Dear Readers, it is with great pleasure that I take this opportunity to introduce the first edition of the newsletter of the Working Group on Extractive Industries, Environment and Human Rights.

The first substantive article provides an introduction of the Working Group: who we are, the work of the Working Group since its establishment in 2009, and the current ongoing projects and strategic priorities.

This newsletter, which coincides with the adoption of the State Reporting Guidelines on Articles 21 and 24 of the African Charter on Human and Peoples’ Rights, provides an opportunity to reflect on this important milestone, as well as other developments in norm-setting in relation to extractive industries on the continent by the Working Group and the African Commission on Human and Peoples’ Rights.

In addition to a discussion of the State Reporting Guidelines and how various actors can contribute to its operationalization, the newsletter also gives an overview of Resolution 376 of the Commission, which was adopted by the Working Group, as well as the decision in the Kilwa case, adopted by the Commission in 2016, which added to the developing jurisprudence of the Commission on the obligations of non-state actors.

As useful point of departure illuminating the raison d’être for the existence of the Working Group and the weight of the issues to be addressed, the newsletter presents a keynote speech that I delivered on the theme.

The final article provides a country profile, in this case focusing on the developments in the extractive industries legal and policy framework in Tanzania. The purpose of the newsletter is in the first place the sensitisation of all stakeholders about the work of the Working Group, in particular disseminating and popularising its normative and knowledge creation work, and additionally to increase visibility among stakeholders.

I wish to express my appreciation to the Organisation internationale de la Francophonie for the financial support in the publication of this newsletter. My hope is that this will be the beginning of a regular annual newsletter, publicizing the work of the Working Group. It is also my belief that this provides us a platform for collaborating with and engaging the Working Group for addressing the serious human rights issues prevalent in the extractive industries sector in many parts of Africa.
With the exponential increase of exploration and extraction of natural resources on the continent, there are major risks of the occurrence of human and peoples’ rights violations, including dispossession of land and displacement of communities; weak or poorly beneficial terms of concession; environmental degradation and poor labour rights protection; lack of transparency in respect of royalties paid and profits made and avoidance of taxes. Yet, a comprehensive and systematic continental framework for monitoring, reporting on and availing redress for human rights issues in the extractive industries has as yet to be fully developed. For this reason the ACHPR, through Resolution ACHPR/Res.148 (XLVI) 09 adopted at the 46th Ordinary Session held in Banjul, The Gambia, from 11-25 November 2009, established the WGEI. Resolution 148 is the main guiding document providing the WGEI’s mandate, but the ACHPR has also tasked it with other independent, but related, functions and focus areas. In this regard, Resolution ACHPR/Res.236 (LIII) 13 on Illicit Capital Flight from Africa, mandates the WGEI to undertake an in-depth study on the impact of illicit capital flight from Africa on human rights, in collaboration with the ACHPR Working Group on Economic, Social and Cultural Rights in Africa, while Resolution ACHPR/Res.271 (LV) 14 on Climate Change in Africa requests the Working Group to undertake an in-depth study of the impact of climate change on human rights in Africa.

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.
Within this broad context, the specific goals of the Working Group are grouped around four Strategic Priorities (SP):

SP 1: Developing a Monitoring & Emergency Response Mechanism. The aim of this priority is for the WGEI to be able to systematically and continuously track developments on the continent, collect information and respond to emerging situations on the continent relating to extractive industries, human rights and the environment.

SP 2: Knowledge production & Development of Normative Frameworks/tools. Through this priority the WGEI aims to assess the state of extractive industries and human and peoples’ rights in Africa, clarify the standards relating to rights and obligations in the context of extractive industries and human rights, and improve the working methods and available tools of the ACHPR in all aspects of its work, as regards extractive industries and human rights.

SP 3: Visibility & Reconnecting with Wider Stakeholders. The WGEI aims to develop mechanisms of collaboration with various stakeholders so as to: increase the visibility of the WGEI and extend the impact of its work to local actors; increase the WGEI’s access to information on its mandate and expand its knowledge base; as well as to engage with regional and international policy processes relating to the extractive industries so as to contribute to and shape such policy processes.

SP 4: Sustainability of the Work and the Activities of the WGEI. This priority area involves developing a coordinated approach to the work of the WGEI and the ACHPR’s response to issues of extractive industries, human rights and the environment; development of the internal rules and procedures for the WGEI; having a clear and coordinated approach to the provision of support for the work of the WGEI; and obtaining sufficient funding to carry out activities and achieve strategic objectives.
Activities of the WGEI

Looking Back at Key milestones of the WGEI:

Regional Consultations on Extractive Industries, Environment and Human Rights Violations

Southern African consultation (August 2014, Johannesburg, South Africa); East African consultation (January 2015, Nairobi, Kenya); Central African Consultation (July 2015, Lubumbashi, DRC);

Informal and Study Missions

+ Undertook an informal mission to Marikana, South Africa following the tragic incidents at the Lonmin Mine which led to the deaths of approximately 44 people and attended a public hearing of the Marikana Commission of Inquiry (May 2013);
+ Promotion Mission to Uganda (August 2013);
+ Research and Information Mission to the Republic of Zambia (13 to 17 January 2014);
+ Promotion Mission to Swaziland (7-11 March 2016);

Norm development and elaboration

+ The Commission adopted ACHPR/Res. 367 (LX) 2017 Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector, during the 60th Ordinary Session in Niamey, Niger;
+ Adoption of the State Reporting Guidelines during the 62nd Ordinary Session in Nouakchott, Mauritania;

Stakeholder engagements

Commissioner Dersso and WGEI Member Erick Kassongo

+ Panel discussion on “Extractives industries, environment and human rights in Africa: cases from Cameroon, Liberia and Kenya” (April 2013, in Banjul, The Gambia);
+ Various meetings and workshops with State Representatives, National Human Rights Institutions (NHRIs), civil society actors and international organisations, as well as UN Working Groups and Experts.

Other Strategic interventions by the WGEI:

Policy speech on the power of big business and the human rights protection vacuum presented by the WGEI Chairperson at the inaugural General Assembly of the African Coalition for Corporate Accountability held on 6 July 2016, at the University of Pretoria (http://www.achpr.org/news/2016/07/d226/).

The WGEI Chairperson took part in a forum on the theme ‘Natural Resources Governance in Africa’ at the 6th Tana High Level Forum on Security in Africa on 22 April 2017;


Letter of Appeal sent to the DRC urging the adoption of the new mining Code, followed by a letter of appreciation after it was signed into law.

Various letter of appeal, concern and appreciation sent to States in relation to human rights and EI.
Activities of the WGEI

Ongoing activities:

+ Drafting of a Background Study on Extractive Industries, Environment and Human Rights;
+ Development of a tool for monitoring, tracking and responding to human rights violations in EI;
+ Drafting of a Study on Illicit Financial Flows (together with the Working Group on Economic, Social and Cultural Rights);
+ Seeking partners for the Study on Climate Change and Human Rights (together with the Working Group on Economic, Social and Cultural Rights);
+ Development of a webpage for the WGEI;
+ Engagement with the process for the development of a UN Binding Treaty on Business and Human Rights;
+ Strengthening partnerships with key stakeholders in government, civil society and other international institutions.

State Reporting Guidelines: relevance and key features

What is the state reporting procedure?

The State Reporting procedure under Article 62 of the African Charter is one of the most useful mechanisms through which the African Commission monitors the implementation of the rights guaranteed in the African Charter and clarifies what is expected of States under the African Charter. States are required to submit Reports every two years, providing an update on the situation in their country in relation to each of the rights under the African Charter, as well as provide feedback on the extent of implementation of recommendations made by the Commission during a previous round of reporting. The Report is then considered during plenary in the Ordinary Sessions of the Commission. This is structured so that the State representatives make a presentation on the Report, which is followed by questions from the Commission. The State is provided with some time to prepare its response and then reports back to the Commission. Following this exercise, the Commission prepares concluding observations, which note the positive developments, matters of concern and makes recommendations to the State on how to give better effect to their obligations under the African Charter.

Why do we need state reporting guidelines on Extractive Industries?

In the course of reviewing state reports a number of issues have been observed. + Assessment of reports submitted by State Parties to the African Charter shows that usually no adequate or relevant information is provided on legislative and other measures taken for the operationalization of peoples’ rights under the Charter, including under Articles 21 and 24, in the context of extractive industries.

+ The State Reporting Guidelines of the Commission, adopted in 1998, provide little detail with respect to Articles 21 and 24 of the African Charter and there is thus no consistent and standardized approach in the provision of relevant information.
Overview of the Reporting Guidelines on Articles 21 & 24

The State Reporting Guidelines and Principles is divided into two parts:

PART I: The State Reporting Guidelines

The Reporting Guidelines identify the issues under Articles 21 and 24 of the African Charter on which State Parties should provide information in their Periodic Reports to the African Commission generally and with specific reference to the operations of extractive industries in their territories in particular. These relate to central themes such as land use and ownership, participation and consultation of affected persons, sanctions and grievance mechanisms, fiscal regulation and structures for ensuring implementation of the rights.

PART II: Explanatory note

In order to identify the full scope of the issues that should be covered under Articles 21 and 24 of the African Charter, the Reporting Guidelines are accompanied by an explanatory note that elaborates the principles underlying these rights; substantive contents of the rights; and the obligations arising from these rights in respect of both the State and the companies involved in extractive industries.

In relation to the duties on states, Article 1 of the Charter provides for a general obligation on States to “recognise” the rights, duties and freedoms enshrined in the Charter, and “to adopt legislative or other measures to give effect to them.” Furthermore, obligations arising from the provisions guaranteeing the rights in the Charter entail duties of respect, protection, promotion and fulfillment by states of its various obligations under Articles 21 and 24.

In contrast to the United Nations Guiding Principles on Business and Human Rights, the African Charter does not only require corporations to respect human rights, it sets direct and indirect negative obligations as well as certain positive obligations on companies, particularly in relation to fiscal responsibilities and transparency obligations, the duty to adequately inform and substantively consult with the affected people on any of their activities or decisions that may materially affect the people, as well as obligations of companies to contribute to the development needs of the host communities, not only as a matter of social responsibility, but also in the sense of a legal obligation.

Article 21

(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

(2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

(3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

(4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

(5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.
Who can use the guidelines and how?

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

African Commission
+ Reviewing of State reports;
+ Engagement with States and other stakeholders during promotion missions;
+ Engagements of the Working Group with States in its promotion and protection activities;

States
+ Preparation of State report;
+ Preparation for promotion missions of the Commission;
+ Guide reforms in national legislation, policy & practice to bring in line with African Charter;
+ Ensuring compliance by corporations with their duties arising from the African Charter;

Civil society
+ Contribute to the preparation of State reports;
+ Holding States and companies accountable in relation to their Charter obligations;
+ Sensitization of vulnerable people to their rights under the Charter;

NHRIs
+ Support States in preparation of State reports;
+ Collaborate with the African Commission and ensure that it is provided with the most up-to-date information and data on extractive industries;

Companies
+ Ensuring that their practices are in line with the African Charter.

PROCESS FOLLOWED IN ADOPTION OF THE GUIDELINES

Technical expert meeting: 2 to 3 December 2016 in Dakar, Senegal;
Second technical expert consultation: 14 to 15 September 2017 in Dakar, Senegal;
Stakeholder consultation & panel discussion at the 61st Ordinary Session of the Commission: November 2017;
Website consultation;
Adopted by the Commission at its 62nd Ordinary Session in May 2018 and launched at the 63rd Ordinary Session in October 2018.

ISSUE 1
Article 24
All peoples shall have the right to a general satisfactory environment favourable to their development.
The adoption of the United Nations Guiding Principles on Business and Human Rights (popularly known as the Ruggie principles) in 2008 seemed to herald a new age of protection of human rights from violations by big business. However, challenges continue to abound, and the limitation of the duty on companies merely to “respect” human rights, as provided for by the Ruggie Principles, has been more and more drawn into question. Reflecting on calamities such as the large scale destruction of the Niger Delta by Shell Oil Company with the military backing of the State; the tragedy of the Marikana massacre where protesting miners were fired at with live ammunition, resulting in the death of 44 people; as well as the continued violation of the rights of children forced to work in cobalt mines on the continent, among many other abuses of power and failure of the principles of ‘voluntary compliance’, has necessitated a rethinking of the obligations of companies, particularly those operating in the extractive industries.

The African Commission established the Working Group on Extractive Industries, Environment and human rights in 2009, with one of the main aims under the mandate of this Working Group being to determine the possible liability of non-state actors for human rights violations, focusing particularly on the context provided by the African Charter on Human and Peoples’ Rights (African Charter). The African Charter provides a unique context, for a number of reasons. In the first place, the Africa Charter provides for the protection not only of human rights, but also for the collective rights of peoples. Particularly important in this context is the right of all peoples to freely dispose of wealth and natural resources guaranteed under Article 21 of the African Charter, and be free from foreign economic exploitation. Secondly, the African Charter also importantly provides for duties on individuals in Articles 27 to 29. Given that the Charter goes so far as to place duties on individual people, including the obligation to exercise rights ‘with due regard to the rights of others’, it can be derived that certain duties would also apply to corporations. Given their vast power as compared to individual persons, they would thus have a resultant and corresponding higher level of duty of both due diligence and care.

It is within this context and understanding of the radical potential of the application of the African Charter to the obligations on States and non-state actors that the Commission during its 60th Ordinary Session held from 8 to 22 May 2017 in Niamey, Niger adopted Resolution ACHPR/Res. 367 (LX) 2017 on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector. This Resolution underscored the right of peoples to freely dispose of their wealth and natural resources, and further reiterates that the primary responsibility to prevent and provide redress for violations of human and peoples’ rights rests on the State. This is underscored by the fact that all of the recommendations in the resolution are directed at State Parties to the Charter. However, the Commission also affirms that companies operating in the extractive industries have a legal obligation to respect the rights in the Charter.

Article 21(4) of the African Charter requires of State Parties to exercise the right to free disposal of wealth and natural resources, not only individually but also collectively,
with the aim to strengthen African unity and solidarity. In strengthening this provision, the Resolution 367 calls on State Parties to establish regional mechanisms for cooperation between States, developing capacities for value addition and beneficiation, building regional marketing platforms and collectively fighting illicit financial flows.

**The Resolution 367** further expresses concern about a number of developments on the continent in respect of human rights and extractive industries, including the lack of transparency in the terms of concessionary contracts and the receipt and use of revenues; the exploitative terms on the basis of which the extractive industries operate in many parts of the continent; the loss of a considerable amount of revenues due to weak governance and tax regimes as well as bargaining capacity of States; as well as the increasing destruction with impunity of the environment.

**All of these concerns** are addressed in the substantive section of the Resolution through recommendations to the State Parties to adopt legislative measures, which cover the whole production cycle of extractive industries, from the start of exploration and environmental impact assessments, to the granting of mining licenses, the local beneficiation of the processes of the extractive industries, the fiscal provisions and application of funds from the extractive industries, up to mine closure, rehabilitation and regulations aimed at easing the transition of affected communities from economic dependence on extractive industries to reliance on other livelihoods.

**These recommendations** are particularly aimed at ensuring that specifically foreign owned extractive industry companies are not enriched at the expense of the local population, which includes the State as a whole as well as the host communities specifically. For example, the proposed guarantee that all the financial terms of agreements with extractive companies including those relating to licence fees, national and local taxes, custom duties, royalties and shares due to the State are not exploitative. It also aims to empower communities and other affected persons to be informed about extractive industries envisioned in their area, and to have their concerns taken into account. Furthermore, the recommendations are aimed at placing a check on the power of the government itself in the application of the income derived from extractive industries, to ensure transparency, accountability and to ensure that those most affected by the extractive activities, as well as the most vulnerable groups are protected.

Also, taking into account that the bulk of the brunt of the negative impacts of extractive industries is borne by the communities and peoples residing in the area of operations of the extractive industries, and affirming the obligation of companies, the Resolution 367 requests States to legislate on specific measures to the taken by the company to ensure that such host communities are included in all decision-making processes affecting them; that where damage to their livelihoods or environment occurs, they are adequately compensated; providing for civil as well as criminal liability on companies, including private security companies employed by extractive industries for viola-

"THE BULK OF THE BRUNT OF THE NEGATIVE IMPACTS OF EX extrac- tive INDUSTRIES IS BORNE BY THE COMMUNITIES AND PEOPLES RESIDING IN THE AREA OF OPERATIONS OF THE EXTRACTIVE INDUSTRIES"
The contribution of Resolution 367 to the legal framework for EI in Africa (cont’d)

despite the best policies in place there will still be violations that occur, the Resolution also requests States to provide for effective grievance mechanisms for all cases of violations of rights guaranteed in the African Charter.

Finally, in recognition on the one hand of the high number of people who are sustained through artisanal/small scale mining on this continent, as well as the continued criminalisation of artisanal mining activities in many countries, but on the other hand also conscious of the dangers of undertaking mining activities without the necessary knowledge or equipment as well as the high levels of child labour in the artisanal mining sector, the Resolution also calls upon States to ensure the application of human rights and relevant safety and environmental standards for protecting individuals and communities involved in and dependent on artisanal mining with particular attention to the rights of children, women, indigenous populations/communities and other vulnerable groups.

The Resolution 367 was the first attempt by the Commission to give a holistic overview of the duties of States and non-state actors under the African Charter in relation to extractive industries. It does so by covering a wide range of challenges observed in the extractive industries and by drawing on the unique characteristics of the African Charter. In addition to being a useful tool in itself for State Parties to measure their compliance with their obligations under the Charter, the Resolution further can be applied by the Commission in the consideration of State Reports, and in fact most of the recommendations in this Resolution were incorporated into the State Reporting Guidelines on Articles 21 and 24, thus contributing to the coherent approach of the Commission to protection and promotion of human and peoples’ in the extractive industries. Having provided an exposition of the duties and obligations on States, the Resolution can also be applied fruitfully in the future consideration of Communications before the Commission, particularly also as it stresses the duty on States to provide effective redress in the case of violations.

The full text of Resolution 367 can be accessed at http://www.achpr.org/sessions/60th/resolutions/367/.

The Kilwa case: The importance of Communication 373/10: IHRDA v DRC

The African Commission found the government of the Democratic Republic of Congo responsible for the 2004 massacre of over 70 people in Kilwa, in the southeast of Dikulushi, 50 kilometres of a copper and silver mine that the African Commission granted compensation of US $2.5 million to the victims and their families, summarily executed at the Institute for Human Rights and Development of the Democratic Republic of Congo. The facts of the case were that Anvil Mining, an Australian conglomerate, operated a copper and silver mine to take control of the town. The Complaint on behalf of eight of the victims was brought to Against Impunity and

Page 10
The Commission held that the Congolese government had violated a battery of provisions of the African Charter, including through extrajudicial executions, torture, arbitrary arrests, disappearances and forced displacement, amongst others. It awarded the victims named in the complaint US $2.5 million, the highest ever award by the African Commission. It urged the Congolese government to identify and compensate other victims and their families not party to the complaint who were also directly affected by the attack. The Commission further called upon the Congolese government to formally apologise to the people of Kilwa, exhume and rebury with dignity the bodies dumped in a mass grave, construct a memorial, provide trauma counselling for those affected and rebuild the schools, hospital and other structures destroyed during the attack. It requested the Congolese government to report back to the Commission within 180 days (or by 17 December 2017) on what action it has taken to implement its recommendations.

Contribution of the Kilwa case to jurisprudence on extractive industries:

While the Kilwa case is not primarily about the impact of extractive industries on the community, the context of a mining community within which the case plays out, as well as the central role of the Anvil mining company in the atrocities committed, makes it an interesting case from the perspective of extractive industries, particularly as it relates to the obligations of non-State actors.

Violation of Article 1

The seminal case of the Commission on extractive industries is its decision in Communication 155/96 - Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (the SERAC case). The Commission in the Kilwa case relied heavily on the SERAC case in establishing the obligations of the Respondent State for respecting and protecting the rights of people. The Commission holds in paragraph 101 of the Kilwa case that:

“Additionally and equally importantly, the Claimants alleged that the Anvil Mining Company was involved in the perpetration of the alleged violations of various rights under the African Charter. Although this raises the question of the responsibility of the multinational corporation for violations of rights guaranteed in the African Charter, principally it concerns the duty of the State to protect. This duty entails that the State takes all necessary steps to safeguard against human rights abuses by third parties, including corporations, including through taking measures for preventing, investigating, punishing and providing redress for victims.”

This is in line with the finding of the Commission in the SERAC case. Thereafter, and building on the findings in the Kilwa case the Commission goes further, and in relation to the role of the mining company stresses the need and the legal imperative that entities engaged in the extractive industries undertake their activities with due regard to the rights of the host communities. They should at least avoid engaging in activities that violate the rights of community members in their areas of operation. This includes non-participation or non-support for the perpetration of violations of human and peoples’ rights.”

The Commission thus found a violation of Article 1 of the African Charter, inter alia because the State “failed not only to investigate and punish the involvement of the Anvil Mining Company but also to provide redress for the victims against the Company for the role it
played in the perpetration of the violations.”

While the Communications procedure of the Commission remains limited to making findings of violations of provisions of the African Charter by State Parties to the Charter, the Commission spoke out strongly against the involvement of corporations in these atrocities and gave clear directions as to the minimum obligation on companies not to actively violate or support the violation of human rights, thus going further than previous decisions in defining the duties on non-state actors, particularly in the context of extractive industries.

**Remedies**

Additionally, the recommendations of the Commission in the Kilwa case builds on the finding of the violation in Article 1, particularly in requesting the Respondent State to “to take the necessary steps to prosecute and punish State employees and personnel of the Anvil Mining Company involved in the said violations”. In terms of collective reparations, the Commission further requested the State to rehabilitate the socio-economic infrastructure destroyed during the events, as well as providing psycho-social support to the victims. In doing so the Commission again went further than the SERAC case by explicitly calling for the government to hold the company accountable and provide redress for violations suffered as a result of the actions of the State, as well as the company. While in the SERAC case the government was requested to investigate the violations and provide compensation to victims, the explicit reference in the Kilwa case to corporate accountability is clearly a positive development.

**Conclusion**

Almost fifteen years after the adoption of the SERAC case, the Kilwa case presented an opportunity to the Commission to further develop its jurisprudence on the human rights obligations under the African Charter of non-state actors. Based on the analysis above it is clear that the Commission took this opportunity, continuing the incremental process of clarifying the obligations on companies and resolving the myriad of challenges arising from the operations of multinational companies engaged in extractive industries on the African continent.

Following the adoption of the Kilwa decision, the Commission in December 2017 transmitted a letter to Anvil Mining Company regarding the allegations of their facilitation and support of violations perpetrated by the 62nd Infantry Brigade of the DRC Armed Forces in Kilwa in 2004. The letter among others, requested the Anvil Mining Company to acknowledge responsibility for breaching its duty of care through a public statement and contribute to the reparations that the African Commission granted to the victims of violations. The press statement on this letter can be accessed at [http://www.achpr.org/press/2017/12/d381/](http://www.achpr.org/press/2017/12/d381/).
The Power of Big Business and the Human Rights Protection Vacuum

Speech delivered during the 2016 inaugural General Assembly of African Coalition for Corporate Responsibility - Commissioner Solomon Ayele Dersso

Ours is a time of globalization. Perhaps more accurately, this time is best described as the era of corporations, the single most dominant force and beneficiary of globalization. As the Australian social scientist Alex Carey aptly observed, ‘the 20th century has been characterized by three developments of great political importance: The growth of democracy, the growth of corporate power, and the growth of corporate propaganda as a means of protecting corporate power against democracy.’

While the demise of the Cold War brought about a new global order premised on the triumph of liberalism famously declared by Francis Fukuyama in his famous book The End of History and the Last Man, one of, if not, the most prominent development of the new world order has been the rise and rise of corporations to unprecedented levels of economic and socio-cultural prominence. The power and unconstrained mobility that corporations has increasingly marshaled has been breathtaking in its sheer magnitude so much so that, in the words of Christian La Brie, ‘there seems to be nothing to prevent the transnational corporations taking possession of the planet and subjecting humanity to the dictatorship of capital’.

Clearly, the corporation’s sheer power not only presents a threat to the socio-economic and democratic wellbeing of societies but also brings about massive adverse impacts for human rights. Their activities in international trade, finance, and investment have numerous implications for the observation and protection of human rights, particularly economic, social and cultural rights, and the solidarity rights of peoples.

The perils of corporate power for people and for human rights are even bigger in Africa and other economically weak regions of the world. For example, the Special Representative of the Secretary General pointed out in one of his reports in 2008 that much of and the most serious of violations involving the operations of corporations take place in the parts of the world like Africa, ‘where governance challenges were greatest: disproportionately in low income countries; in countries that often had just emerged from or still were in conflict; and in countries where the rule of law was weak and levels of corruption high.’

Beyond the pervasiveness and gravity of violations that the operation of corporations occasion in places like ours, the perils of corporate power is best portrayed in so colorful and dramatic terms in what the renowned African novelist Ngugi wa Thiogo calls corporonalism. This is, as he noted in his famous novel the Wizard of the Crow, the incorporation of countries by powerful corporations and their transformation into corporate colony, corporonies. The upshot of this view is that in the African context the sheer scale of the economic, socio-cultural and political power of corporations creates huge imbalance in their relations with states skewing the balance firmly in favor and to the principal advantage of corporations and away from and to the determent disadvantage of the role and ability of the state to ensure protection of human rights.

In the context in which human rights is organized around the role of the state as both the principal, if not exclusive, bearer of obligations and the primary focus of accountability for human rights violations, the obligation of corporations for human
The Power of Big Business and the Human Rights Protection Vacuum (cont’d)

rights and their role as focus of accountability remains not only poorly established in law but also severely contested. Seen against the background of the power of corporations and the major human rights impact of their operations, what the lack of legal obligation and direct responsibility of corporations for violations has left on our hands is one of the most serious challenges that have faced the human rights regime.

This challenge is what I call a human rights protection vacuum. This human rights protection vacuum is a challenge with huge strategic ramifications in Africa on account of both the pressure to attract investment and the pervasive institutional and regulatory weakness of the state.

The challenge facing this gathering here and indeed the human rights community working on business and human rights is promoting the required legal developments that fully remove the prevailing condition of a human rights protection vacuum in relation to the operation of big business.

In Africa, no where is the impact on human and peoples’ rights of, and the threat that the unaccountable power of corporations presents to, human rights is more pronounced than in the extractive industries. While the investment of extractive industries is increasingly seen as a vehicle for development, which is not entirely wrong, there is huge concern about the manner in which their activities affect peoples’ access to and ownership of land, their rights to a healthy environment, and the conditions they are forced to work under.

It is this recognition of the long-term impacts of the poorly regulated operations of the extractive industries on human rights that led the African Commission on Human and Peoples’ Rights to establish as one of its special mechanisms, the Working Group on Extractive Industries, the Environment and Human rights in Africa. Central to the mandate of this Working Group is also developing a framework not only for enabling the Commission to respond effectively and systematically to the human rights issues arising from the operations of the extractive industries. It is also for overcoming the human rights protection vacuum I highlighted above including through analyzing and determining the ‘direct accountability of corporations for human and peoples’ rights violations’ under the African Charter.

As you set yourself to face this tremendous task and work towards promoting legal developments that fully remove the human rights protection vacuum that the nature of the operation of corporations have created, I call on you to collaborate with and support the work of the Working Group of the African Commission on Extractive Industries.

I wish this gathering a very successful deliberation and I look forward to an outcome that help us clearly define the course of accomplishing this monumental task of ending the human rights protection vacuum.

I thank you all for your kind attention.

6 July 2016
Tanzania in July 2017 adopted three new laws aimed at increasing accountability of companies and increasing national revenues from the extractive industries, namely the Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017; the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017; and the Written Laws (Miscellaneous Amendments) Act, 2017 amending the Mining Act of 2010.

Together, these laws result in a comprehensive overhaul of the extractive industries framework, including by providing for increased royalties tax; better regulation of redress for damage caused by environmental pollution due to mining activities; and enforcement of local beneficiation of minerals, strict local-content requirements and restrictions on the repatriation of earnings. It also gives the far-reaching power to the Government to renegotiate or dissolve contracts deemed prejudicial to the interests of Tanzanians. The laws further require the listing of all mining companies on the Dar es Salaam Stock Exchange (DSE), that 30% of shares in mining companies be transferred to Tanzanian citizens and require adjudication of disputes by judicial bodies in accordance with Tanzanian law. In addition the government adopted certain measures to support the legislative changes, including a temporary ban on issuing of new mining licenses as well as a review of all existing mining licenses with foreign investors; a temporary ban on mineral exports to push for the construction of a domestic mineral smelter and a comprehensive audit to identify loopholes resulting in income losses. (p6)

Nine separate mining regulations aimed to give effect to these laws were adopted in January 2018. Unfortunately there seems to be certain discrepancies between the laws and the regulations, for example the regulations introduce the concept of ‘indigenous Tanzanian companies’ whereas this wording is not found in the legislation. Such discrepancies, together with the far-reaching implications of the new legislation have meant that there have not been many new investments in Tanzania during the past year. AngloGold Ashanti has lodged an appeal with the United Nations Commission on International Trade Law to have a mine development agreement it signed with Tanzania in 1999 upheld, while seeking talks with the government over the deadlock. Other companies have a more positive outlook, for example Kibaran Resources indicated that they are ready to meet with the Minerals Commission provided for under the new legislation, that they support the new mining laws as well as being positive that they would be able to meet the requirements under the new legislation. Another company, Katoro Gold, is determined not to let the changes in legislation deter it from finalising a feasibility study for a new gold mine. It is possible that other countries on the continent are watching the case of Tanzania with interest, and may be encouraged to also reform their policies to better provide for the interest of their citizens. Similar trends have already been observed in the Democratic Republic of the Congo, Zambia, and Ghana, among others.