report trade data continuously, making it hard to fully grasp the extent of IFF, and therefore impacting on the right to access to information.
The call of the Commission in Resolution 367 for collective State efforts should also be understood within the context of the African Free Trade Area Agreement, which provides an opportunity for States to stand stronger in assessing the commercial value of resources being exported, and in agreeing on collective policies and approaches to foreign trade and taxation, and additionally to put in place regional institutions to fight IFF. This collective engagement also provides an avenue for African countries to engage in international taxation reform, as proposed by the Report. The AU system not only allows for this, but the African Charter in Article 21 requires States to collaborate in this regard.

Finally, while accountability for corporations under international law remains a matter which is yet to be fully resolved in the context of the ongoing process for a binding instrument on business and human rights, the Commission has confirmed that corporations do have both negative and positive human rights obligations under the African Charter, including fully declaring their profits, which is directly contravened by mis-invoicing, one of the major sources of IFF.

From these considerations, there is thus an important role for a human rights based approach to addressing IFF. The rights of African peoples should be at the heart of national policies and laws to address IFF as well as be put front and centre in corporate practices, with strict accountability, including criminal liability being applied in cases of non-compliance.

Country profile - Focus on Botswana

His Excellency Dr. Mokgweetsi E.K. Masisi, President of the Republic of Botswana presented a high-level lecture during the African Human Rights Day Celebration, hosted virtually by the Commission on 21 October 2020. Under the theme: “Human and Peoples’ Rights and the Covid-19 Pandemic: Protecting Rights for Building Back Better”, President Masisi discussed Botswana’s prudent management of natural resources in its development trajectory, based on its four National Principles of Democracy, Unity, Self-Reliance and Development. The following is an abstract from his lecture:

“6. Excellencies, I want to preface my presentation by paying tribute to Botswana’s founding fathers whose visionary leadership contributed immensely to modern day Botswana. The foundation that they laid is characterised by Botswana’s four National Principles of Democracy, Unity, Self-Reliance and Development, which essentially guided the development of the Constitution of our country.

7. Botswana’s development path is also underpinned by the Rule of Law, Good Governance and respect for
Human Rights. Thus, our Constitution protects fundamental human rights as enshrined in international instruments, including our own, African Union Charter on Human and People’s Rights. This also guides the management of our natural resources and the development of Botswana.

8. Excellencies, Botswana like many African countries is endowed with a broad range of natural resources, including, land, water, minerals and flora and fauna, which if sustainably managed and used can ensure our success in eradicating poverty and achieving Africa’s Agenda 2063, the Sustainable Development Goals, and in the case of Botswana, the National Vision 2036. Our natural resources can therefore contribute in no small measure to the improvement of the standard of living of our people.

9. The management of Botswana’s natural resources is governed by laws, policies, strategies and well established institutions. To this end, Botswana regards her natural resources as an implicit part of the human rights framework.

10. Statutory frameworks that govern the management of Botswana’s natural resources include the following:

- **The State Land Act**
- **Tribal Land Act,**
- **Mines and Minerals Act,**
- **Wildlife Conservation and National Parks Act,** and
- **The Water Act.**

11. Central to our legislative framework is that Botswana’s natural resources belong to the State.

For example:

- in terms of the Mines and Minerals Act, no tribal grouping or community can claim ownership of minerals found in their area,
- Wildlife, except wildlife located in private game parks, is by law a national resource and the Wildlife Conservation and National Parks Act, prohibits the hunting of protected game animals throughout Botswana, The Tribal Land Act denounces tribal land claim for the benefit of all citizens, and as such, promotes a balanced approach to the socio-economic development of our country.

12. In accordance with our laws, Batswana can acquire land 'anywhere' in the country and land allocation is solely based on proof of citizenship, and neither on ethnicity nor place of origin. Thus our legal framework has immensely contributed to the integration of tribes in Botswana, leading to the peaceful coexistence of our people.

13. It is on the basis of our national legislation, policies and strategies, that the revenue generated from our natural resources across the country, is deposited into a Consolidated
14. Botswana’s National Development Plans promote equal distribution of wealth to all its citizens. Our public policy design is premised on the principle that every citizen is entitled to social services provided by the State. These include free basic education, free health care services, safe drinking water, as well as, the provision of sustainable housing to the less privileged and social safety programmes. The latter covers, among others, Orphan Care, People Living with Disability and Old Age Pension.

15. In line with the Constitutional right of equality, Botswana has adopted a National Vision which is themed, “Achieving Prosperity for All”. The vision is a transformational blue print which defines Botswana’s development road map. It is aimed at transforming Botswana from an Upper Middle-Income Country to a High-Income Country by 2036, through an inclusive development course which encompasses the empowerment of all Batswana.

16. The legal infrastructure which my country has put in place for public funds governance ensures that the country’s revenues are utilised for people centred development. One of these legislations is the Finance Management Act. Notwithstanding our success story, Botswana recognises that cases of misappropriation of public funds are unavoidable and can only be managed.

17. In this context, we have established institutions, which are dedicated to fighting corruption. They include the Directorate on Corruption and Economic Crime, the Corruption Court, the Ethics and Integrity Directorate, the Financial Intelligence Agency and the Office of the Receiver – which recovers revenue and property from the proceeds of crime.”