Dear Readers, the publication of this newsletter is an important platform for not only popularizing the work of the Working Group on Extractive Industries, Environment and Human Rights (WGEI) but also keeping abreast of some of the developments in the extractive industries sector. Accordingly, I am delighted to introduce this second edition of our newsletter. This second newsletter provides updates on the work of the WGEI during the course of the past year.

In order to offer an understanding of where the work of the WGEI fits in the existing natural resources governance framework in Africa, this edition also aims to situate the work of the WGEI within the wider normative framework regarding natural resource governance.

In the first contribution, myself together with Elsabé Boshoff, Technical assistant to the WGEI, present a brief analysis of the contribution of the Commission’s work to the existing natural resource governance framework. This highlights the ways in which the norm elaboration and monitoring work of the WGEI substantially strengthens the natural resources governance regime in Africa. Using the lens of particular category of right holders, the other contribution prepared by an Expert Working Group Member, Sheila Keetharuth, explores women’s rights in the context of extractive industries, in particular drawing attention to areas where gaps remain in fully realising the rights of women in participating in this sector.

This is followed by a review of “The Looting Machine: Warlords, Oligarchs, Corporations, Smugglers, and the Theft of Africa’s Wealth”, a book that offers an in-depth analysis of how the extractive industries sector has become the site for the systematic looting of Africa and the human rights protection vacuum characteristic of the sector. The review underscores the critical importance of the work of the WGEI and the enormity of the human and peoples’ rights challenges faced in the extractive industries sector.

The newsletter concludes with a Country profile on the extractive industries in the Democratic Republic of the Congo, prepared by Expert Working Group Member Erick Kassongo.

I wish to thank all the Working Group Members who made contributions to this second edition of our newsletter for their time and effort.

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 most recent milestone of the WGEI was the adoption and launch of its State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter on Human and Peoples’ Rights in October 2018. Since then, the WGEI has been undertaking activities to sensitize various actors on the relevance and use of these Guidelines and Principles, as well as its other normative elaborations.

**COMPOSITION OF THE WGEI**

**Chairperson:** Honourable Commissioner Solomon Ayele Dersso  
**ACHPR Members**  
Honourable Commissioner Yeung Kam John Yeung Sik Yuen;  
Honourable Commissioner Jamesina E.L King;  
Honourable Commissioner Rémy Ngoy Lumbu;  
**Expert Members**  
Professor Michelo Hansungule;  
Professor James Gathii;  
Mr. Erick Kassongo Kalonji;  
Mr. Clement Nyaletsossi Voulé;  
Ms. Sheila Beedwantee Keetharuth; and  
Ms. Valerie Couillard.

**MANDATE OF THE WGEI UNDER RESOLUTION 148:**

(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.
1. During the launching of the Annual Human Rights Yearbook on the sidelines of the AU Summit in January 2019, the Chairperson of the WGEI used the opportunity for popularization and distribution of the Guidelines and Principles and the first edition of the WGEI Newsletter to Representatives of AU Member States and others present.

2. A Joint meeting of the WGEI and the Working Group on Economic, Social and Cultural Rights (ECOSOC) was convened in Banjul, The Gambia on 17 and 18 February 2019, in order to discuss their joint mandates, among other matters. The participants considered the draft Study on Illicit Financial Flows, mandated to the two working groups under the Commission’s Resolution 236 and made comments for its improvement, as well as a draft of the WGEI’s Background Study on Extractive Industries in Africa. The Working Groups also discussed on the way forward in relation to the Study on Climate Change and Human Rights, mandated by Resolution 342.

3. On the margins of the 64th Ordinary Session of the Commission, the Chairperson of the WGEI convened an informal consultation on the United Nations process towards a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights (UN Binding Treaty), to initiate the elaboration of a Common African Position on the Binding Instrument, given the vulnerability of the African continent to the adverse effect of the activities of multinational corporations on human and peoples’ rights, as well as the accountability gap in holding corporations accountable.


5. On 29 July 2019 the WGEI Chairperson, together with the Country Rapporteur for the DRC issued a Press Statement on the death of 43 artisanal miners in a mine collapse in the DRC.

6. From 29 to 30 August, as part of sensitization on the Guidelines and Principles and in support of the mandate of the WGEI, the Zimbabwe Environmental Law Association (ZELA) convened a sensitization workshop for the SADC region on the Guidelines and Principles. This Workshop was the first promotional activity around the Guidelines and Principles, and provided an opportunity for participants for an in-depth consideration of this valuable normative instrument and how it can be applied practically within their work. In addition, the WGEI used this opportunity to consult with stakeholders on a draft Advisory Note to the Africa Group in Geneva, in relation to the ongoing process for the adoption of a UN Binding Treaty. Action points and recommendations were adopted on taking forward the conclusions of the Workshop.
The value of the Commission’s work within the existing natural resource governance framework

By Solomon Dersso and Elsabé Boshoff

While acknowledging that in many African countries extractive industries constitute a source of revenue which, if managed in a viable, sustainable and transparent manner, can contribute to development, the African Commission in its Resolution 367 identifies some of the main human rights challenges associated with the extractive industries sector on the African continent. These challenges include extensive individual and collective human rights violations such as the right to property, to dispose of their wealth and natural resources, and to participate in decisions affecting them; destruction with impunity of the environment and social impacts which further exacerbate poverty in the host communities; lack of transparency in the negotiation and terms of concessionary contracts and the receipt and use of revenues; unduly long tax holidays and disadvantageous duty-free privileges.

All these challenges have contributed to the status quo where local communities that bear the brunt of the impacts of extractive industries receive almost none of the benefits. Instead, they become worse off as they are made to absorb some of the externalities of the operations of the extractive companies and become victims of the phenomenon of resource curse. While these challenges are at their core a manifestation of the skewed power relations in the global chain of the extraction and use of natural resources, they are in part a result of weak regulatory frameworks and absence of effec-
tive institutional mechanisms for enforcing applicable rules and standards. Debates abound on what the best course of action should be particularly vis-à-vis the legal obligation of extractive companies is concerned. Yet, various global and regional initiatives and frameworks have been developed to address some of these challenges.

These frameworks include the Africa Mining Vision (2009), the African Peer Review Mechanism (2003); the Extractive Industries Transparency Initiative (2008), and the UN Guiding Principles on Business and Human Rights (2011). While the normative and knowledge production work of the WGEI, including its State Reporting Guidelines and Principles on Articles 21 and 24 and Resolution 367 on the Namib Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector, has thus not taken place in a vacuum, they also aim at addressing some of the shortcomings of the existing frameworks, particularly by placing the challenges within the unique and rich normative framework provided by the African Charter.

In what follows, this short article presents in comparative perspective the contribution of the norm elaboration works of the WGEI to the natural resource governance regime, particularly on the African Continent.

**Africa Mining Vision**

The Africa Mining Vision, adopted in 2009, is a key guiding document of the African Union, aimed at ensuring that the benefits of mining on the continent accrue to African people. The Mining Vision is formulated as encompassing “[t]ransparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development”. It envisions “[a] sustainable and well-governed mining sector that effectively garner and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities,” as well as linking into mineral beneficiation and manufacturing.

Formulated in those terms, the aims of the Africa Mining Vision overlap with that expressed in the Commission’s Guidelines and Principles on Extractive Industries. As noted in the explanatory note to the State Reporting Guidelines on the Contents of the Rights and Obligations under Articles 21 and 24 of the African Charter, the right of peoples to freely dispose of their wealth and natural resources under Article 21 entails that peoples and individuals ‘have secure access to, use of and benefit from their wealth’ and ‘to access, develop and use these resources in a way that is sustainable and improves their standard of living.’

In addition, the Mining Vision notes that one of the challenges to the responsible development of Africa’s natural resources is the lack of basic geological mapping in many areas, which increases the risk for investors who consequently demand extremely favourable tax regimes. The Mining Vision thus proposes an extensive survey to map the natural resources. The Guidelines similarly require States to be aware of the resources that are available within their jurisdictions. Both are also concerned with resources tax regimes, to ensure that States get the maximum benefit from its resources.

Another area of overlap is in relation to the specific challenges posed by artisanal mining. Unregulated and ill-equipped artisanal mining results in environmental degradation, health implications,
and social ills including child labour. The Mining Vision thus states the need to improve the understanding of ASM issues on the policy, regulatory, environmental, health, cultural, society, and economics domain, and to address these issues through, inter alia, provision of specialized training to miners and dissemination of technology, establishing financial schemes for ASM miners, enhancing the formalization of the sector and addressing environmental and human health issues. Similarly, the WGEI State Reporting Guidelines require that States have in place provisions for regulation, monitoring and providing support for persons engaged in artisanal and small-scale mining particularly in applying minimum environmental, health and safety standards, as well as steps taken to formalize the sector.

In relation to complementarity, the Africa Mining Vision is in the first place aimed at economic development in Africa. While the aim is to ensure that such development is to the benefit of the people of Africa, it is not formulated in terms of rights. In this regard the Guidelines elevate the Mining Vision’s aspirational formulation to a legally enforceable right. As such, it situates the principles of the Mining Vision not only as aspirations for States, but as human rights obligations. As articulated in paragraph 4 of the Explanatory Note one of the principles is the use of natural resources and principles in the exclusive interest of the peoples of a state. Elaborating on this it states, ‘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.’

Additionally, while the Mining Vision lumps together “provisions that safeguard transparency and good governance as well as enforce internationally acceptable safety and health standards, environmental and material stewardship, corporate social responsibility, and preferential recruitment of local staff”, the Guidelines unpack each of these in much more detail and provides guidance to States on what is required of them from a human rights perspective in relation to each of these. In formulating these same principles in terms of rights and obligations, it provides a much more rigorous framework not only for the implementation of the provisions in the Mining Vision but also for the elaboration of effective national regulations and enforcement mechanisms.

Additionally the Mining Vision does not address itself sufficiently to the duties on companies. While it acknowledges the importance of balancing the varying interests of local communities, the people of the State generally and companies, it largely relies on the goodwill of companies, the ability of States to negotiate more beneficial contracts and corporate social responsibility to effect this change.

The Guidelines on the other hand acknowledges that there are both positive and negative legal obligations not only on states but also on companies operating in the extractive industries, that go beyond the voluntary and often vaguely applied standards of corporate social responsibility. In so doing, the State Reporting Guidelines not only bring the right holders and beneficiaries to the centre but also accord due recognition
to the place of extractive companies in the legal relations of actors involved by attributing to them such minimum standards of legal obligations corresponding to the magnitude of power they wield, the share of benefit that accrue to them and the scale of the impact of their operations in the country of their operation.

In terms of the scope of application, there is also another notable difference between the norms elaborated by the ACHPR WGEI and the African Mining Vision. While the latter focuses only on the mining industry, the former is broader in its scope in that it covers the extractive industries sector, hence covering the oil, gas, minerals and other extractable natural resources sector.

**African Peer Review Mechanism (APRM)**

A second regional framework of considerable importance in relation to extractive industries is the APRM, an instrument voluntarily acceded to by Member States of the AU, as a self-monitoring mechanism of four identified areas, namely democracy and political governance, economic governance and management, corporate governance and socio-economic development. The APRM is thus a tool for sharing experiences, reinforcing best practices, identifying deficiencies, and assessing capacity-building needs to foster policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration.

Presently 38 Member States have acceded to this instrument, and the coverage of the APRM is thus much smaller than the work of the African Commission, as 54 of the 55 African States have acceded to the African Charter.

A core document of the APRM is the “Objectives, Standards, Criteria and Indicators for the APRM” which sets out the considerations and indicators under each of the four areas of review. Importantly, the African Charter is identified as a key Standard under each of the areas, and thus there is a requirement for States undergoing the APRM review to comply with the provisions of the Charter, and the soft law instruments adopted in this regard, such as the State Reporting Guidelines. There are further a number of Objectives and Criteria which overlap with the Guidelines, including:

- promotion and protection of economic, social, cultural, civil and political rights as enshrined in all African and international human rights instruments;
- ensuring accountable, efficient and effective public office holders and civil servants;
- promotion and protection of the rights of vulnerable groups;
- promotion of macroeconomic policies that support sustainable development;
- implementation of transparent, predictable and credible government economic policies;
- promotion of sound public finance management; fighting corruption and money laundering;
- ensuring that corporations act as good corporate citizens with regard to human rights, social responsibility and environmental sustainability;
- ensuring that corporations treat all their stakeholders (shareholders, employees, communities, suppliers and customers) in a fair and just manner; and
- providing for accountability of corporations and directors.

It is clear from the above that there is important overlap between the APRM areas of consideration and a human rights approach to extractive industries regulation. Furthermore, both the APRM framework and the Guidelines are concerned with financial management and policies and transparency in economic activities, as well as ensuring that corporations comply with, and are held responsible for breaches of their human rights obligations and labour and environmental standards.

Because of
The value of the Commission’s work within the existing natural resource governance framework (continued)

these overlaps, the State Periodic review procedure and the APRM frameworks complement each other, in that the review of States under the one system also reinforces their compliance with the other framework. In order to formalise this relationship, the African Commission and the APRM in 2017 signed a Memorandum of Understanding to provide for a framework for collaboration, including reporting to each other and follow-up with States on implementation of recommendations from each process.

The APRM framework applies across economic fields and hence lacks standards specific to the major sources of revenue for all of the resource rich countries on the continent, namely extractive industries. By contrast, the ACHPR through the norm development works of the WGEI particularly the State Reporting Guidelines and Resolution 367 articulated standards that specifically govern the extractive industries sector as highlighted some detail in the earlier sub-section.

Extractive Industries Transparency Initiative (EITI)

In terms of global frameworks governing extractive industries, the EITI is probably one of the most notable. It is characterised as “the global standard to promote the open and accountable management of oil, gas and mineral resources,” and is established through an international protocol. While 24 African States have been part of the EITI, two have been suspended, Liberia for missing a reporting deadline and CAR for reasons of political instability. A number of African States have also indicated their intention to join the EITI mechanism.

The EITI Standard requires countries and companies to disclose information on the key steps in the governance of oil, gas and mining revenues, including: contracts and licencing, production, revenue collection, revenue allocation and social and economic spending. While there is overlap between the EITI and the norms elaborated under WGEI, namely the State Reporting Guidelines and Resolution 367 on extractive industries, the EITI focuses on a much narrower scope. The State Reporting Guidelines and Resolution 367 of the ACHPR are concerned with the whole cycle of extractive industries from exploration to closure, and with the whole range of affected human rights. Unlike the EITI, these norms of the ACHPR deal with not only in respect of transparency and accountability in natural resource governance but also how these benefit the people and the economy.

“The EITI Standard requires countries and companies to disclose information on the key steps in the governance of oil, gas and mining revenues”

Because it is much more focused in its approach, the EITI goes deeper into these areas, and can be used to supplement and expand on the requirements of the Guidelines. In addition, as the EITI’s principles on transparency and accountability are aligned to the principles in the Guidelines, compliance with EITI standards can be used by the Commission to assess compliance with its own standards, without doing double work.

Also, because EITI stand-
ards require states to make public certain important information about spending and payments related to extractive industries, it is also an important source of information to the Commission to engage with specific States, for example during promotion missions and State Periodic Reporting. In this regard, for example, the fact that most African States that are part of the EITI have made “meaningful progress” in fulfilling the EITI standards, is a positive development that can be a point of departure for engaging on other challenges related to resource governance. The Commission has also in the past during its State Reporting Processes raised questions with States about aspects of their compliance and intentions to accede to the EITI protocol.

As the Commission found during its promotion mission to Nigeria in December 2016, the EITI’s focus is on public disclosure of all financial information relating to the operation of the extractive industries sector. It does not concern itself with the determination of enforcement measures when it is established that the whereabouts of revenues collected could not be accounted. The ACHPR norms under the State Reporting Guidelines and Resolution 367 on the other hand cover the accountability measures required. Thus Resolution 367, for example, stipulates that ‘criminal and administrative accountability’ are imposed on ‘all those involved in corrupt practices and misappropriation of public funds accruing from the operations of extractive industries.’

**UN Guiding Principles on Business and Human Rights**

Another normative framework at the global level relevant to extractive industries is the UN Guiding Principles on Business and Human Rights (the Ruggie principles). These Principles have established a universal consensus that corporations bear certain responsibilities in relation to human rights standards in all their operations, in particular they have the obligation to “do no harm”, to comply with all applicable laws and respect human rights, and where necessary to remedy any breaches. However, the Ruggie Principles and the responsibilities contained therein remain non-binding and depend for their application on the will of corporations and companies.

As experiences in places such as the Democratic Republic of Congo and many other places show, these principles are observed more by their breach than compliance by extractive industries. Even their due diligence obligations are applied superficially, leading, in the DRC for example, to extraction of coltan using child labour.

The State Reporting Guidelines and accompanying principles and Resolution 367 of the ACHPR on the other hand have developed standards, including as noted above attributing legal obligations on companies, that adequately cater for the specific realities and historical and socio-political context of the operations of extractive industries in Africa and the rights guaranteed under the African Charter. Thus, going beyond the Ruggie Principles, these normative instruments of the ACHPR set out, within the framework of the African Charter, the obligations that the extractive industries bear. Firstly, because the African Charter recognises duties on individuals, and because of the superior power of corporations to individuals, the African human rights system imposes not only non-binding obligations but also binding duties on companies operating on the African continent. Second, apart from the obligations
laid down in the Ruggie Principles, the Guidelines go further and impose duties to: ensure responsible supply chain management; undertake consultative human rights impact assessments; cleaning up and rehabilitation where the environment is affected by their activities; responsibility for the actions of those that act on their behalf or to their benefit including private security companies; adopting measures to comply with requirements against illicit financial flow; and contributing to the development needs of the host communities.

Conclusion

While not aiming to provide a comprehensive assessment of all the areas of overlap and complementarity between the normative developments of the Commission and other regional and global initiatives, this contribution aims to provide an illustration of how the Commission adds tremendous value, strength and richness to the existing natural resources governance norms. Some of the areas in which it has made important contributions include in relation to the scope of application of the norms, the elaboration of the scope and content of the rights and obligations involved, the responsibilities of companies, and to frame the natural resource development goals of countries in terms of human rights and obligations, including the protection of vulnerable groups, rather than mere development aspirations.

In doing so, the ACHPR has also presented a framework that allows the elaboration of national regulations and enforcement mechanisms reflective of the richness of the legislative materials that the African Charter presents and the historical, political and socio-economic context of many African countries that depend on the extractive industries sector. This represents a huge step in the effort not only to rectify the human rights protection vacuum prevalent in the extractive industries sector in Africa but also to fill in the existing major regulatory gaps for enforcing applicable standards.

The value of the Commission’s work within the existing natural resource governance framework (continued)

Women in the Extractive Industries in Africa: Gender Perspectives

Women and girls play an essential role in communities where extractive activities (EI) are carried out, although this is not always sufficiently recognized. The Working Group on Extractive Industries, the Environment and Human Rights Violations (WGEI) advocates for their contributions to be fully acknowledged and accommodated.

Many resource-rich countries on the African continent regard the extractive sector (including oil, gas and mining) as a pathway to development and as offering opportunities to their populations. However, their impacts on women, including human rights violations committed in the sector and challenges to their participation are lesser known. Gender equity is important in defining an EI regime that would facilitate a rights-based, equitable and sustainable development on the continent as per the provisions and spirit of the African Charter on Human and...
Peoples’ Rights. In this short article, we focus on key insights gained from the WGEI’s work on women in EI.

Women play a leading part in communities where EI activities are undertaken, as they increasingly sustain the very activities that operate in their midst. In Marikana, South Africa, for example, empirical research conducted shows that mines benefit directly from household labour or social reproductive work of women. Their surpluses are directly related to the “hidden” work that women perform daily for the smooth operation of the mines. The women in the community also have a deep awareness of how mine work affects and shapes their lives [See Benya, A.P., The invisible hands: Women in Marikana].

The EI sector has traditionally been male-dominated. Although small inroads have been made to increase the presence of women, even in today’s work environment, the EI sector is still widely regarded as largely unsuitable for women. In countries like South Africa, where mines are legally obligated to include a minimum of ten percent (10%) women in their workforce since the mid-90’s, the figures currently do not go beyond fifteen percent (15%). Because the EI sector has remained a largely male-dominated industry, the effects of EI on women have been less scrutinized and received less attention, contributing to making its impact on women less visible.

However, the present challenges are not limited to issues of overt discrimination. One crucial human rights challenge in the EI sector is sexual and gender-based violence and harassment. The matter is deep-rooted as the very culture of mines constructs the “ideal” worker as male. Therefore, women are symbolically excluded, spawning broader impact and touching on diverse matters, including the design of machinery used for work underground and of the Personal Protective Equipment (PPE) for women. With regards to PPE, there are examples where women are given protective clothing which not only allows them to work comfortably but also provides an additional layer of protection in case of sexual and gender-based violence in that environment.

Other improvements have to be introduced to contribute to better protection of women in this environment, such as better lighting, separate toilet and ablution facilities and work shifts which bear in mind gender aspects.

This is a significant point to highlight, because even if policies addressing discrimination and/or harassment may be in place and implemented, women mine workers continue to feel like outsiders, precisely because it is not a matter of policy but one of culture in a strongly patriarchal workplace and community.

Women play an even larger role in the artisanal and small scale mining sector (ASM) in Africa. A World Bank report estimates the percentage of female workforce in the ASM in Africa as anything from 40 to 100 percent [Eftimie, A., Heller, K., Hinton, J.,...
Lahiri-Dutt, K., Mutemerie, N., Strongman, J., Gender dimensions of artisanal and small scale mining: a rapid assessment toolkit, The World Bank (2012). Most women in the ASM sector are engaged in transporting and processing minerals (for example in the gold mining industry women often process gold ore in their homes, and work as porters at mining sites), and ancillary roles such as cooking and water provision. This division of roles is attributed to different social and traditional factors that limit women’s engagement in digging for minerals. For example, in certain areas of the DRC, women are considered to bring bad luck in the artisanal mining sites. Zambian women actively involved in the country’s gemstone mining sector as owners of mines and small scale miners represent a continent-wide exception.

While women share many of the same challenges as men in this unregulated and highly dangerous sector, they face additional gender related impediments including limited access to capital and financing, heightened exposure to dangerous substances on account of their role in processing minerals, limited access to information and training, and lower wages. To meet their domestic demands women often carry out potentially hazardous mineral processing in their homes alongside regular domestic activities, putting themselves and their families at risk. A UNDP report gives the example of women in Eastern Uganda who use grinding stones in the home to pulverize gold ore as they carry out activities related to child care, food preparation, digging, and other work.

Women in communities where EI have been implanted in Africa bear the brunt of the industries’ negative social and environmental impacts which resulted in the violation of the rights of women, as well as the silencing of their voices and consent relating to development models of their communities. Women in Africa pay the highest price attached to the less visible and talked about human costs associated with the extraction of mineral resources.

While commitments to women’s rights that address many of the violations that women suffer exist on paper, much more needs to be done to integrate them in policy making for the EI sector. In order to build a more gender sensitive as well as responsive EI regime women need to be considered as a stand-alone stakeholder community. In addition, EI policies and regulatory frameworks should address their unique contributions and challenges, in view of the human rights obligations which African States have signed up to. In view of their individual and collective experiences around the African continent, women should be empowered to freely express their views on development models which favour extraction.
IN A SPEECH THAT I DELIVERED IN JULY 2016 (AVAILABLE AT WWW.ACHPR.ORG), I SPOKE ABOUT THE POWER OF BIG BUSINESS AND THE HUMAN RIGHTS PROTECTION VACUUM IN AFRICA. AS I BRIEFLY EXPOUNDED IN THAT SPEECH, THE HUMAN RIGHTS PROTECTION VACUUM IS A PRODUCT OF A CONFLUENCE OF FACTORS.

These factors include the enormous scale of the economic, socio-cultural and political power that big business has come to amass in the age of globalization, the lack of legal obligation and direct responsibility of corporations for human rights, the poor bargaining power of African states and the pervasive institutional and regulatory weakness prevalent on the continent.

As I also highlighted, nowhere in Africa is the impact of the human rights protection vacuum more pronounced than in the extractive industries sector. At the time, a book that I relied on to portray the danger that the power of big business poses on the African continent was Ngugi wa Thiogo’s novel the Wizard of the Crow, particularly what he termed ‘corpolonialism’.

A year before the speech in which I articulated the concept of the human rights protection vacuum, a book of magnificent depth on the so-called resource curse was published: The Looting Machine: Warlords, Tycoons, Smugglers and Systemic Theft of Africa’s Wealth by Tom Burgis. Published in 2015 in the United Kingdom by William Collins, The Looting Machine is unparalleled, to my knowledge, in its analysis of the power structures that lies behind what Burgis calls ‘systemic theft of Africa’s wealth’ or in Thogo’s formulation, ‘corpolonialism’. I also found it awesomely insightful in its analysis of the factors that created the human rights protection vacuum, a focus of my concern since I have been tasked with the responsibility of leading the work of the WGEI.

The Looting Machine starts with an interrogation of what may be termed ‘the trouble with Africa’ (to paraphrase from Chinua Achebe’s famous essay The Trouble with Nigeria) in general and the phenomenon of the resource curse in particular. Burgis observes that there ‘are plenty of theories as to the cause of the continent’s penury and strife’. ‘Colonizers had ruined Africa, some of the theorists contended, its suffering compounded by the diktats of the World Bank and the International Monetary Fund; others considered Africans incapable of governing themselves, excessively ‘tribal’ and innately given to corruption and violence. There were those who thought Africa was largely doing just fine but that journalists seeking sensational stories and charities looking to tug at donors’ heartstrings distorted its image.’

In a way that captures the confused state of contemporary economic
policy-making in Africa, ‘European colonialists’ and the achievement by African states of their sovereignty, by ‘corporate behemoths of the resource industry’ of ‘their interests’. Burgis also debunks the prevalent image of Africa as a burden to the world and one that contributes little to the global economy. As he pointed out, ‘[o]utsiders often think of Africa as a great drain of philanthropy, a continent that guzzles aid to no avail and contributes little to the global economy in return’.

With respect to the resource curse, the *Looting Machine* notes that rather than being ‘some unfortunate economic phenomenon, the product of an intangible force’, it is a direct result of ‘systematic looting’. Level Panel on Illicit Financial Flows from Africa headed by former South African President Thabo Mbeki that Africa gives Southern Africa, in the far more money ($50 billion by nineteenth century, the trading way of illicit financial flows) of slaves, gold and palm oil than it receives in aid, Burgis along Africa’s Atlantic sea-observes that a close look at the board and the flow of crude oil resource industry shows that the in Nigeria by the middle of the relationship between Africa and twentieth century. A major the rest of the world is far from factor that has what the recipient-donor narrative presents. The ‘basic rich African countries commodities that lie in to the curse of riches, abundance in Africa remain the according to the primary ingredient of the global economy’, with fuel and mineral retention, upon the exports from Africa in 2010, for departure of example, accounting for $333 billion, more than seven times the value of the aid that went in the opposite direction.

This introductory part of the book concludes with a presentation of what the looting machine is made up of – ‘networks of multinationals, ‘[o]utsiders often think of Africa as a great drain of philanthropy, a continent that guzzles aid to no avail and contributes little to the global economy in return’. Burgis traces the origins of the resource curse to the colonial past with the plunder of Thabo Mbeki that Africa gives development to the world and one that contributes little to the global economy.

Lending further evidence to the findings of the African Union/United Nations Economic Commission for Africa’s High Level Panel on Illicit Financial Flows from Africa headed by former South African President Thabo Mbeki, Burgis observes that a close look at the board and the flow of crude oil resource industry shows that the in Nigeria by the middle of the relationship between Africa and twentieth century. A major the rest of the world is far from factor that has what the recipient-donor narrative presents. The ‘basic rich African countries commodities that lie in to the curse of riches, abundance in Africa remain the according to the primary ingredient of the global economy’, with fuel and mineral retention, upon the exports from Africa in 2010, for departure of example, accounting for $333 billion, more than seven times the value of the aid that went in the opposite direction.

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Burgis traces the origins of the resource curse to the colonial past with the plunder of Thabo Mbeki that Africa gives Southern Africa, in the far more money ($50 billion by nineteenth century, the trading way of illicit financial flows) of slaves, gold and palm oil than it receives in aid, Burgis along Africa’s Atlantic sea-observes that a close look at the board and the flow of crude oil resource industry shows that the in Nigeria by the middle of the relationship between Africa and twentieth century. A major the rest of the world is far from factor that has what the recipient-donor narrative presents. The ‘basic rich African countries commodities that lie in to the curse of riches, abundance in Africa remain the according to the primary ingredient of the global economy’, with fuel and mineral retention, upon the exports from Africa in 2010, for departure of example, accounting for $333 billion, more than seven times the value of the aid that went in the opposite direction.

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their own enrichment.’ As it becomes evident from the analysis in the various chapters of the book, other forces abetting and conniving with the looting machine include international law (particularly international trade and investment law), the global financial institutions, and the major economies where the leading extractive companies are domiciled.

In the rest of the chapters, the book interrogates with a hard-nosed approach the grip of the looting machine across the breadth and width of Africa – from Angola and Nigeria with their oil, to the Democratic Republic of Congo with its coltan and diamonds, Guinea with its bauxite, Niger with its uranium, Ghana with its Gold, and South Africa with its platinum and diamonds – and the way the machine operates to keep the wrenched of these resource rich countries poor and fuel the profits of multinational companies and the economies of the developed countries where the price of Africa’s resources are set.

In Angola, where oil accounts for 98 percent of its exports and three-quarters of government’s income, the looting machine involved the political elite, the leadership of the national oil company Sonangol, a ‘bearded, bespectacled chinese man called Sam Pa’, Joe Bryant and extractive multinationals from China and the West. It operated not only on the basis of delivery to local officials ‘of a suitcase stuffed with cash’ but also the use of local companies that operate as a front for the stake that military, political and Sonangol officials take in the richest mining ventures of multinational companies such as Cobalt from the US and China Sonangol.

The systematic looting results in numerous disasters to the national economy, the environment, stability and security, state-society relationship, and generally to the social and economic welfare of the masses of the people of the affected countries.

From the wars it funneled in Angola, the DRC and Nigeria to the military coup in Niger and the Marikana massacre in South Africa, much of the trouble with Africa’s resource rich states is associated with the looting machine. Burgis writes in relation to Nigeria, for example, that the ethnic, religious and political violence that claimed the lives of ‘some eighteen thousand Nigerians between 1999 and 2012’ is ‘the result of Nigeria’s poisonous petro-politics.’ He goes on to note that in ‘these direct acts of violence alone – not counting all of the children slipping away in dilapidated hospitals, the drivers who meet their end on roads where maintenance contracts have been embezzled, and the victims of a police force that is more predator than protector – the Nigerian looting machine claims a life every six hours’.

Arguably, no other African country endured as much misfortune for its riches as the DRC. While the minerals in provinces such as the Katanga served as drivers of past conflicts, in more recent times the looting machine in the DRC fueled violence in the East of the country. The ‘coltan trade has helped fund local militias and foreign armies that have terrorized eastern Congo for two decades, turning what should be a paradise into a crucible of war.’

The Looting Machine also presents evidence of how the struggle over Africa’s resources between the West and China fuels conflict and military coups, best captured in the Chapter titled ‘When Elephants Fight, the Grass Gets Trampled’. Such was the case in Niger where the struggle between France, former colonial ruler of Niger that ‘enjoyed a de facto monopoly on the stuff that makes Niger a place of strategic importance – its
uranium,’ and China, which furnished Niger’s President Tanja with huge sum of money ‘[i]n return for permits to dig uranium and rights to drill Niger’s previously untapped reservoirs of oil,’ contributed to the conflict involving the Tuareg rebellion and the coup against Tanja.

The looting machine operates through the instrumentality of the enormous bargaining power of extractive industries vis-à-vis weak African states. This involves the use of exploitative terms, tax dodges or ‘transfer pricing’. ‘In gold mining,’ writes Burgis, ‘the standard rate of mining royalties is settled at about 3 per cent across the continent, among the lowest anywhere in the world.’ It is in the *Looting Machine* that one comes close to realizing that the descriptions of ‘pillaging Africa’ or ‘bleeding the countries of the continent’ to be no hyperbole but accurate representations of Africa’s experience with the extractive industries and the human rights protection vacuum. For example, of the $2.1 billion that the mining industry in Ghana generated in 2008, ‘the sum of royalties, taxes, and dividends from government stakes in mining ventures paid to the state was $146 million, or 7 per cent – and that is before factoring in the cost to the state of the subsidized electricity the mines use.’ This is, Burgis rightly notes, ‘pittance compared with the 45 to 65 per cent that the IMF estimates to be the global average effective tax rate in mining’.

Secrecy of licensing contracts and exploitative terms are at the core of the systematic looting. In Niger, the licensing contracts of Areva, a French mining company that enjoyed monopoly in the extraction of uranium for decades, are not published, but its most recent decade-long agreements running to the end of 2013 obtained by reporters showed that ‘Areva was exempt from paying duties both on the mining equipment it imported and the uranium it exported. The royalty…was 5.5 per cent on the uranium it mined, well below that charged by other, wealthier countries and locked in by a clause exempting the company from any increase in the rate under new mining laws’.

The looting machine does not stop with the exploitative terms. It siphons more money even from the little that it offers to the weak African states. Thus, even ‘when African governments ignore the threats and blandishments of the World Bank and the resource industry and manage to secure a greater share of the revenues from oil and minerals’ (as DRC and Tanzania attempted to do in the past during 2017/2018 by revising their mining laws), ‘there is little they can do to stop the torrent of money that flows out of their countries through tax fiddles made possible by the globalization of finance.’

Not surprisingly, Burgis makes it abundantly clear that despite the many changes there is substantial continuity between the colonial past and the present, particularly in as far as the troubles that Africa endures from the extractive industry is concerned. He notes, ‘[i]n many African resource rich states the oil and mining industries took hold before independence, before the new born nations had had a chance to develop institutions to steward the common good and circumscribe arbitrary power’.

Answering who the contemporary Cecil Rhodes’ that lord over the continent are, Burgis has this to say ‘Areva in Niger, Shell in Nigeria, Glencore in Congo – they and others like them replicate in their sheer power over African nations the empires that came before them.’ Of course, Burgis is alive to the...
differences between the new resource empires and the old. Thus, in the middle of the book he observes the ‘power structure of the new resource empires differ from those that the likes of Rhodes built in one striking way: ‘gives an indication of where the benefits of the oil and mining trade accrue – and why most Africans still barely scrape by.’ Thus, ‘for every woman who dies in childbirth in France, a hundred dies in the desert nation of Niger, although this a prime source of the uranium equality goes against his own that fuels France’s nuclear-analysis on the sheer power that powered economy. The average these other actors are able to marshal. But this is not the only to live to eighty, nurtured by way that the new differs from the old. This is best captured in the valuable companies are, introductory chapter, where Burgis observes ‘[w]here once the world’s top two mobile treaties signed at gunpoint phone manufacturers. By dispossession of their land, gold and diamonds, today phalanxes of lawyers representing oil and mineral companies with annual revenues in the hundreds of billions of dollars impose miserly terms on African governments and employ tax dodges to bleed profit from destitute nations.’

In her review of the Looting Machine, Michela Wrong charges that ‘Frustratingly, Burgis never addresses the question of what can be done to halt — or at least brake — the systematic looting.’ While that beneficiary is the African has not indeed been the focus of potentates and the losers are the book, in the afterword of the ordinary Nigerian, Angolan, book he asks, by way of starting Congolese, South African, the discussion on what needs to Ghanaian or Nigerian woman. As be done, ‘what if companies were Burgis also points out, the subject to a duty of care to disparity between life in the prevent corruption?’, a standard

higher than the current standard of due diligence, which leaves a lot of room for abuse.

In the work that the WGEI has undertaken since at least I took the responsibility of chairing it, it has made its major focus filling in the legal gaps that continue to enable the looting machine or the systematic looting of Africa and

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The legal framework of extractive industries in Congo has recently undergone major changes with the adoption of Act No. 15/012 of 1 August 2015 on the general regulations governing the petroleum industry and Act No. 18/001 of 9 March 2018 amending and supplementing Act No. 007/2002 of 11 July 2002 on the Mining Code. The role of the State and stakeholders in the implementation of the new Code is featured in the various provisions relating to social and environmental responsibility, transparency and good governance as well as in the special tax, customs and foreign exchange regime provided for in this new Code.

The revised Mining Code includes the following amendments which have profoundly changed the manner in which the sector is governed:

1. Departure from a contract-based mining regime to a single mining regime that is subject to Ordinary Law thereby applying the same conditions to all operators in the mining industry.
2. Elimination of the Exclusive Exploration Zone (ZER) and concessions as a mining right as well as individualized authorizations for reconnaissance. A simple declaration is sufficient to carry out reconnaissance.
3. Introduction of a clear distinction between the conditions for granting or cancellation of mining or quarry rights and the conditions for operation.
4. Introduction of procedures for granting, renewal and withdrawal of permits to ensure speed, objectivity and transparency.
5. Inclusion of provisions on quarries (mineral substances classified as quarry products) and the re-delegation of management powers to the sole Ministry in charge of mines.
6. Establishment of a surface right per square metre and mining royalties.
7. Establishment of a tax and customs regime specific to the mining sector and an exchange control system applicable to all mining operators.
10. Obligation placed on mining operators to ensure the protection of the environment affected by their mining activity and to rehabilitate sites after closure of mines. In this regard, they shall submit: An Environmental Mitigation and Rehabilitation Plan, an Environmental Impact Study and a Project Environmental Management Plan.
11. Lastly, introduction of provisions on securities (mortgages and substitution mechanisms for a defaulting operator).

MINING RIGHTS. According to Articles 62 and 68 of the new Code, the share capital to be transferred to the State by the company applying for an exploitation permit has been increased from 5% to 10% (non-dilutable shares) in consideration for the facilities and tax relief granted. And in the event of the transfer of the exploitation permit to another company, Article 182 provides that the State’s equity interest remains the same in the acquiring company.

It is provided that access, through tender, to a deposit explored, documented or exploited by the State shall be subject to payment to the State of a non-refundable tax (pas de porte) equivalent to 1% of the value of the mining deposit. In addition, the State shall receive a percentage, to be determined by
On CSR, the Code, in its Articles 44, 62, 217 and 223, introduces provisions relating to the detailed list of terms, costs and responsibilities of mining companies, social opinion for obtaining an exploitation permit, the identification of social actions and the availability of a sustainable development programme for communities residing in surrounding areas. Social opinion is sought to endorse the sustainable development plan targeting communities living in surrounding areas.

With regard to the holder’s industrial liability and societal and environmental obligations, Articles 211 and 212 provide that the holder is liable for damages caused to persons, property and the environment as a result of its mining activity. Thus, the “polluter pays” principle is taken into account. Consequently, the holder is required to repair any damage caused by its mining activity (contamination, pollution, disease).

The tax system: Customs duties on intermediate goods and other consumables (Article 157) are increased from 5% to 10%, with the aim of stimulating national or local production of such goods. Surplus or superprofit tax is proposed at 50% of the difference between operating profits. This tax, in accordance with Article 180, is levied only in the event of an increase in the stock market prices of mining products, which are 25% higher than those indicated in the feasibility study. Article 230 of the Code provides for the effective repatriation of 40% of export earnings. It also provides for a fine equal to 5% of the amount that has not been repatriated to be paid by the permit holder.