

REPORT OF THE AFRICAN COMMISSION'S WORKING GROUP
ON INDIGENOUS POPULATIONS/COMMUNITIES

Extractive Industries,
Land Rights and
Indigenous Populations'/
Communities' Rights



African Commission on
Human and Peoples' Rights
(ACHPR)



International
Work Group for
Indigenous Affairs

Report of the African Commission's Working Group
on Indigenous Populations/Communities

**Extractive Industries, Land Rights and
Indigenous Populations'/Communities' Rights**

East, Central and Southern Africa

Submitted in accordance with the
"Resolution on the Rights of Indigenous Populations/Communities in Africa"

Adopted by
The African Commission on Human and Peoples's Rights
at its 58th Ordinary Session

2017

Report of the African Commission's Working Group on
Indigenous Populations/Communities

**Extractive Industries, Land Rights and
Indigenous Populations'/Communities' Rights**

Copyright: IWGIA

Typesetting and Layout: Jorge Monrás

Prepress and print: Eks-Skolens Trykkeri, Copenhagen, Denmark

ISBN: 978-87-92786-76-0



AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

Nº 31 Bijilo Annex Layout, Kombo North District, Western Region – P.O.Box 673 – Banjul, The Gambia
Tel: (+220) 441 05 05/441 05 06 – E-mail: achpr@achpr.org – Web: www.achpr.org



INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS

Classensgade 11 E, DK 2100 – Copenhagen, Denmark
Tel: (+45) 35 27 05 00 – E-mail: iwgia@iwgia.org – Web: www.iwgia.org

The report has been produced with the financial support of
the Danish Ministry of Foreign Affairs

Table of contents

Acronyms and Abbreviations	6
Foreword	8
Executive Summary	10
I. INTRODUCTION	16
II. ISSUES AND DEFINITIONS	23
A. Indigenous Populations/Communities in Africa?	23
B. Land Rights for Whom?.....	28
C. Beyond Extractive Industries?	35
III. MECHANISMS AND SAFEGUARDS	40
A. Protect, Respect and Remedy.....	41
B. Free, Prior, and Informed Consent	44
C. Declaration on the Rights of Indigenous Peoples.....	52
D. Special Rapporteur on the Rights of Indigenous Peoples	54
E. African Union and Africa Commission	56
F. Extractive Industry Standards.....	58
G. International Financial Institutions	64
H. Indigenous Voices	66
I. Good Practices and the Absence Thereof.....	67
IV. COUNTRY PROFILES	70
A. Uganda: Communal Tenure in Focus.....	71
1. National Setting.....	72
2. Local Context	78
3. Discussion.....	87

B. Namibia: Whose Sovereignty over Natural Resources?	88
1. National Setting	89
2. Local Context	94
3. Discussion	100
C. Kenya: Moving Downstream	102
1. National Setting	102
2. Local Context	106
3. Discussion	118
D. Cameroon: Beyond Oil, Gas and Minerals	120
1. National Setting	120
2. Local Context	123
3. Discussion	129

V. CONCLUSION	130
----------------------------	------------

VI. RECOMMENDATIONS	132
A. African states	132
B. Business Enterprises	134
C. International Financial Institutions	135
D. Indigenous populations/communities	136
E. Civil Society Organisations	137
F. National Human Rights Institutions	137
G. African Commission on Human and Peoples' Rights	138

Acronyms and Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AfDB	African Development Bank
CAR	Central African Republic
CBO	Community-based organisation
CCO	Certificates of Customary Ownership
CED	Centre pour l'Environnement et le Développement
CERD	Convention on the Elimination of Racial Discrimination
CLA	Communal Land Associations
CSR	Corporate Social Responsibility
DRC	Democratic Republic of the Congo
ECO	Ecological Christian Organisation
ECOFAC	Conservation et utilisation rationnelle des écosystèmes forestiers en Afrique centrale
EITI	Extractive Industries Transparency Initiative
EMRIP	United Nations Expert Mechanism on the Rights of Indigenous Peoples
ESIA	Environmental and Social Impact Assessment
FPIC	Free, Prior and Informed Consent
FPP	Forest Peoples Programme
ICMM	International Council on Mining & Metals
IFC	International Finance Corporation
IPO	Indigenous Peoples' Organisations
KEDF	Kaoko-Epupa Development Foundation
KNCHR	Kenya National Commission on Human Rights
LAC	Law Assistance Centre
LAPSSET	Lamu Port South Sudan Ethiopia Transport Corridor
NGO	Non-Governmental Organisation
NNDFN	Nyae Nyae Development Foundation of Namibia
NULP	Northern Uganda Land Platform
OD	Operational Directive
OKANI	Association OKANI
OP	Operational Policy
REDD	Reducing Emissions from Deforestation and Forest Degradation
SEAT	Socio-Economic Assessment Toolbox

SRIP	UN Special Rapporteur on the rights of indigenous peoples
ULA	Uganda Land Alliance
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNHR	United Nations Human Rights
UNPFII	United Nations Permanent Forum on Indigenous Issues
WGEI	Working Group on Extractive Industries, Environment and Human Rights Violations
WGIP	Working Group on Indigenous Populations/Communities in Africa
WWF	World Wildlife Fund

Foreword

Africa's quest for development has largely, if not wholly, been premised on its rich land and natural resources. Although for most African countries achieving economic growth driven by natural resources has been illusive at best and devastating at worst, they continue to hinge their hopes and dreams on it. Especially in the last two decades, African countries seem to have redoubled their efforts to explore and extract every natural resource within their jurisdiction with a view to 'industrialize and modernize' their economies. This has been exacerbated by the skyrocketing of the global demand for natural resources driven especially by the rapid growth of non-Western economies with huge populations such as China and India, and the establishment of liberal investment regimes and proliferation of risk-mitigating investment agreements that have enabled transnational enterprises to operate in regions that were previously beyond reach.

Indigenous communities of Africa are the ones who feel the brunt of this phenomenon the most. This is mainly because, first, indigenous communities in Africa live on or near lands and territories where most of these remaining natural resources are found. Second, traditionally indigenous communities by and large have collective land tenure systems which is not recognized by many African states and even worse is considered terra nullius (no one's land) since there is no 'visible' use or occupation of the land. Hence, they are evicted from their ancestral lands and territories without any free, prior and informed consultation/ consent or compensation to give way to the exploration of natural resources by extractive industries or for the construction of mega infrastructural projects such as dams, pipelines and roads.

The study attests to these plight and suffering of indigenous communities in Africa by looking into the lived-experiences of indigenous communities in Uganda, Namibia, Cameroon and Kenya. The findings of the study clearly establish that irrespective of the nature of the extractive industry, the community affected or the country they operate in, extractive industries pose the greatest challenge to the land rights and survival of indigenous communities' culture and way of life in present day Africa. The lack of adequate national procedural and normative guarantees against dispossession of land and the deficiency of laws that regulate the activities of extractive industries coupled with misguided and patronizing state policies towards indigenous communities and development have threatened the existence and survival of indigenous communities across Africa.

The study further establishes the responsibility and obligation of extractive industries to respect and protect the rights of indigenous communities living on and/or near

areas where they operate. In this respect, they have the obligation to conduct free, prior, informed consultation, in good faith, with indigenous communities and/or their rightful representatives from the inception to the planning, implementation and follow-up of their activities. States, as primary obligation holders, have also the responsibility to put in place laws and policies that recognize, respect and protect the rights of indigenous communities within their territories and must ensure their proper implementation and enforcement. Doing so, is not only pivotal to uphold the interests and wishes of their populace, indigenous communities in particular, but it is also in line with African states' international human rights obligations.

If African states are genuinely keen in achieving their long overdue and much needed development, they have to adopt people-centered and people-driven approach to development. They have to get rid of typical manifestations of colonial legacy including policies, laws and practices that are concerned more about land and natural resources than the people that live on it; that are exploitative; that are discriminatory and dehumanizing to some communities and groups. Sustainable development is only possible when it is people-driven, all inclusive, responsive and transparent. ○

Executive Summary

In 2003, the African Commission on Human and Peoples' Rights (ACHPR) established the Working Group on Indigenous Populations/Communities in Africa (WGIP) with the responsibility to advise the Commission on matters relating to the rights of indigenous populations/communities on the continent. In this capacity, the WGIP found it appropriate to commission a study on extractive industries, land rights and indigenous populations/communities to inform and guide its activities and that of all other stakeholders.

Objective of the study

The scope of the study is as follows:

- To examine the impacts of extractive industries on indigenous populations/communities' rights to land and natural resources;
- To map out the extent to which extractive industries are affecting indigenous populations/communities in Africa;
- To evaluate the extent to which states are promoting, protecting and fulfilling indigenous populations/communities' rights to land and natural resources in relation to extractive activities and large-scale development projects, including the right to free, prior and informed consent, in line with their obligations under international and regional instruments;
- To evaluate the extent to which extractive industries are held accountable for the negative impacts generated by their activities, and adhere to the different international standards;
- To identify some good practices by states and extractive industries;
- To make recommendations to States Parties, extractive industries, indigenous populations/communities, international financial institutions and civil society organisations for the promotion, protection and fulfilment of indigenous populations/communities' rights to land and resources in Africa.

Issues and Definitions

The report that follows is divided into three main sections. The first section of the report attempts to respond to some of the confusion encountered during the study from a range of actors over the definition or understanding of three main concepts: indigenous populations/communities, land rights and extractive industries. In almost every discussion that took place during the development of this study, one or often all of these three concepts were put in question. As a result, the report re-presents these three concepts, discusses the issues they raise and clarifies how this report understands their use.

The report acknowledges that the international definition of Indigeneity still receives much resistance from a range of actors in Africa not least from the governments of its nations. It is clear that, on the one hand, a dominant perspective among many sub-Saharan governments and their majority populations is that since all Africans were colonised by European powers, and subsequently fought for their independence from those powers, all Africans should be considered to be indigenous. However, the report points out that this dominant understanding does run counter to the international definition of Indigeneity, a definition shared and clarified by the ACHPR in recent years, which seeks to support indigenous populations/communities as a distinct group of people whose culture and way of life are intimately tied to their lands and who suffer from marginalisation and discrimination from their neighbours and dominant society.

Next the report seeks to understand indigenous populations/communities' attachment to their lands and territories, which form a fundamental part of their individual and social identity, and to suggest why they have found it so hard to have their rights to their lands recognised by the nation states. The report argues that hunting and gathering and pastoralism are not valued by most African governments and that these adaptations to their surroundings continue to be marginalised by dominant society. The report suggests that the dominant policy in African states is to see land titled under individual tenure, further discriminating against most indigenous land management which is based on communal ownership of their lands.

The final concept looked at is that of extractive industries themselves and the report seeks to understand the breadth of industries that have similar impacts on indigenous lands and livelihoods but which are not typically included in the category. This report suggests that as well as more traditional forms of extraction like mining, oil and gas industries, industries such as logging, agro-industry and biofuels should be equally investigated. Finally this section suggests that in order to fully understand the impact of extractive industries on indigenous populations/communities, the report also looks at activities outside the specific extraction of resources, such as dams, refineries and deep sea ports which provide extractive industries with the means for extraction as well as the means to move the resources around the world.

Safeguards and Mechanisms

The second section of the report looks into the various mechanisms that have been put in place to better regulate extractive industries' and governments' engagements with indigenous populations/communities in order to eradicate the kinds of human and peoples' rights violations that have been historically associated with extractive industries' practices. Governments and extractive industries have in turn developed their own internal mechanisms to better safeguard the human rights of local communities. However, before the report looks into the mechanisms and standards developed in the last ten years, it discusses and clarifies the duties and responsibilities of those involved in the extractive industries sector and takes its lead from the UN Framework, 'Protect, Respect and Remedy'. Crucially, this framework explicitly recognises states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; the role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights; and the need for rights and obligations to be matched to appropriate and effective remedies when breached.

With these responsibilities clearly laid out, the report is able to make an analysis of the human rights framework of 'free, prior and informed consent' (FPIC) which the report urges should be seen as an expression of a range of human rights protections that attempt to secure indigenous populations/communities' ability to freely determine and manage their lands and livelihoods. The report identifies the range of human rights mechanisms, which includes elements of FPIC, and discusses some of the more practical considerations that must be made when ensuring the application of FPIC in an extractive industry setting. The report highlights the impact of instruments and mechanisms like the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the role of the Special Rapporteur on the rights of indigenous peoples (SRIP), that have had influential roles in highlighting and mitigating many of the impacts historically suffered by indigenous populations/communities in relation to extractive industries.

Before concluding this section, the report takes a look at some of the extractive industry and international financial institutions safeguards that apply to indigenous communities in Africa and notes that while groups like International Council on Mining and Metals (ICMM) and the International Finance Corporation (IFC) have made explicit acknowledgement of the need to include the FPIC of indigenous communities, there continue to be an overwhelming number of extractive industries and financial institutions, such as the World Bank and Rio Tinto for example, that continue to resist including the full rights of indigenous populations/communities in their policies and safeguards.

The final word in this section is left to indigenous populations/communities as the report documents three responses to extractive industries in three key declarations which each clearly demand a stop to the grabbing and violation of their lands and an end to all extractive industries that do not respect their

fundamental human rights and that do not seek their full FPIC in any developments on their lands.

Country Profiles

This third section of the report attempts to provide current and grounded examples through the investigation of extractive industries in Uganda, Namibia, Kenya and Cameroon. The case study from Uganda looks into the Karamoja region, which has received a lot of interest from gold mining companies in recent years. The report suggests that the Karamojong do not yet have their rights to their lands recognised by the government and, further, that the government does not see Karamojong pastoralism as a valid use of their lands. The Ugandan case study also suggests that the junior mining companies working in Karamoja are, at best, oblivious to the human rights violations taking place and, at worst, complicit in the violations themselves. And while this participation may result from a lack of awareness of international human rights, this study is clear that business enterprises' responsibility to indigenous populations/communities' fundamental human rights exists independently of states' own protection of such rights and, as such, extractive industries have a responsibility to make themselves aware of their duties to indigenous populations/communities.

In the Namibian case study, the situation of the San communities living in the east of the country and their ability to freely manage and develop their lands and the natural resources they contain is one of the most complex this study has come across. While the government clearly lists the many ways in which legislation protects the rights of indigenous populations/communities to manage their lands and livelihoods, it is the opinion of this study that any such rights offered in existing legislation fall far short of those rights demanded by international law. Further, it is clear that the Namibian government only sees indigenous communities as beneficiaries of their lands and not as owners of such lands. This finding was uniformly backed up by the other case studies where governments promoted benefit-sharing activities within their policies but did not publicly or practically support indigenous populations/communities' rights of ownership to their lands and resources.

The example of the Himba populations in Namibia clearly identified not only the direct threat of extractive industries but also the human rights violations caused as a result of activities indirectly related to natural resource extraction, such as the energy needs of existing mines which, in the Namibian case, account for almost 40% of the country's electricity demand. The Kenya case study built upon this finding and presented an extreme case where the potential impacts of the entire value chain of natural resource extraction were considered. These impacts included the desertification of one of Africa's most important lakes for the purpose of agro-industry and power generation projects and the complete appropriation of the Aweer communities' lands for the construction of an oil pipeline and deep sea port. Such large-scale

human rights violations suggest that not only is natural resource extraction an issue at the local level but also at the national level where, in the case of Kenya, an entire country's future is being built upon a project that leaves human rights violations at every corner it turns.

Finally, in Cameroon, the study managed to coalesce the main issues of this report around the very real concerns of the indigenous populations in Ocean department, who are currently facing new threats against their lands as a result of palm oil plantations and iron ore mines at the same time as they try to come to terms with existing appropriations of their lands at the hands of conservation and logging concerns. The report's findings when faced with such blatant and whole-scale appropriation of lands is that not only are the governments of Africa, and the companies they furnish with access, entirely to blame for the violations carried out against the indigenous populations of Africa but that, more worryingly, the national, regional and international community's ability to defend the rights of those suffering the worst of these violations is ineffective at best.

A full list of recommendations is offered at the end of the report. ○

[Indigenous peoples'] territories and cultures remain the final and most sought-after frontier in [globalization's] latest expansion and their resistance its final obstacle. They stand, both physically and ideologically, at the frontlines of the struggle to transform the globalization model. If unsuccessful, they stand to be the most profoundly impacted by it. For many, the threats it poses to their cultures and territories puts their very existence as a people at stake. As with previous waves of globalization that occurred during the colonial era, the current model of economic globalization is based on the exploitation of natural resources predominantly located in indigenous territories. What differentiates this latest phase of economic globalization from phases past is the rate at which it is occurring and the geographic and physical extent of its impacts. Unprecedented demands for the world's remaining resources including oil, gas, minerals, forests, freshwaters and arable lands, combined with new technological methods of harvesting what were, in many cases, hitherto inaccessible resources, and speculation on the future value of these resources have created a new development paradigm in which even the remotest and most isolated indigenous community in the world cannot avoid globalization's extended reach.

Doyle and Gilbert¹

1 Doyle & Gilbert (2010) Indigenous Peoples and Globalization: From 'Development Aggression' to 'Self-determined Development', *European Yearbook of Minority Issues*, Vol7, 2008/9, p. 221.

I. Introduction

The Working Group on Indigenous Populations/Communities in Africa (WGIP) is one of the special mechanisms of the African Commission on Human and Peoples' Rights (ACHPR or Commission) that is mandated to advise the Commission on issues related to the rights of indigenous populations/communities in Africa.² In line with this mandate, the WGIP has, since its establishment in 2001, undertaken several researches, studies, country visits and several other activities with a view to bring the plight of indigenous communities to light and find common grounds and solutions to the multitude of challenges that indigenous communities in Africa face in consultation and collaboration with all stakeholders.

It is against this backdrop that the WGIP decided to commission a study to assess the impact of extractive industries on the land rights and other human rights of indigenous communities in Africa which in the view of the WGIP is a burning, timely and cross-cutting issue across Africa.

Background and Rationale

Studies show that the territories of indigenous populations/communities "host the majority of reserves and resources currently targeted by companies and governments".³ It is estimated that, by 2020, up to 70 percent of copper production will take place in territo-

2 The WGIP is mandated to:

- With the support and cooperation of interested Donors, Institutions and NGOs, raise funds for the WGIP's activities relating to the promotion and protection of the rights of indigenous populations/communities in Africa;
- Gather, request, receive and exchange information and communications from all relevant sources, including governments, indigenous populations and their communities and organisations, on violations of their human rights and fundamental freedoms;
- Undertake country visits to study the human rights situation of indigenous populations/communities;
- Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/communities;
- Submit an activity report at every ordinary session of the Commission;
- Cooperate, when relevant and feasible, with other international and regional human rights mechanisms, institutions and organisations.

3 Moody, cited in Andy Whitmore (eds.), *Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries* (Tebtebba, IWGIA and Piplinks, 2012), p. 5.

ries claimed by indigenous populations/communities. In 2009, the European Commission recorded that approximately 70 percent of uranium used in nuclear reactors was sourced from the homelands of indigenous populations/communities worldwide. The studies also show that this trend is particularly notable in Africa.⁴

The illegal land grabbing that often accompanies such resource exploitation seems to be on a collision course with the lands and territories of indigenous populations/communities. The experiences to date have been mostly negative to the point where the widespread expropriation of indigenous land for extractive projects, including logging and commercial farming, has come to be termed “development aggression” by indigenous populations/communities. As one author has noted, “In every session of the UN Permanent Forum on Indigenous Issues, since it was created in 2002, indigenous populations/communities have presented reports on how extractive industries’ corporations have caused environmental degradation, cultural ethnocide, and gross human rights violations”.⁵ And yet another has noted, “Mining, oil and gas exploitation are among the most serious threats to the territories and livelihoods of indigenous populations/communities. For peoples who have already been pushed to the margins by colonialism, nation-building and cultural discrimination, the pressures of the mining, oil and gas industries can be hard to resist”.⁶

What is more worrying is that despite compelling indications showing that indigenous communities/populations in Africa are negatively impacted by extractive industries, there are few empirical and comprehensive studies or research cases done to evaluate the level of impact of such industries on the environment, lives and livelihoods of indigenous communities/populations in Africa, and policies/measures put in place by states to protect these communities.

Therefore, the WGIP found it appropriate to commission a study on the topic to inform and guide its activities and that of all other stakeholders. This is in line with the mandate and long standing practice of the WGIP of undertaking researches and studies relevant to the issue of indigenous communities in Africa. The study has been conducted in collaboration with the Working Group on Extractive Industries, Environment and Human Rights (WGEI).

Objectives

The main objectives of the study were:

- To examine the impacts of extractive industries on indigenous populations/communities’ rights to land and natural resources;

4 Ibid.

5 Ibid, p. xxii.

6 M Colchester & E Caruso 2005 *Extracting Promises*, 2nd Edition, FPP and Tebtebba, Philippines, p. 2.

- To map out the extent to which extractive industries are affecting indigenous populations/communities in Africa;
- To evaluate the extent to which states are promoting, protecting and fulfilling indigenous populations/communities' rights to land and natural resources in relation to extractive activities and large-scale development projects, including the rights to free, prior and informed consent, in line with their obligations under international and regional instruments;
- To evaluate the extent to which extractive industries are held accountable for the negative impacts generated by their activities, and adhere to the different international standards;
- To identify some good practices by states and extractive industries;
- To make recommendations to State Parties, extractive industries, the African Commission on Human and Peoples' Rights, indigenous populations/communities, international financial institutions and civil society organisations for the promotion, protection and fulfilment of indigenous populations/communities' rights to land and resources in Africa.

Scope of the Study

Due to resource constraints, the study focuses on three sub-regions only, that is, East Africa, Central Africa and Southern Africa. As there are many countries in these sub-regions, and because of limited resources and time constraints the study undertook country visits to selected four countries – Uganda, Namibia, Cameroon and Kenya. Uganda was chosen due to the infancy of its extractive industry sector, Namibia for its maturity, Cameroon for its diversity, and Kenya for its scale.

Timeframe and Methodology

The study combined both desk review and on-site/country visits to the above listed four countries. The study began on 1 September 2013, with the first four weeks being spent compiling authoritative texts which could be used as a baseline for the study. September was also spent contacting stakeholders and government actors in the proposed countries that the study was to visit.

Desk review

The scope of the review was primarily an attempt to analyse the extent to which indigenous populations/communities' issues are addressed, included and promoted within the context of extractive industries.

The desk review was further guided by the following questions:

- What issues exist in relation to indigenous populations/communities and extractive industries? How are land rights affected by these issues?
- Are indigenous populations/communities taken into account in the overall context of extractive industries? If so, to what extent are they discussed?
- What are existing frameworks for the protection of indigenous populations/communities' rights with regard to extractive industries? Are they sufficient?
- To what extent are FPIC guidelines understood and adhered to in the extractive industry and African contexts?
- Do good practices that safeguard the rights of indigenous populations/communities within the extractive industry sector exist?
- To what extent are indigenous populations/communities integrated into the design, implementation and monitoring of extractive industry projects on their lands?

The desk review focuses on documents from the following areas:

- Free, Prior, and Informed Consent (FPIC) and other safeguard mechanisms applicable to indigenous populations/communities and extractive industries.
- Extractive industries globally, focusing on best practices and lessons learned.
- Extractive industries in Africa, focusing on best practices and lessons learned.
- Indigenous populations/communities studies for general information on their current status.
- Indigenous populations/communities and extractive industries studies.

Key reference documents consulted as part of the desk review included the following:

- Relevant African Union documents and reports;
- Relevant documents, policies and reports by International Financial Institutions;
- Relevant private sector voluntary codes, guidelines and similar soft law documents;
- Civil society reports and documents;
- Indigenous populations/communities' organisations' reports and documents;
- Academic researches.

While these questions, areas and documents are extensive, it was possible to develop a baseline of material from which to build the study on. While information on indigenous populations/communities in Africa, their lands and extractive issues is scarce and rarely investigated in a cohesive way, there is nonetheless a great deal of information on

many of these individual issues. As such, this study will attempt to collect and re-package existing material in a way that brings the issues discussed in Part Two together.

In-country visits

Throughout October, November and into December 2013, the study focused on visiting three countries in East, Central and Southern Africa respectively. It was envisaged that the study would spend a period of two weeks in each country. The plan was ideally to spend around five days in each country working with government, civil society and private sector partners in the capital cities and then spend the remaining time in communities affected by extractive industries.

After consultations with civil society partners, indigenous communities and WGIP members, it was decided that the study would visit Uganda, Botswana, Cameroon and Kenya.

The study waited until the last possible moment to withdraw its plans to visit Botswana in the hope that authorities might grant permission. At the last possible moment it was decided that the study should instead focus on Namibia which also has a long history of natural resource extraction. This however meant that the visit to Namibia was vastly under-prepared and ad hoc. The study is therefore indebted to the Legal Assistance Centre who helped at the last minute to develop an itinerary and facilitate the study's visit.

In addition, the study was unable to visit Cameroon in person and, as a result, it collaborated with colleagues in Cameroon to complete the study. The report is therefore indebted to the Forest Peoples Programme (FPP), the Centre pour l'Environnement et le Développement (CED) and Association Okani (OKANI) for their completion of the study in Cameroon. While the study was being conducted in Cameroon, the consultant travelled to Kenya to conduct an additional in-country visit there.

Limitations of the Study

The problems encountered in the course of undertaking the study were twofold.

Firstly, it is apparent that there is a dearth of information on the situation of indigenous populations/communities, their rights to land and their relationships with extractive industries. As was confirmed through the case studies, many countries in the research area are only starting to develop their extractive industry sectors and, as a result, communities and their supporters are either unaware of how this sector is affecting their human rights enjoyment or do not have the capacity to respond to any human rights violations. While it was generally assumed that extractive industries must be having a negative impact on indigenous populations/communities' land rights, it was not clear how this was manifesting itself in each specific context.

Secondly, the study experienced great difficulties in contacting and communicating with representative of governments or extractive industries. In the case of one country alone, 36 individuals from the government, including Ministers, Members of Parliament and civil servants, were contacted and not a single email was returned. The cases where the study was able to speak to government officials were therefore extremely limited and their opinions form a glaring absence in this report.

Equally, extractive industries were no better and attempts to contact them went unanswered for the most part. As with governments, the inclusion of extractive industry perspectives in this report is limited and stands as testament to some of the real issues with the industry and its engagement with indigenous populations/communities.

It is understood that both governments and private sector actors may feel wary of the enquiries of external studies and may therefore choose to remain silent. However, this is a limited and short-sighted approach and does nothing but generate further confusion, alienation and resentment on the part of both indigenous communities and various stakeholders who are attempting to ensure that extractive industries are conducted in a meaningful and productive way and out of respect for indigenous communities. Although extractive industries may be able to avoid discussing these issues in the short term, the long-term viability of their industries in these countries will be hugely determined by the policies and practices that govern local community involvement. Any failure to acknowledge and engage with these issues in a public and transparent manner does not seem to make financial or business sense and is definitely not supportive of the existence of a human rights framework for all of Africa's indigenous populations/communities.

It is also perfectly reasonable to assume that many government officials and private sector partners refused to contribute to this study for fear that their mismanagement of natural resources, lack of adequate policies and flagrant abuses of existing mechanisms aimed at protecting the rights of state citizens would be brought to public attention. In this regard, it is the duty of all stakeholders to ensure that these instances are brought to the fore at every opportunity and the human rights violations are stopped at the soonest possible occasion.

It is important to acknowledge that the study takes a very focused perspective in understanding the issues surrounding indigenous communities, land and extractive industries. While, on the one hand, the following report has tried to be as objective and inclusive as possible of all perspectives, it does however understand that indigenous communities have typically been silenced from any real interaction with the discourse in sub-Saharan Africa.

With this in mind, and in recognition of the limited participation and cooperation shown by governments and extractive industries, the study felt it was important to prioritise its engagement with indigenous communities, their organisations and supporters during the in-country visits. Allowing this report to act as a voice for otherwise silenced participants and to attempt to give space and validity to their views became a worthy goal of this study.

As a result, the success of the study was wholly dependent upon the willingness and openness of indigenous populations, their organisations and their supporters to host and facilitate the study's in-country visits. ○

II. Issues and definitions

The lack of a minimum common ground for understanding the key issues by all actors concerned entails a major barrier for the effective protection and realization of indigenous peoples' rights in the context of extractive [industries].

James Anaya, Special Rapporteur on the rights of indigenous peoples⁷

This study was tasked with better understanding the relationship between three main concepts: indigenous populations/communities, land rights and extractive industries. While the main body of the report will attempt to do just that, an important first step must be taken. In almost every discussion that took place during the development of this study, one or often all of these three concepts were put in question. Some questioned these concepts out of ignorance and a desire to find more meaningful answers while others did so as a way to resist the definitions that they believed came with such concepts. Yet others did nothing to question these terms and, in doing so, showed fundamental misunderstandings of the very concepts that underpin gross human rights violations. As a result, this report seeks to re-present these three concepts, discuss the issues they raise and clarify how this report understands their use. It is hoped that this will allow readers from various backgrounds to engage with the report from a common position.

A. Indigenous Populations/Communities in Africa?

The concept of indigenous identity is highly contested in Africa.⁸ This was expressed clearly in the opinions of the head of the San Development Programme under the Office of the Prime Minister of Namibia, who told the study that as Africans we are all black, we are all indigenous to Africa.⁹ While this report does not deny anyone's right to hold this view, it is important to highlight that this view, one widely held throughout Africa,

⁷ Quoted in, C Doyle & J Carino 2013 *Making Free, Prior and Informed Consent a Reality: Indigenous peoples and the extractive sector*, [www.piplinks.org/makingfpcreality], p. 3.

⁸ See, for example, A Barnard and J Kenrick (eds) (2001) *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalised Minorities'?*, Centre of African Studies, University of Edinburgh.

⁹ Mr. Gerson Hizembi Kamatuka, Pers. Comm.

is in sharp contrast to almost all international mechanisms and wider discourse on Indigeneity. Since this concept is absolutely central to the discussion of land and rights that follows, it is important to clarify both the debate over 'indigenous peoples'¹⁰ in the African context, and the report's position within this debate.

It is clear that, on the one hand, a dominant perspective among many African governments and their majority populations is that since all Africans were colonised by European powers, and subsequently fought for their independence from those powers, all Africans should be considered indigenous. For example, in keeping with a number of other African countries, Article 10 of the Constitution of Uganda states that any group existing and residing within the borders of Uganda before 1926 is indigenous.¹¹ In Botswana, home to more than half of all San peoples of Africa, the government "refused to participate in the 1993–2003 UN Decade of the Indigenous People, on the grounds that in their country *everyone* was indigenous".¹²

But this view of indigenous identity in Africa fails to recognise the internal subjugation and historical marginalisation that Africa has experienced, and it is a view contradicted also by the way in which many African governments (those of Cameroon, Uganda, Central African Republic (CAR), Democratic Republic of the Congo (DRC), Kenya, Tanzania, for example) routinely go along with, say, World Bank and International Finance Corporation (IFC) directives on the issue of indigenous peoples (such as Operational Directive (OD) 4.20 or Operational Policy (OP) 4.10). This acknowledgement by African governments that parts of their populations constitute indigenous populations/communities for the purposes of international policies and projects is enshrined in bilateral international treaties between the country and international financial institutions. In law this is persuasive evidence of at least a state of mind, and in this case more: of international relations and legal opinion.

So, although there may be a dominant rhetoric, such governments' positions are far from uniform on whether there are indigenous populations/communities. The international agreements they sign up to imply support for the other perspective on the question of indigenous peoples in Africa, one held by the international human rights community, which is that the concept of indigenous populations/communities should be applied only to certain sections of African society to reflect the internal subjugation and historical marginalisation that has taken place.

Rather than choosing between these positions, this report aims to integrate the most useful aspects of them by proposing that, while in relation to colonial or neo-colonial powers all Africans are indigenous, in relation to most of their African neighbours,

10 The report will use the terms 'peoples', 'populations' and 'communities' interchangeably and seeks not to determine which is the most appropriate term to use for the diverse groups discussed in this report.

11 Republic of Uganda (1995) *Constitution of the Republic of Uganda*, The Law Development Centre, Kampala.

12 R B Lee (2006) 'Twenty-first century indigenism', in *Anthropological Theory*, vol. 6, no. 4, p 459; emphasis in original.

African indigenous populations/communities are seen – by their neighbours and by themselves – as being distinctly indigenous, who truly belong to the lands they inhabit. As a result, while all Africans are clearly indigenous to a continent that was colonised by European powers, we use the term ‘indigenous peoples’ to refer to those people who see themselves, and are seen by their neighbours, as indigenous to Africa. Where their neighbours’ origin myths often speak of migration and arrival from elsewhere, the origin myths of most indigenous communities in Africa speak of emergence from – and belonging to – their lands.

In addition to the fact that the use of the term reflects the historical internal colonisation that took place in Africa, the term is also usefully employed in relation to more current issues. The 2003 report of the African Commission on Human and Peoples’ Rights (ACHPR), for example, states that:

‘Indigenous Peoples’ has come to have connotations and meanings that are much wider than the question of ‘who came first’. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction.¹³

Given the current marginalised status that many indigenous populations/communities in Africa endure, some have asked whether it might not be more useful for them to frame their claims for equal treatment in terms of ‘human rights’ instead of ‘indigenous rights’, in terms of their being ‘marginalised minorities’ instead of ‘indigenous peoples’. It has been argued that African governments may well respond more favourably to these terms, since they may feel that if they accept such peoples’ right to indigenous status then this might put them in the uncomfortable position of being seen as colonisers in relation to these minorities. For such governments, the difference between the two ways of framing these peoples’ rights could signify a difference between divisiveness and something “more in tune with the rhetoric of nation building”.¹⁴ This reframing would simply translate such peoples’ demands into terms that may be more acceptable to those who have historically marginalised them, and thereby demonstrates precisely why it is unlikely that such an approach will be able to bring about the paradigm shift that is needed: one that acknowledges the different forms of land ownership, resource use and social organisation through which such indigenous populations/communities engage with the world. These forms are often completely at odds with the dominant

13 ACHPR (2003) *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, ACHPR, Banjul, Gambia and IWGIA, Copenhagen, Denmark.

14 J. Suzman (2001) ‘Indigenous Wrongs and Human Rights: National Policy International Resolutions and the Status of the San in Southern Africa’, in A Barnard and J Kenrick (eds) *Africa’s Indigenous Minorities*, p. 293.

majority populations and are often used to justify their marginalisation. Further, while the specific conditions and contexts which these populations live in are complex and varied, it is clear that the generative processes that have marginalised them and the problems which they are experiencing are sufficiently similar to warrant being offered a category that “adequately encapsulates the real situation of the groups and communities concerned”.¹⁵

A response to indigenous populations/communities’ rights which neglects this specific social, political and cultural position would lack the insight needed to understand fully the generative processes that create the structures of impoverishment that marginalise them.¹⁶

One of the misconceptions regarding indigenous peoples is that to advocate for the protection of the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. The issue is not special rights...the issue is that certain marginalised groups are discriminated in particular ways because of their particular culture, mode of production and marginalised position within the state. This is a form of discrimination which other groups within the state do not suffer from. It is legitimate for these marginalised groups to call for protection of their rights in order to alleviate this particular form of discrimination.¹⁷

What should then be taken from this discussion is that while ‘indigenous populations/communities’ as a category has often been claimed by those in power to be divisive and counterproductive, in practice the truth is the exact opposite. While it is true that the category suggests these people experience a specific set of issues caused by a specific set of circumstances, the way in which the category seeks to have such problems addressed is anything but divisive. What they seek is to be treated within the same framework of rights that all citizens demand from their elected leaders, the right to education, the right to land, and the right to health for example. Nothing less than the full acknowledgement of their fundamental human rights, but yet also nothing more.

15 African Commission on Human and Peoples’ Rights (2006) *Indigenous peoples in Africa: the forgotten peoples?* ACHPR and IWGIA, Banjul and Copenhagen, p. 12.

16 S. Saugestad (2000) *Dilemmas in Norwegian Development Assistance to Indigenous Peoples: A Case Study from Botswana*, <http://se1.isn.ch/serviceengine/FileContent?serviceID=7&fileID=895E0E8D-CC2C-0FB0-CEC8-3FC5432051A9&lng=en> (accessed 3 April 2008).

17 African Commission on Human and Peoples’ Rights (2006), p. 34.

Box 1: State denial of Indigeneity in Africa¹⁸

“One of the fundamental difficulties facing companies that operate in indigenous territories, or whose operations affect those territories, is the absence of formal recognition of indigenous peoples by the State in which they live, or recognition limited solely to certain groups. Nevertheless, a generally accepted principle of international human rights law holds that the existence of distinct ethnic, linguistic or religious groups, including indigenous peoples, can be established by objective criteria and cannot depend on a unilateral decision by a State.

Businesses cannot use limited recognition, or absence of explicit recognition, of indigenous peoples in the countries in which they operate as an excuse not to apply the minimum international standards applicable to indigenous peoples, including in cases where States are opposed to the application of such standards”.

The ACHPR's 2003 Report lists the common characteristic features of indigenous populations/communities in Africa that identify themselves as such as follows:

- Their cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction.
- A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.
- They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society.
- They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalisation, both politically and socially.
- They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalisation violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development.¹⁹

18 UN Global Compact, (2013) *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples*, Geneva, p. 19.

19 ACHPR (2003), p. 89.

Generally in Africa, the majority of indigenous populations/communities practise either hunting and gathering or pastoralism as their main livelihood system. It is often suggested that they do not have rights to the lands they inhabit because they are nomadic, and therefore do not comply with the permanent residence and domestication of the land that is deemed necessary in order to hold property rights. The use of the term 'nomadic' in this way is pejorative and has been employed by colonial and post-independence governments, and dominant neighbours, to deny indigenous populations/communities their basic rights. This manipulation of the term shows, at best, a misunderstanding of the term itself and the customary tenure of indigenous populations/communities, and, at worst, is a misrepresentation designed specifically to deny such people rights to their land. The term 'nomadic' should refer to communities who have temporary or semi-permanent dwellings and who regularly move location as part of their livelihood strategies. The term describes a particular pattern of movement and habituation and does not suggest that 'nomadic' peoples have no territories. In fact, 'nomadic' peoples, including hunter and gatherers and pastoral peoples, have elaborate understandings of their territories, which are socially regulated through shared values, and they practise complex resource management regimes to ensure the health of such territories. This report's use of the word 'nomadic' should not be taken as in any way denying indigenous populations/communities their rights to their lands; in fact, we specifically acknowledge that 'nomadic people' have fundamental inalienable rights to the lands on which they live (see also International Labour Organization Convention (ILO) 169).

B. Land Rights for Whom?

Box 2: The relationship between indigenous populations/communities and their lands²⁰

Indigenous populations/communities' relationship with their lands and territories is profound; it constitutes a fundamental part of their identity and is deeply rooted in their culture and history, transcending the material to become a relationship that is spiritual and sacred in nature. For indigenous populations/communities, land is the source of all life. This relationship extends to, inter alia, their natural resources, bodies of water and forests and biodiversity. In the mindset of indigenous populations/communities, land and territory are "the vital space" and guarantee the existence of present and future generations.

²⁰ UNPFII (2011), *Study on indigenous peoples and corporations to examine existing mechanisms and policies related to corporations and indigenous peoples and to identify good practices*, E/C.19/2011/12, p. 7.

As indigenous populations/communities are intimately dependent upon their territories for their sustenance, it is clear that one of their primary concerns is the defence of their lands from appropriation and exploitation. What is a greater worry is that this very denial of rights to land is being carried out by governments, and their private sector partners, in the name of national development. And yet those in most need of economic support are more often than not the very peoples whose lands and livelihoods are appropriated. This goes against international human rights standards, which have long stated that although development facilitates the enjoyment of all human rights, the lack of development cannot be used to justify the abridgement of internationally-recognised human rights.²¹

Such loss of lands impoverishes communities socially, economically and culturally, a point duly acknowledged by the World Bank in its Extractive Industries Review Report in 2003 wherein it concluded that failure to recognise indigenous populations/communities' territorial rights, "undermines efforts to alleviate indigenous populations/communities' poverty and to achieve sustainable development [and] jeopardize[s] the potential for development and poverty alleviation from the extractive sector". It further concludes that "[s]tructural reforms and legal codes that provide automatic approval of exploration and development concessions on indigenous lands, territories, and resources without the participation and the free prior and informed consent of these communities only exacerbate the problem".²²

Box 3: What are customary rights?²³

"Customary rights derive from customary law, a set of usually unwritten rules that draw their authority from 'tradition'. Customary laws govern a wide range of issues, including family relations, property law, and use and ownership of land and natural resources. Customary land tenure refers to the systems that many rural communities use to express and regulate ownership, management, use, access and transfer of land and the natural resources therein. Customary tenure is often intricately bound with local conceptions of kinship, generational descent and broader social definitions of the role and rights of individuals and groups within the community. Customary laws and rights derive from the community rather than the state (statutory law), and although on the ground the

21 Mackay, F., 2004: 'Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review', *Sustainable Development Law & Policy*, vol. 4, no. 2, p. 44.

22 Quoted in *ibid*, p. 45.

23 Colchester M., 2013: *Governance of Tenure Technical Guide 3: Respecting free, prior and informed consent*, FAO, Rome, Italy, p. 16-7.

two systems frequently overlap, customary rights are not always recognized or given equal weight by the state. Customary rights may be informal (without formal state recognition), or they may be formal where they are given the force of law by ratified international treaties, by national constitutions, by statutory laws and ordinances, or through court decisions. Customary land rights vary significantly across communities depending on their locations, social organization and modes of livelihood. In some communities, land and natural resources may be collectively owned, used and managed on an egalitarian basis (sometimes referred to as the 'commons' of customary tenure). Frequently, rights are 'nested' – for example, where individual or family farmlands are held within wider communal territories. Lands and natural resources also have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems”.

In most contexts, the study found that states' legislations and interests with regard to land rights favour individual private land tenure systems. This is a specific problem for most indigenous populations/communities, who continue to practise customary land ownership and, more specifically, communal land ownership. As a result, most indigenous peoples' rights to land are not safeguarded by their respective governments. This next section of the report will suggest why it may be the case that indigenous populations/communities' rights to land are not prioritised by independent governments in Africa.

This issue is absolutely central to understanding the land problems that indigenous populations/communities face, since – as will become evident – many of the laws that currently affect indigenous populations/communities can be traced directly back to colonial policies and attitudes to both the environment and indigenous populations/communities. To bring this issue centre-stage, it is worth presenting some of the themes that have helped to foster these conditions and which have caused such conflict between those holding such different ways of perceiving the natural resources of Africa.

And God said unto them,
Be fruitful, and multiply, and replenish the earth,
And subdue it: and have dominion
Over the fish of the sea, and over the fowl of the air,
And over every living thing that moveth upon the earth²⁴

In the West, historically through dominant aspects of Judaeo-Christian and Greek traditions, and further developed through the Enlightenment and Darwinism, Western thought has evolved an ideology which dictates that humans and nature are (or have

24 Genesis 1: 28.

become) mutually exclusive categories, humans being civilised and nature being wild.²⁵ As a result 'nature' was "to be mastered, tamed, brought under 'man's' control, bent to his will, forced to reveal her secrets, compelled to satisfy his needs and minister to his happiness".²⁶ It was within this paradigm that eighteenth-century writers such as Adam Smith theorised the development of mankind out of nature and into modernity. For Smith, human economic activity evolved through a series of four stages, commencing with hunting and gathering, which he described as "the lowest and rudest state of society".²⁷ Economic activity was seen to progress through pastoralism and settled agriculture, culminating in manufacturing and commerce.²⁸ Prior to this, John Locke had famously recounted his theories of property in *Two Treatises of Government*.²⁹ It is here that Locke justifies the private ownership of land and goods through the application of labour:

Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.³⁰

Here Locke's theory of property ownership can be seen to rely on a distinction between land in a 'state of Nature' and domesticated land which has been adapted by the labours of 'men'. As Argyrou writes, "Mastery of nature came to be seen as the unmistakable mark of civilisation, the core characteristic not of European 'man' but of 'man' as such. To paraphrase Marx ... 'man' makes himself only insofar as he remakes the world around him. The more he changes the world around him, the more he becomes his true self".³¹

Crucially, as will be elaborated below, Locke's theories deny indigenous populations/communities their rights of ownership, individually or collectively, of their ancestral lands.

25 M. Colchester (1994) *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*, United Nations Research Institute for Social Development Discussion Paper 55; K. Thomas (1983) *Man and the natural world: changing attitudes in England 1500-1800*, London, Allen Lane, p. 17-50.

26 V. Argyrou (2005) *The logic of environmentalism: Anthropology, Ecology and Postcoloniality*, Berghahn Books, Oxford and New York, p vii.

27 A. Smith (1776) *An Inquiry into the Nature And Causes of the Wealth of Nations*, Book V, Chapter 1, Part 1. <http://www.adamsmith.org/smith/won/won-index.html> (accessed 14 January 2007).

28 *Ibid.*; see also M. Cowen and R. Shenton (1995) 'The invention of development', in J. S. Crush (ed.) *Power of development*, Routledge, London; A. Barnard (2004) 'Hunting-and-Gathering Society: an Eighteenth-Century Scottish Invention', in A. Barnard (ed.) *Hunter-gatherers in history, archaeology and anthropology*, Berg, Oxford.

29 J. Locke (1823) *The works of John Locke*, Thomas Tegg, London.

30 *Ibid.*, p. 116.

31 V. Argyrou (2005), p. 5.

They legitimise the appropriation of these lands by colonial forces, a process of exploitation that continues today in the denial of indigenous populations/communities' rights to the areas that were formerly their homes. Specifically, Locke writes that the failure to apply one's labour denies individuals or groups the ability to call a good or piece of land their own: "If either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other".³²

As Buchan and Heath write, "Land use other than settled agriculture was declared 'waste', rather than industrious and rational use, and incapable of forming the basis of property rights. This Eurocentric framework establishes Indigenous social forms as inferior and reduces their distinctive features to a derisory comparison with European social forms".³³ It is this Eurocentric framework, informed by Adam Smith's notion of economic development that justified the following remarks made by a Ugandan State Minister in 2005:

Constantly people are in competition for natural resources, the state must then harmonise the groups so that all of them survive...the Batwa and Bambutu [hunter-gatherers] are common to the Great Lakes and these people represent the original communities and represent the simplest form of social organisation. How do you protect these people? Then you have the Karamojong [pastoralists] who are a bit advanced who have established some leadership around a warlord who leads raids on the Dinka and the Turkana. Their understandings on rights to natural resources are different to the Batwa. Then more advanced than that are the Baganda [agriculturalists] who have central authority [a King]. Understanding rights to natural resources are dependent on the social development of the groups. The Baganda believe the land belongs to the king, the Karamojong do not have one leader. Our thinking's are different so that is why we are here to discuss these ideas.³⁴

In this speech, given at a communal land rights conference, we see reproduced the same justifications used by Locke. As a result, hunter-gatherers are assumed to have no rights to their land because of the form of their political and ecological relationships.

This concept of ownership through the application of labour was joined by a second theory, derived from nineteenth-century evolutionary anthropology, which suggested that

indigenous peoples were seen to be extremely primitive insofar as they apparently did not have institutions or concepts related to sovereignty or jurisdiction. They could not, therefore, legally occupy their own lands. Since it could be presumed that the lands were 'vacant' from a legal point of view, the Crown could legitimately acquire sovereignty and jurisdiction merely through placing authorized colonists on the lands.³⁵

32 J. Locke (1823), p. 121.

33 B. Buchan and. M Heath (2006) 'Savagery and Civilization: From Terra Nullius to the "Tide of History"', in *Ethnicities*, vol. 6, no. 1, p. 8.

34 Personal notes.

35 M. Asch (2005) 'Levi-Strauss and the Political: The Elementary Structures of Kinship and the Resolution of Relations between Indigenous Peoples and Settler States', in *Journal of the Royal Anthropological Institute*, vol. 11, no. 3, p. 431.

When these two theories were used together, they enabled colonial forces to deny the customary land rights of indigenous populations/communities formalised through the legal concept of *terra nullius* in Australia and Canada, and *vacant et sans maîtres* (which literally means empty (land) and without masters) in French Central Africa.³⁶ Colonial powers also negotiated treaties of cession with some societies instead of employing the *terra nullius* doctrine. However, these negotiated treaties were made only with societies seen to have the social institutions that the colonials believed were necessary to hold rights to the land in the first place. As a result, hierarchical societies like kingdoms were often engaged in negotiations, whereas hunters and gatherers and pastoralist societies were not negotiated with because colonial powers perceived their social structures as being unfit to hold rights to any property which they might wish to negotiate over. The use of these justifications for the appropriation of lands has not ended with colonialism but has been continued to the present day, often by former colonial subjects.

The concept of *terra nullius* has continued relevant to indigenous populations in Africa, as their livelihood strategies have not been recognised as endowing rights to the lands. This has been represented most vividly in the denial of indigenous populations/communities' self-determination and control of their territories, and also in the fact that free, prior and informed consent is not sought from them in relation to developments carried out on their lands. In addition, there has been widespread dislocation of indigenous populations/communities from their lands, partly because they have not been seen to have applied any transformative labour to the lands, and so have been stripped of their property rights to it. In brief, the majority of land laws in Africa have been made by those in colonial and post-independence power without consideration for the rights of indigenous populations/communities. As a result, the benefits have fallen to those with power in the state, while indigenous populations/communities have lost out almost entirely.

Indigenous peoples' permanent sovereignty over natural resources

One key issue that is an essential precondition to the realisation of indigenous populations/communities' right to self-determination is permanent sovereignty over natural resources. In reports from 2001³⁷ and 2004,³⁸ UN Special Rapporteur Erica-Irene A. Daes pays specific attention to indigenous populations/communities and their rights to their lands and livelihoods. According to Daes, "Peoples and nations must have the authority to manage and control their natural resources and in doing so to enjoy the

36 J. Nelson (2001) 'Sub-Saharan Africa', in M Colchester (ed.) *A survey of Indigenous Land Tenure, Forest Peoples Programme, Moreton-in-Marsh*, pp. 56, 59.

37 UNCHR (2001), *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, 1E/CN.4/Sub.2/2001/21.

38 UNCHR (2004), *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Mrs. Erica-Irene A. Daes*, E/CN.4/Sub.2/2004/30.

benefits of their development and conservation".³⁹ Daes suggests that this understanding of permanent sovereignty not only applies to sovereign states but that indigenous populations can equally be regarded as sovereign in the eyes of the law. This acknowledgement of indigenous peoples' rights to own and manage their lands, regardless of state claims to control the same lands, is further bolstered by the clear fact that, "the natural resources originally belonged to the indigenous populations/communities concerned and were not, in most situations, freely and fairly given up".⁴⁰

If we accept, as does Daes, that indigenous populations/communities have never relinquished their rights to their natural resources, we also have to acknowledge that these rights must include both surface and sub-surface rights, a view shared by the Constitutional Court of South Africa whose decision in *Alexkor Limited and the Government of South Africa v. The Richtersveld Community and Others* ruled that ownership of the sub-surface resources was vested in the indigenous community not only because such ownership was established by the indigenous law of the community but also because the resources could not have belonged to anyone else, if they did not belong to the indigenous community.⁴¹

However, governments argue that there are limitations to the enjoyment of these rights in issues that are pursuant to a valid public purpose, for example. However, in this case,

In accordance with decision of the Inter-American Court of Human Rights in *Saramaka People v. Suriname*, limitations on indigenous peoples' rights to their resources are permissible only where the state:

- a. Ensures the effective participation of members of the indigenous peoples, in conformity with their customs and traditions, regarding any development, investment, exploration or extractive plan;
- b. Guarantees that the indigenous peoples will receive reasonable benefit from any such plan within their territory;
- c. Ensures that no concession will be issued within indigenous peoples' territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.⁴²

Importantly, the United Nations Special Rapporteur on the Rights of Indigenous Peoples questions whether such a situation can even apply in the case of extractive industries:

...a threshold question in such cases is whether the limitation is pursuant to a valid public purpose. The Special Rapporteur cautions that such a valid public purpose is not

³⁹ Ibid, p. 5.

⁴⁰ Ibid, p. 11.

⁴¹ Ibid, p. 14.

⁴² UNHRC (2012), *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, A/HRC/21/55, p.21-22

found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain. It should be recalled that under various sources of international law, indigenous peoples have property, cultural and other rights in relation to their traditional territories, even if those rights are not held under a title deed or other form of official recognition. Limitations of all those rights of indigenous peoples must, at a minimum, be backed by a valid public purpose within a human rights framework, just as with limitations on rights formally recognized by the State.⁴³

The *Ogoni* decision of the ACHPR suggests that even if it can be argued that a sovereign state has the right to deprive an indigenous population of their lands for the greater good, states can only exercise those powers and rights in a manner that protects and respects the human rights of the populations/communities in question.⁴⁴ But as Daes then rightly suggests, and given that indigenous ownership of their natural resources “is associated with the most important and fundamental of human rights: the rights to life, food, and shelter, the right to self-determination, and the right to exist as a people”, there are no circumstances that would enable a state to deprive an indigenous population of their resources without grossly violating their enjoyment of their fundamental human rights. If this is correct then state appropriation of indigenous lands can never have a legal basis in international law.

C. Beyond Extractive Industries?

In *Pitfalls and Pipelines*, extractive industries are defined as those “concerned with the physical extraction of non-renewable raw materials from the earth, via mining, quarrying, dredging or drilling. Logging, large-scale hydro and monoculture are sometimes included in the definition, but in general are not because they [sic] deal with resources that can regenerate”.⁴⁵ This study does not want to disagree with this statement. It does however suggest that restricting the scope of the study only to these business enterprises does deny comparisons with similar other enterprises that are potentially useful and limits an opportunity to see extractive industries, and their relationship to indigenous populations/communities and their lands, as part of a much bigger process of exploitation and aggression that is violating the rights of indigenous populations in Africa and beyond on an increasing level.

As a result of the above, the study would like to suggest two spheres in which a much broader definition can be useful. Firstly, as will be seen in the case of Kenya,

43 UNHRC (2013), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, A/HRC/24/41, p. 11.

44 UNCHR (2004), *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Mrs. Erica-Irene A. Daes*, E/CN.4/Sub.2/2004/30, p. 16, see also M Colchester & E Caruso 2005 *Extracting Promises*, 2nd Edition, FPP and Tebtebba, Philippines, p. 23.

45 Whitmore (ed) (2012), p. 6.

threats to indigenous populations/communities' lands are not necessarily manifest in what might better be described as upstream extractive industries (see Box 4). Instead the threat comes as a result of downstream extractive industries, like support services and infrastructure developments, which are necessary to support the aspirations of upstream extractive industries. Specifically, in the Kenya case, the study looked at the impacts of a transport corridor consisting of a proposed eight lane super-highway, running in tandem with a rail road and an oil pipeline starting from as far away as South Sudan and terminating in a proposed 32-berth deep sea port and oil refinery in Lamu County, Kenya.

Box 4: Expanded Extractive Industry Glossary⁴⁶

Upstream

The exploration and production phases of the oil and gas industry

Downstream

The activities in the oil and gas industry taking place after production. E.g. transportation, refining, and marketing.

Value Chain

Extractive industries value chain: the steps from the extraction of natural resources, to their processing and sale, all the way through to the ultimate use of the revenues.

What all of this infrastructure development means is that while many of these communities may have no direct engagement with upstream extractive industries in their immediate locations, and despite some upstream sites being located thousands of kilometres away, they are nonetheless experiencing a process of often violent land appropriation and human rights violations. As a result, any study into the impacts of extractive industries on indigenous populations/communities has to cast its net far and wide and consider the inclusion of not just the industries themselves but the entire extractive industry value chain.

In addition, any study needs to go beyond the confines of the extractive industry value chain to acknowledge the infrastructure that services the extractive industry value chain. In the case of Lamu this includes but is not limited to a suite of five star hotels,

46 EITI (2013), *The EITI Glossary*, <http://eiti.org/glossary>, [accessed on 24 January 2014]

a coal power station, several golf courses, and all the support services a development of this size will need.

Secondly, as is the case most noticeably in Cameroon, restricting the scope of investigation to only extractive industries as defined by *Pitfalls and Pipelines* above denies the very real similarities experienced by communities suffering as a result of other natural resources exploitation industries like commercial logging, palm oil production or hydropower projects. Indeed, other so-called sustainable 'Green Technologies' like wind and geothermal power can have equally damaging effects on indigenous populations, as is the case in Kenya where indigenous populations have suffered forced resettlement and violation of their rights.⁴⁷ Acceptance of these wider enterprises and a discussion of how they can be aligned with extractive industries brings this study to the heart of indigenous populations/communities' issues. In almost all cases of natural resource exploitation, the following are present:

- Diverging values and aspirations for land management are in conflict.
- Indigenous populations/communities' aspirations are for sustainable management.
- External aspirations are typically but not universally for extraction of resources.
- Engagements are with market driven enterprises, often with state backing.
- Developments of these enterprises are being driven by external demands for resources and energy.
- Indigenous populations/communities' rights to self-determination and rights to ownership of lands and territories and the rights to freely determine their economic and social development are not being recognised.
- Indigenous populations/communities' lands are being appropriated, often violently, without their free, prior and informed consent.
- Additional violations of collective social, cultural, environmental and economic rights are being experienced.⁴⁸

Whether it be the wave of indigenous lands appropriated by governments during the creation of national parks in the 1980s and 1990s or the recent wave of lands appropriated to make way for oil extraction, what is common is that the values and interests of indigenous populations, who happen to be the legal owners of such lands, are entirely silenced, to be replaced by an entirely different set of values and interests. Indeed, this study focuses on these competing interests for indigenous lands, regardless of

47 See for example the Olkaria geothermal developments on Masai land and wind power projects on Turkana lands.

48 See also Doyle & Gilbert (2010) Indigenous Peoples and Globalization: From 'Development Aggression' to 'Self-determined Development', *European Yearbook of Minority Issues*, Vol7, 2008/9, p. 225.

their specific outputs, and investigates the systems that seemingly legitimise the illegal appropriation of lands and the impoverishment of entire populations of people.

As was noted in one workshop on indigenous communities:

Of particular concern are the violations of human rights faced by indigenous peoples, especially as a result of mega projects, including, mining, oil, gas and timber extraction and other extractive industries, monoculture plantations and dams and their impact, including environmental damage on their traditional lands, territories and resources, their subsistence, traditional knowledge and livelihoods, often resulting in conflict and forced displacement, further discrimination and marginalization, increased poverty and decline in health status and an overall negative impact on their well-being.⁴⁹

A view shared by the Special Rapporteur on the rights of indigenous peoples (SRIP):

...mining, forestry, oil and natural gas extraction and hydroelectric projects have affected the lives of indigenous peoples...raising concern about the long-term effects of a certain pattern of development that entails major violations of the collective cultural, social, environmental and economic rights of indigenous peoples within the framework of the globalized market economy.⁵⁰

The African Commission's WGEI is mandated, among other things, to carry out research on the specific issues affecting the right of all peoples to freely dispose of their wealth. Given this interpretation, it is valid to suggest that beyond the oil, gas and mineral enterprises that are the primary focus of this study it may be useful to include other categories of private sector investment that exploit natural resources in opposition to indigenous populations' visions and plans for their lands.

This study is concerned with, but not limited to the following forms of natural resource exploitation and secondary services that support them:

- Oil and gas,
- Mining,
- Logging,
- Palm oil production,
- Dams and other hydropower schemes,
- Agro-industry (including floriculture, tea, coffee, cotton and sugar plantations),
- Biofuels.

Arguments could be made to widen this definition even further to include the following enterprises, which have other goals and objectives but have nonetheless been involved in human rights violations and loss of lands:

49 UNPFII (2007) *UN Permanent Forum on Indigenous Issues International Workshop on Perspectives of Relationships between Indigenous Peoples and Industrial Companies*, New York, p. 6.

50 UNHRC (2011), *Extractive industries operating within or near indigenous territories*, A/HRC/18/35, p. 8.

- Commercial hunting,
- Biodiversity conservation,⁵¹
- Tourism,
- Cattle ranching,
- 'Green technologies' like wind and geothermal power,
- REDD+ and other carbon credit schemes.

It is, finally, important to acknowledge that despite the damaging effects of these industries on indigenous populations/communities' ownership and management of their lands and livelihoods, such damage is not the only outcome of their interaction with indigenous populations/communities. This report would go further and suggest that, in the event that these industries are conducted in a participatory manner and in full respect for indigenous populations/communities' rights to their lands, the outcomes can be beneficial for both the indigenous populations and the wider nations they are part of. ○

51 See for example J. Fairhead, M. Leach & I. Scoones (2012) *Green Grabbing: a new appropriation of nature?* The Journal of Peasant Studies, Vol. 39, No. 2, April 2012, p. 237–261.

III Mechanisms and safeguards

It is clear that, as one former UN Special Rapporteur has reported:

The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands, territories and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from proceeding with their own forms of development, consistent with their own values, perspectives and interests.

Much large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development.⁵²

In light of this, various mechanisms have been put in place to better regulate extractive industries and governments' engagements with indigenous populations/communities. Governments and extractive industries have in turn developed their own internal mechanisms to better safeguard the human rights of local communities. This section of the report will detail some of these key mechanisms that seek to protect the rights of indigenous populations/communities in relation to extractive industries.

However, before the report moves on, a crucial caveat must be made. These mechanisms and standards, and their successful implementation, are dependent on:

...clear recognition and protection of indigenous peoples' rights, particularly to lands, territories and resources traditionally owned or otherwise occupied and used. Without full recognition of indigenous peoples' territorial rights, FPIC will not fully provide the protection it is designed to provide. In this sense, it is important to note that under international law indigenous peoples' territorial rights arise from and are grounded in indigenous custom and practice and exist independently of formal recognition by the states.⁵³

As a main concern, prior to engagement with extractive industries, indigenous populations/communities and their supporters must first have their lands and territories pro-

⁵² UNCHR (2001), *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, 1E/CN.4/Sub.2/2001/21, p. 21-22.

⁵³ *Ibid.*, p. 57.

tected by the state. This is often easier said than done when it is the state itself that is supporting extractive industries on indigenous lands.

Before the report begins to look into the mechanisms and standards developed in the last ten years it is necessary to discuss and clarify the duties and responsibilities of those involved in the extractive industries sector, be they the state, private industry, indigenous communities or civil society.

A. Protect, Respect and Remedy

In 2005, with increasing human rights abuses in the extractive industry sector and a widening gulf in understanding between all parties, the United Nations (UN) decided to invest its resources in understanding the business and human rights predicament in detail. A core component of this review was the appointment of Harvard Professor John Ruggie as a Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises. As part of his research, Ruggie conducted consultations on five continents, undertook more than a dozen research projects and produced more than 1,000 pages of text.⁵⁴ At the end of this period, in 2008 Ruggie produced the “Protect, Respect and Remedy: a framework for business and human rights” report which is also known as “Ruggie Framework” and later in 2011 the Guiding Principles on Business and Human Rights, which offers a practical commentary on his original framework.⁵⁵ When taken together, this work has produced a robust and compelling framework for structuring the relationships between extractive industries, governments and the human rights of local communities, including indigenous populations.

As part of his research, Ruggie received evidence of 320 different cases of human rights abuses between February 2005 and December 2007.⁵⁶ Of those 320 cases, approximately 28% involved extractive industries, 22% were in Africa and 59% of cases involved a direct impact on local communities.⁵⁷ Crucially for our own study, Ruggie found that in his sample:

Key issues raised in relation to local indigenous communities are failure to seek informed consent, forced displacement, killings and violence, and environmental harms. These issues result in a range of impacts on the human rights of indigenous peoples,

54 UNHRC (2008a), *Protect, respect, and remedy: a framework for business and human rights* A/HRC/8/5, p. 3.

55 See UNHRC (2011a), *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* A/HRC/17/31.

56 UNHRC (2008b), *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse* A/HRC/8/5/Add.2, p. 2.

57 UNHRC (2008b), p. 9-10, 23.

including rights to life, health, food, education, self-determination, privacy, freedom from torture, freedom of movement, minority rights to culture, and freedom of information.⁵⁸

Importantly, he found that the business and human rights debate at the time lacked an authoritative focal point and that this allowed some states as well as companies to fly below the radar. In response to this, the Ruggie Framework developed “three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies”.⁵⁹

Box 5: Ruggie Framework Guiding Principles⁶⁰

These Guiding Principles are grounded in the recognition of:

- States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the chal-

58 UNHRC (2008b), p. 25.

59 UNHRC (2008a), p. 4.

60 UNHRC (2011a), p. 6.

allenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

Vitaly, the Ruggie Framework unequivocally recognises that:

States have the *duty* under international human rights law to *protect* everyone within their territory and/or jurisdiction from human rights abuses committed by business enterprises. This duty means that States must have effective laws and regulations in place to prevent and address business-related human rights abuses and ensure access to effective remedy for those whose rights have been abused.⁶¹

Equally, the framework recognises that:

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.⁶²

Critically this responsibility of business enterprises to respect the fundamental human rights of indigenous peoples in its areas of operation applies to all businesses regardless of the size. This is important because as one report notes '[o]ne emerging trend in the context of resource extraction on indigenous lands and territories is the application for licenses and permits by small-scale enterprises that are then sold to large-scale enterprises prior to or during development'.⁶³

Finally, the framework recognises:

the fundamental right of individuals and communities to access effective remedy when their rights have been adversely impacted by business activities. When a business enterprise abuses human rights, States must ensure that the people affected can access an effective remedy through the court system or other legitimate non-judicial process.⁶⁴

With the Ruggie Framework in place, the UN created the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to

61 UNWGBHR, *The UN Guiding Principles on Business and Human Rights: An introduction*, UN, p. 2.

62 UNHRC 2011a, p. 13.

63 UNHRC (2012), *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, A/HRC/21/55, p. 15.

64 UNWGBHR, p. 2.

oversee and support the implementation of the framework. In line with the Working Groups mandate to give special attention to persons living in vulnerable situations, it published a report directly assessing the value of the framework for indigenous populations.⁶⁵ What is key to acknowledge in the report is the authority and weight given to free, prior and informed consent in guiding the relationship between state, private companies and indigenous populations:

Free, prior and informed consent (FPIC) is a fundamental element of indigenous peoples' rights... States have an obligation to consult and cooperate in good faith in order to obtain FPIC before the adoption of legislation or administrative policies that affect indigenous peoples and the undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources.⁶⁶

Moving forward, it will be important for the ACHPR to find ways in which it can work with the Working Group to highlight both rights violations as a result of business enterprises but also ways in which good practices have been fostered and implemented.

B. Free, Prior, and Informed Consent

Free, prior and informed consent (FPIC) is described by the United Nations Permanent Forum on Indigenous Issues (UNPFII) as “a process undertaken free of coercion or manipulation, involving self-selected decision-making processes undertaken with sufficient time for effective choices to be understood and made, with the relevant information provided and in an atmosphere of good faith and trust”.⁶⁷ As a process it should not be viewed as a one-off yes or no but a continual dialogue and negotiation between indigenous populations/communities and external actors engaged with activities on their lands.

Crucially, FPIC should be understood not as a standalone right but as “an expression of a wider set of human rights protections that secure indigenous populations/communities' rights to control their lives, livelihoods, lands and other rights and freedoms”.⁶⁸ As the term indigenous populations/communities can be used to describe a specific group of rights applying to populations/communities in very similar situations, FPIC can also be seen as a way in which to group a specific set of rights for peoples

65 UNWGBHR 2013, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/68/279, p. 6.

66 UNWGBHR 2013, p. 9-10.

67 Quoted in H. Tugendhat et al. 2013 *Business, Human Rights and Indigenous Peoples: The right to free, prior and informed consent*, FPP, Moreton-in-Marsh, England.

68 M. Colchester 2013 *Governance of Tenure Technical Guide 3: Respecting free, prior and informed consent*, FAO, Rome, Italy, p. 4.

experiencing similar issues. As a result FPIC is “integral to the exercise of the right to self-determination by indigenous peoples and [is] an integral component of their rights to lands, territories and resources.”⁶⁹

It should also be clear that while FPIC is used to highlight a specific set of rights for indigenous populations/communities, it is clear that “non-indigenous, project-affected people have the right to consultation and negotiation in decision making processes in ways that are consistent with the principles underlying the right to FPIC.”⁷⁰

Box 6: Elements of free, prior and informed consent⁷¹

Free should imply no coercion, intimidation or manipulation;

Prior should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;

Informed should imply that information is provided that covers (at least) the following aspects:

- The nature, size, pace, reversibility and scope of any proposed project or activity;
- The reason/s or purpose of the project and/or activity;
- The duration of the above;
- The locality of areas that will be affected;
- A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
- Personnel likely to be involved in the execution of the proposed project (including indigenous populations/communities, private sector staff, research institutions, government employees and others);
- Procedures that the project may entail.

Consultation and participation are crucial components of a consent process.

69 United Nations Economic and Social Council, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, (17 February 2005) UN Doc E/C.19/2005/3, p. 10.

70 C. Hill et al (2010) *Guide to Free Prior and Informed Consent*, Oxfam, p. 4.

71 UNESCO (2005), p. 5.

Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous populations/communities should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous populations/communities have reasonably understood it.

At this stage, it may be worth discussing why FPIC should be considered by governments and extractive industries. In their report, written for a private sector audience, Buxton and Wilson suggest that:

Gaining and maintaining a 'social licence to operate' is becoming a necessary part of doing business for oil, gas and mining companies. Operating without the support and trust of the local communities can lead to violence, litigation, operational delays, project closure and both financial and human loss...Companies are being forced to engage with these issues in a more meaningful way as even the most remote communities are becoming more connected and more aware of their rights.⁷²

Later in their report, they suggest that some of the elements for making a business case for FPIC include: respecting the law, meeting third-party obligations, building trust with local communities, avoiding conflict, effective and efficient project management, optimising local content, getting social investment right, being the employer of choice, maintaining investment security and contributing to poverty reduction.⁷³

Such logic is counter to indigenous populations/communities' own justifications for FPIC and, as such, continued justifications for FPIC based on business models are extremely frustrating. Indeed, there should not be any need to justify FPIC practice any more than acknowledge the respect for an individual or people's fundamental human rights to lands and livelihoods. FPIC is therefore not a benefit which private companies or the state can choose to furnish indigenous communities with but is rather a fundamental right which should be enjoyed by all.

72 A. Buxton & E Wilson (2013) *FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects*, p. 10.

73 *Ibid.*, p. 18-20.

Box 7:**Elements of FPIC in International law and human rights mechanisms**

A) International Jurisprudence

- Inter-American Commission on Human Rights
- Philippines, Australia's Northern Territories, Venezuela Greenland, Canada and Bolivia
- United Nations Committee on Economic Social and Cultural Rights (CESCR)
- United Nations Committee on the Elimination of all forms of Racial Discrimination (CERD)

B) UN Declaration on the Rights of Indigenous Peoples.

FPIC is required in six of its articles with Article 32 specifically addressing FPIC in the context of the extractive sector. It states that:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

C) International Standards

- Akwe: Kon guidelines for the implementation of Article 8j of the Convention on Biological Diversity
- Andean Community
- Convention on Biological Diversity
- Convention to Combat Desertification
- European Commission
- European Council of Ministers
- Forest Stewardship Council
- International Labour Organization Convention 169,
- IUCN Vth World Parks Congress
- Organisation for Economic Cooperation and Development
- Organization of African Unity
- Oxfam Australia

- Roundtable on Sustainable Palm Oil
- Special Rapporteur on Indigenous People and their Relationship to Land
- Special Rapporteur on the rights of indigenous peoples
- The Human Rights Council

- The Inter-American Draft Declaration on Indigenous Peoples
- UN Centre for Transnational Corporations
- UN Commission on Human Rights
- UN Development Programme
- UN Expert Mechanism on the Rights of Indigenous Peoples
- UN Permanent Forum on Indigenous Issues
- UN Sub-Commission on the Promotion and Protection of Human Rights
- UN Working Group on Indigenous Populations
- World Commission on Dams
- World Wildlife Fund

D) Financial Institutions

- Asian Development Bank
- European Bank for Reconstruction and Development
- Inter-American Development Bank
- International Finance Corporation
- The World Bank Group Safeguard Policies and the Equator Principles
- World Bank Extractive Industries Review

E) Private Sector

- Anglo American
- Association and the International Association of Oil & Gas Producers
- De Beers
- International Council of Mining and Metals (ICMM)
- International Petroleum Industry Environmental Conservation Association
- Rio Tinto
- Talisman Energy

Even in the cases where FPIC is accepted by government or private companies there are nonetheless a number of issues which have prevented full implementation of FPIC across the extractive industries sector. When looked at in more detail, these issues show a deep misunderstanding of core FPIC principles.

In one study of attitudes towards FPIC, indigenous populations/communities offered the following challenges they faced in enjoying FPIC:

- Lack of access to adequate and correct information.
- Difficulties in mustering financial and logistical requirements.
- Strength of traditional authorities to assert right to FPIC.
- Dominance of formal law over customary law.
- Determining best strategies to use in pressing for FPIC.
- Lack of recognition by states of indigenous populations/communities' sovereign rights.
- Existing state laws benefit developers and not local communities.⁷⁴

These concerns are very telling of the marginalised political and social position most indigenous populations/communities find themselves in. These stumbling blocks are key to the success of an FPIC process and are yet at the heart of the problem FPIC is necessarily trying to overcome. Indeed if indigenous populations/communities were in positions of political and social control of their lands and livelihoods they would have the ability to engage with extractive industries on their own terms and would have no need for FPIC processes.

In contrast to indigenous populations/communities concerns, in the same study, private sector companies offered the following challenges, among others:

- What does 'consent' mean?
- Consent of whom?
- Who is indigenous?
- When and how often is consent required?⁷⁵

One way to deal with these concerns is to acknowledge that the entire process of FPIC entails the acknowledgement of fundamental human rights within a specific framework for the express reason of addressing social and political marginalisation from the extractive industry sector. As a result it is not the responsibility of extractive industries to determine what consent means in a given context, who should be providing that consent, who are indigenous populations/communities, or how often their consent should be considered. Instead these are all issues which indigenous populations/communities, in partnership with their traditional and representative authorities, have a right to determine. A failure to see this highlights an unfortunate misunderstanding about the very premise of the FPIC process. The UN Working Group on Business and Human Rights advises that:

⁷⁴ Doyle, C. & Carino, J. (2013), p. 24-5.

⁷⁵ *Ibid.*, p. 43-5.

States (and business enterprises) are advised to seek an open and inclusive dialogue... When such an approach is taken, indigenous peoples will themselves identify their legitimate representatives. Likewise, the indigenous peoples affected should determine autonomously how they define and establish consent... There may be cases where the legitimacy of community representatives is disputed or where communities do not reach informed consent according to their own decision-making modes. In such cases, additional time and effort from all sides are required and responses should be guided by the principle of FPIC which flows from the rights of indigenous peoples and which cannot... be replaced by seemingly easier ways to obtain consent.⁷⁶

Another major issue that appears to be largely misunderstood by extractive industries is that of determining the point at which indigenous populations/communities' rights come into play in their operations and, similarly, when FPIC should be initiated. Those extractive industries that study managed to talk to suggested that it would be too difficult to find the resources and expertise to carry out FPIC during the exploratory stage of operations. They suggested that, given the possibility that only one in a hundred exploration licenses may be converted into extraction licenses, it would simply cost too much money to carry out FPIC in all cases. While this is an understandable constraint of the business model, it should also be well understood by exploration companies that human rights do not apply only when it is profitable for them to do so. On the other side of the issue, many of the indigenous communities interviewed felt that their rights had been violated by not being included in the exploratory stage of the enterprises and that, by the time they move on to extraction, the communities felt already disempowered and removed from any real position of value in decision-making.

The UN Global Compact, a platform designed to support global businesses to embrace universal principles relating to human rights, labour, environment and anti-corruption, has released a business guide to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which provides a much more detailed analysis of the business implications of indigenous populations/communities' rights as determined in the UNDRIP. It is very clear in reinforcing that this is an indigenous rights issue and that indigenous populations/communities' rights should be observed at all times (see Box 8).

Box 8: FPIC in Exploration Operations⁷⁷

- Agree to a process for FPIC relating to exploration activities with the indigenous communities prior to the exploration phase;

⁷⁶ UNWGBHR 2013, p. 11.

⁷⁷ United Nation Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples*, (December 2013), p. 29.

- In seeking consent for exploration, ensure that indigenous populations/communities are informed about what may be proposed if exploration results are positive, and that any new indigenous employment or other benefits may end if exploration results are negative;
- Recognize that even though FPIC may have been obtained for exploration, the business will again be required to obtain FPIC before it starts project development or production;
- As exploration continues, ensure that indigenous populations/communities are kept up-to-date with all relevant information. The more up-to-date the business has kept the indigenous communities throughout the exploration process, the more efficient and effective the process of obtaining further FPIC is likely to be; and
- Ensure that the business is familiar with the potentially affected indigenous populations/communities' decision-making processes, and seek to understand the likely time period that they will require to provide FPIC. The time and information requirement for FPIC processes are a function of many variables. For example, communities that have never been exposed to mining have very different information requirements than those that already have mining in their territories. In the case of the former, indigenous populations/communities will need to be made aware of the potential for exploitation to follow exploration and what it may entail. The business may need to delay lodging an application if it would start a legislative time frame that was too short to allow for the relevant FPIC and decision-making processes.

There are now a number of technical guides which offer suggested frameworks for successfully incorporating FPIC into project design and which deal with the issues raised above in more detail.⁷⁸

78 See Nelson, J & Lomax, T (2013) "They want to take our bush" *An independent assessment of processes to obtain the Free, Prior and Informed Consent (FPIC) from communities in the Mundemba and Nguti Subdivisions in South West Cameroon, for palm oil developments overlapping their customary territories, the case of Herakles/SGSOC, Moreton-in-Marsh, England and Hill, C, Lillywhite, S, & Simon, M (2010) Guide to Free Prior and Informed Consent, Oxfam, Victoria, Australia. Buxton, A & Wilson, E (2013) FPIC and the Extractive Industries: A guide to applying the spirit of free, prior and informed consent in industrial projects. IIED, London. Colchester, M (2013) Governance of Tenure Technical Guide 3: Respecting free, prior and informed consent, FAO, Rome, Italy*

Box 9: Cautions on the use of FPIC⁷⁹

The common focus on consultation and free, prior and informed consent as a point of departure for discussing the issue of extractive industries in relation to indigenous populations/communities is blurring understanding of the relevant human rights framework by which to understand the issue. A better approach is first to consider the primary substantive rights of indigenous populations/communities that may be implicated in natural resource extraction. These include, in particular, rights to property, culture, religion, health, physical well-being and to set and pursue their own priorities for development, as part of their fundamental right to self-determination.

In this connection, consultation and free, prior and informed consent are best conceptualized as safeguards against measures that may affect indigenous populations/communities' rights. Other such safeguards include but are not limited to carrying out prior impact assessments, the establishment of mitigation measures, benefit-sharing and compensation for any impacts, in accordance with international standards.

C. Declaration on the Rights of Indigenous Peoples

More than 20 years in the making, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) forms a major foundation for indigenous populations/communities' enjoyment of their human rights. For the first time, indigenous rights are identified and listed in one key document that has received almost universal recognition and support from UN member states.⁸⁰ Despite this broad support, the UNDRIP has been poorly implemented by states and business enterprises and disagreement exists on the legal effect of the document. Those who would like to limit the force of the Declaration suggest it should be viewed as an inspirational document and, as such, has no binding effect. Others, keen to see the Declaration achieve the potential that many indigenous populations/communities would wish it to achieve, alternatively highlight that many of the articles of the UNDRIP find their origin in international laws which are themselves legally binding on states. In addition, some argue that the UNDRIP's almost universal support allows it to be considered as customary international law. For the purpose of this study, the UNDRIP will be considered a document of customary international law

79 UNHRC (2012), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya* (6 July 2012) A/HRC/21/47, 9, p. 19.

80 UN General Assembly, (2012), *Resolution adopted by the General Assembly on 19 December 2011: 66/142. Rights of indigenous people*, A/RES/66/142.

that carries potential legally binding effects for those states which are party to it. In addition, the study would argue that the moral and ethical effects of the Declaration are such that all states and business enterprises have a duty and responsibility to recognise and seek to protect the rights contained therein regardless of its legal status.

Box 10: UNDRIP articles of specific interest to extractive industries

Self-determination, self-governance and nationality	3, 4, 5, 6 and 23
Removal and relocation	10
Participation in decision-making	18 and 19
Development, political, economic and social activities	20 and 21
Land and natural resources – ownership, use, development, exploitation and conservation	26, 27, 28, 29 and 32

There is a need for practical support for states, indigenous populations/communities and business enterprises in terms of understanding how to integrate and implement the UNDRIP in extractive industries. In an attempt to do just that the United Nations Global Compact, “a leadership platform for the development, implementation, and disclosure of responsible corporate policies and practices”,⁸¹ has published a guide, “to elaborate on ways business can engage respectfully and positively with indigenous populations/communities within the context of the UN Declaration, while recognizing that indigenous populations/communities have a unique and important place in the global community.”⁸²

Box 11: A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples⁸³

All businesses should take the following fundamental actions, some of which may be required in conjunction with local and State governments to meet their responsibility to respect indigenous populations/communities’ rights:

1. Adopt and implement a formal policy (whether on a stand-alone basis or within a broader human rights policy) addressing indigenous populations/

81 UN Global Compact, (2013) *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples*, Geneva,

82 *Ibid.*, p. 2.

83 *Ibid.*, p. 11.

communities' rights and committing the business to respect indigenous populations/communities' rights.

2. Conduct human rights due diligence to assess actual or potential adverse impacts on indigenous populations/communities' rights, integrate findings and take action, track and communicate externally on performance.
3. Consult in good faith with indigenous populations/communities in relation to all matters that may affect them or their rights.
4. Commit to obtain (and maintain) the free, prior and informed consent of indigenous populations/communities for projects that affect their rights, in line with the spirit of the UN Declaration.
5. Establish or cooperate through legitimate processes to remediate any adverse impacts on indigenous populations/communities' rights.
6. Establish or cooperate with an effective and culturally appropriate grievance mechanism.

D. Special Rapporteur on the Rights of Indigenous Peoples

In 2011, after spending a large part of his first term in office focusing on extractive industries, the United Nations Special Rapporteur on the rights of indigenous peoples (SRIP), James Anaya, published his annual report and devoted much of the space to an analysis of the impacts of extractive industries on indigenous populations/communities.⁸⁴

As part of his analysis, and through the collection of responses to a questionnaire sent to indigenous populations/communities, governments and private enterprises, the SRIP identified the following issues:

- a. Environmental impact of extractive industries.
- b. Social and cultural effects.
- c. Lack of consultation and participation.
- d. Lack of clear regulatory frameworks and other institutional weakness.
- e. The question of tangible benefits.⁸⁵

In light of these issues and the indigenous experiences that accompanied each one, the SRIP came to the following conclusion:

⁸⁴ UNHRC (2011b), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, (11 July 2011) A/HRC/18/35.

⁸⁵ *Ibid.*, p. 9-14.

On the basis of the experience gained during the first term of his mandate, the Special Rapporteur has come to identify natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide. In its prevailing form, the model for advancing with natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres.⁸⁶

Further, the SRIP decided that in the remaining years of his mandate as Special Rapporteur he should focus solely on extractive industries and their effects on indigenous populations/communities. As a result, he has produced a number of useful documents in the recent years. As stated previously in this report, indigenous experience has been that corporate responsibility has often sought to do no more than domestic legislation has required it to do, despite the Ruggie Framework insisting that corporate responsibility exists independently of states' abilities and/or willingness to protect and promote indigenous rights. In line with this the SRIP found;

...numerous instances in which business enterprises engaged in extractive industries do not go further than compliance with domestic laws or regulations, regardless of the ineffectiveness of those laws and regulations for the protection of indigenous rights. Corporate attitudes that regard compliance with domestic laws or regulation as sufficient should give way to understanding that fulfilment of the responsibility to respect human rights often entails due diligence beyond compliance with domestic law.⁸⁷

However, a key part of his research confirmed the hope that extractive industries had the potential to legitimately operate on indigenous lands and territories if "specific measures of State protection and corporate respect for indigenous peoples' rights" were made.⁸⁸ Indeed in his latest report the SRIP has reinforced this belief but states that, in order for this to happen, there needs to be a fundamental rethinking of the existing model of natural resource exploitation, which is typically:

...one in which an outside company, with backing by the State, controls and profits from the extractive operation, with the affected indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to profits gained by the corporation.⁸⁹

86 Ibid, p. 18.

87 UNHRC (2012), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya A/HRC/21/47*, p. 15.

88 Ibid, p. 18.

89 UNHRC (2013), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, A/HRC/24/41*, p. 3.

Instead, the SRIP calls for a new model of natural resource exploitation whereby indigenous populations/communities establish and implement their own enterprises to extract and develop natural resources. Given the present dominance of non-indigenous actors in the extractive industries sector, it is conceivable that indigenous populations/communities “may benefit from partnerships with responsible, experienced and well-financed non-indigenous companies to develop and manage their own extractive enterprises”.⁹⁰

While many African governments have either shown a lack of interest or have been sluggish in protecting indigenous populations/communities’ rights, business enterprises, compelled by customer and shareholder criticisms of their actions and costly compensation actions and lost revenues, have developed a number of mechanisms designed to respect the rights of indigenous populations/communities.

E. African Union and Africa Commission

As evidenced in this report, although the role that extractive industries play in human rights violations on the continent cannot be understated, the African Union still views large-scale extractive industries as a tool for meeting the Millennium Development Goals (MDGs), eradicating poverty and achieving rapid and broad-based socio-economic development.⁹¹ In 2008, it developed the African Mining Vision (AMV) and a subsequent Action Plan in 2011 to use Africa’s mineral resources to meet these goals. And although the Action Plan does acknowledge that human rights have a role to play in achieving this vision,⁹² their importance is not valued nearly enough.

If the AMV is to fully embrace the need and value of underpinning its work in a human rights framework it need not look far to do so. Of interest to our discussion on extractive industries, the African Charter states in Article 20(1) that “all peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen”.⁹³

The Charter further states in Article 21(1) that “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”.⁹⁴ And the ACHPR has further noted that:

⁹⁰ Ibid, p. 20.

⁹¹ AU, AfDB, UNECA (2011) Building a sustainable future for Africa’s extractive industry: From vision to action - Action Plan For Implementing The AMV, Addis Ababa.

⁹² See programme Cluster 5, *ibid*.

⁹³ Organization of African Unity (1982), *African Charter on Human and Peoples’ Rights (“Banjul Charter”)*, OAU, Banjul.

⁹⁴ *Ibid*.

Similar provisions are contained in many other instruments adopted by the AU such as the African Convention on the Conservation of Nature and Natural Resources whose major objective is: “to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour” (preamble) and which is intended “to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge.”⁹⁵

And finally in Article 22(1) the African Charter states that: “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind”.⁹⁶

The ACHPR, in turn, in its role to promote and protect those rights contained in the African Charter, has been very clear on several issues relating to indigenous populations/communities and extractive industries. In particular, some commentators have suggested that the work of the ACHPR and its WGIP has constituted a ‘pragmatic revolution’ in the way in which indigenous rights are understood in Africa and globally.⁹⁷ Key to that pragmatic revolution, as discussed earlier, is the way in which the ACHPR chooses to apply the term ‘indigenous populations/communities’. As such it is worth repeating the features that the ACHPR associates with indigenous populations/communities:

- Their cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction.
- A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.
- They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society.
- They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalisation, both politically and socially.
- They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalisation violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development.⁹⁸

95 Quoted in ACHPR (2007) *Advisory Opinion of the African Commission on Human And Peoples’ Rights on The United Nations Declaration on the Rights of Indigenous Peoples*, ACHPR, Banjul, p. 9.

96 Organization of African Unity (1982).

97 Gilbert (2011) *Indigenous Peoples’ Human Rights In Africa: The Pragmatic Revolution Of The African Commission On Human And Peoples’ Rights*, International and Comparative Law Quarterly, vol. 60, January 2011 pp 268.

98 ACHPR (2003) *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, Ch 4, p. 89.

But arguably the most important advice emanating from the ACHPR is the decision made in the Endorois case. The Endorois are an indigenous community in Kenya who were evicted from the ancestral territories in 1973 to make way for a protected area. After years of legal action to regain access to their lands the Endorois eventually took their case to the ACHPR where a landmark ruling in 2010 made the following comments,

...neither paper title nor uninterrupted occupation were necessary to prove ownership for indigenous communities. It determined that 'possession' of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property. The Commission further added that, while traditional possession entitled indigenous people to demand official recognition and registration of property title, members of indigenous communities who had unwillingly left their traditional lands, or lost possession thereof, maintained property rights thereto, even though they lack legal title, unless the lands had been lawfully transferred to third parties in good faith.⁹⁹

In conclusion, the ruling made the following legal recommendations,

- Recognize rights of ownership to the Endorois and reconstitute Endorois ancestral land.
- Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.
- Pay adequate compensation to the community for all the loss suffered.
- Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- Grant registration to the Endorois Welfare Committee.
- Engage in dialogue with the Complainants for the effective implementation of these recommendations.¹⁰⁰

When taken together, the African Charter and the work of the ACHPR in promoting the contents of the Charter form a clear and decisive approach to a human rights framework for extractive industries and governments in their relationships with indigenous populations/communities.

F. Extractive Industry Standards

Extractive Industries Transparency Initiative (EITI)

In its own words, the Extractive Industries Transparency Initiative "is a global coalition of governments, companies and civil society working together to improve open-

⁹⁹ Abraham (2012) *Kenya at 50: unrealized rights of minorities and indigenous peoples*, MRG London, p. 10.

¹⁰⁰ Ibid.

ness and accountable management of revenues from natural resources”.¹⁰¹ Its board is composed of individuals representing member countries, extractive industries and civil society organisations. In practice its function is to provide a voluntary ‘standard’ which members states can seek to achieve to win full EITI recognition. EITI “focuses on financial transparency and does not include transparency with regard to the environmental, social, cultural and economic impacts of extractive industries on Indigenous Peoples”.¹⁰² As a result its focus is at the state level and not at the community level.

Despite gaining prominence, and while the transparency of the finances and profits of extractive industries are important, they miss a key step in the extractive industries debate. If the key question is how to better implement extractive industries, which EITI seeks to answer, then it is clear that the decision on the validity of extractive industries and whether or not extractive industries should be implemented in the first place has already been made and that the key first step has therefore already been taken.

This is not to say that this question should be asked by EITI, it may not be in their mandate, but it is a key question for many indigenous communities. It is a concern that states are able to achieve the EITI standard without regard to whether human rights violations are taking place or not in their countries. It is therefore this report’s recommendation that EITI seek to broaden its standards to include protection of the human rights of local and indigenous communities affected by extractive industries.

Crucially, however, and given that land rights, and therefore the legitimacy of extractive projects on indigenous lands, are key issues for this report, the lack of such a space within EITI leaves its mechanisms of questionable use to indigenous populations/communities and with regard to further inclusion in this report.

International Council on Mining & Metals (ICMM)

According to its website, the ICMM was “founded in 2001 to improve sustainable development performance in the mining and metals industry. Today, [they] bring together 21 mining and metals companies as well as 33 national and regional mining associations and global commodity associations to address core sustainable development challenges”.¹⁰³ Included in these members are the Chamber of Mines for Zambia, Ghana and South Africa as well as several mining giants working in Africa such as Anglo American, AngloGold Ashanti, BHP Billiton and Rio Tinto.

In the last few years, the ICMM has put a great deal of energy and resources into developing policies through which to integrate indigenous populations/communities’ issues into its members operations. These policies include a Good Practice Guide and

101 EITI (2013), *What is the EITI?*, <http://eiti.org/eiti>, [accessed on 23 January 2014].

102 UNPFII (2009), *Report of the international expert group meeting on extractive industries, Indigenous Peoples’ rights and corporate social responsibility*, E/C.19/2009/CRP.8, p. 6.

103 ICMM (2013) About Us, [accessed on 26 January 2013] <http://www.icmm.com/about-us/about-us>

Position Statement on Indigenous Peoples and Mining that clearly requires its members to:

- respect the rights, interests, special connections to lands and waters, and perspectives of Indigenous Peoples, where mining projects are to be located on lands traditionally owned by or under customary use of Indigenous populations/communities
- adopt and apply engagement and consultation processes that ensure the meaningful participation of indigenous communities in decision making, through a process that is consistent with their traditional decision-making processes and is based on good faith negotiation
- work to obtain the consent of Indigenous populations/communities where required by this position statement.¹⁰⁴

The ICMM's position on FPIC is ground-breaking in that it not only acknowledges indigenous populations/communities' rights to give or withhold consent for a project but also that even if a state does not recognise a community as being indigenous, ICMM members are nonetheless compelled to treat them as such:

In other situations, there may be no recognition of Indigeneity by states, or the term may have negative associations that discourage people from acknowledging indigenous identity. Irrespective of the local context, ICMM members reject any discrimination or disadvantage that may be related to culture, identity or vulnerability and will seek to apply the principles embodied in this position statement to groups that exhibit the commonly accepted characteristics of Indigenous populations/communities.¹⁰⁵

At the time of going to press, the ICMM was conducting a review of its Good Practice Guide on Indigenous Peoples and Mining and soliciting the views of indigenous populations. It is not yet clear what changes this review will make.

Anglo American

According to its website, Anglo American is one of the world's largest mining companies with operations on five continents and a portfolio of mining interests that includes iron ore and manganese, metallurgical coal and thermal coal; base metals and minerals – copper, nickel, niobium and phosphates; and precious metals and minerals including platinum and diamonds.¹⁰⁶ In Africa Anglo American operates in Angola, Zim-

104 ICMM (2013) *Indigenous Peoples and Mining*, London, England, p.

105 ICMM (2013) *Indigenous Peoples and Mining*, London, England, p. 4.

106 Anglo American (2013), *At a glance*, [accessed on 26 January 2013]
<http://www.angloamerican.com/about/ata glance.aspx>

babwe, South Africa, Namibia, Botswana and Mozambique. As a world leader in the mining sector, their practices carry a huge amount of influence and it is clear that they are attempting to set high standards, particularly with regard to communities affected by their operations.

In 2003, Anglo American developed and launched their Socio-Economic Assessment Toolbox (SEAT) as a cornerstone of their commitment to improving their operations' understanding of their socio-economic impacts, both positive and negative.¹⁰⁷ This SEAT was complemented in 2009 by a management system standard referred to as the Social Way, which seeks to outline their approach to community and social relationships.

Importantly, the Social Way makes the following statement:

Anglo American recognises and respects the special rights and status of indigenous peoples. Operations shall develop a formal plan for interactions with any communities of Indigenous People impacted or potentially impacted by their activities. Plans shall, as a minimum, meet the requirements set out in the International Finance Corporation's (IFC) Performance Standard Number 7 on Indigenous Peoples.¹⁰⁸

The SEAT accompanies this statement with a specific section relating to indigenous populations/communities and greater acknowledgement of their need "to recognise the special status and vulnerabilities of indigenous populations/communities and, at a minimum, recognise formal legal or other generally accepted protections".¹⁰⁹ Finally, the SEAT acknowledges that in some countries formal legal protections may not exist but that in such situations Anglo American operations should aim to follow the good practice contained in the SEAT unless doing so would break national laws.¹¹⁰

While it is important to acknowledge the Ruggie Framework's clear guidelines that business enterprises have a responsibility, independent of state action (or inaction as the case may be), Anglo American's SEAT is weak in that it only recommends that, where protection does not exist, its operations should aim for good practice unless doing so would break national laws. More positive guidelines would instead suggest that operations should not take place if human rights cannot be protected. Anglo's SEAT is filled with further ambiguity, which acts to provide the illusion of genuine care for indigenous issues but, in the end, prioritises its own objectives over the fundamental human rights of indigenous populations/communities.

A note must be made of the SEAT's acknowledgement of FPIC and, in particular, the following comment, which seems to suggest FPIC is not, as it has been internationally understood, a fundamental human right but rather a benefit recognised and/or

107 Anglo American (2012) *Socio-Economic Assessment Toolbox: Version 3 - An Overview*, London, p. 2

108 Anglo American (2009) *The Anglo Social Way*, London, England, p. 12.

109 Anglo American (2012), p. 133.

110 *Ibid.*, p. 134.

offered to indigenous populations/communities by states: "Anglo American does not have a policy that grants indigenous peoples Free, Prior Informed Consent, but it supports the notion where the relevant government authority has granted or recognised the rights of indigenous peoples".¹¹¹

Indigenous leaders have noted elsewhere that a human rights framework or "moral responsibility was found to be insufficient to motivate corporations to change their behaviour...Motivational factors ranged from reputation costs to actual costs associated with litigation, or the introduction of new regulations".¹¹² This seems to be the case with Anglo American, who suggest that failure to respect the rights and interests of indigenous populations/communities may have the following negative consequences:

- legal problems when developing projects;
- project delays, particularly when companies underestimate the time it can take for indigenous groups to negotiate and reach agreements;
- protests and disruptions at operations or conflict in surrounding communities;
- reputational damage to the company; and
- failure to benefit from the knowledge and services offered by indigenous communities.¹¹³

It is concerning that Anglo do not accept human rights violations as being worthy of inclusion as a negative consequence. The overriding sense is that while Anglo American must be commended for leading the way in recognising the need to provide for indigenous populations/communities within extractive industries' operating standards, it is not quite ready to situate this requirement within a human rights framework.

Rio Tinto

Rio Tinto is another global leader in the extractive industries sector, with operations in Africa in Guinea, Cameroon, Namibia, Zimbabwe, Madagascar, Mozambique, South Africa and Swaziland and interests in aluminium, copper, diamonds, gold, industrial minerals (borates, titanium dioxide and salt), iron ore, thermal and metallurgical coal and uranium.¹¹⁴ Rio Tinto provides a large amount of human rights guidance and opinions on issues such as FPIC and indigenous issues. Of importance are its human rights policy and community agreement guidance, both of which fall far below expected standards under international law.

¹¹¹ Ibid, p. 135.

¹¹² UNPFII (2009), *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, E/C.19/2009/CRP.8, p. 7.

¹¹³ Anglo American (2012), p. 134.

¹¹⁴ Rio Tinto (2013) *About Rio Tinto*, [accessed on 26 January 2013]
<http://www.riotinto.com/aboutus/about-rio-tinto-5004.aspx>

For example, Rio's human rights policy does well to specifically mention indigenous populations/communities but makes the observation that, "We respect the diversity of indigenous populations/communities, acknowledging the unique and important *interests* that they have in the land, waters and environment as well as their history, culture and traditional ways" (emphasis added).¹¹⁵ Elsewhere it suggests that it "acknowledges and respects Indigenous and local communities' *connections* to lands and waters" (emphasis added).¹¹⁶ It is extremely important to recognise the very powerful implication of Rio Tinto's expressing what international law concerns as fundamental human rights as mere *interests* and *connections*.

Rio Tinto makes specific mention of FPIC in its Community Agreement Guidance and, while it is fair to acknowledge the importance of the existence of such guidance, it is nonetheless discouraging to read that Rio's position is that it will "work in a *spirit* of reciprocity, transparency and recognition of rights" and "*strive* to achieve the Free, Prior, and Informed Consent (FPIC) of affected Indigenous communities" (emphasis added).¹¹⁷

As with Anglo American, the impression is that Rio Tinto is aware of the specific and vulnerable position of indigenous populations/communities and would like to support such communities through its operations but that it does not see indigenous issues from a human rights viewpoint and will only make submissions to indigenous issues when this is not in conflict with its own priorities.

As other authors have noted about the extractive industries sector more generally:

Despite the existing initiatives of corporate social responsibility, major challenges remain, notably on substantive policies, which fall short of meeting international human rights standards. Further, implementation and enforcement mechanisms are either absent or fail to offer sufficient guarantees and remedies. Indigenous peoples must not only be considered as stakeholders, but as rights holders.¹¹⁸

Often corporate social responsibility (CSR) is presented and discussed as a range of benefits for local people, from scholarships to access roads. As an example, at the Mineral Wealth 2013 conference in Uganda, the provision of uniforms for a disabled volleyball team was used to justify one company's attempts at CSR. The implication of this form of CSR is that each company has the ability to decide which benefits to share with local communities and which benefits to withhold. This report is unequivocal, however, in its view that international law recognises CSR as not being limited to benefit-sharing alone and that true corporate social responsibility goes beyond benefits to include the acknowledgement and protection of all fundamental human rights.

115 Rio Tinto (2012) *Human Rights Policy*, London, England.

116 Rio Tinto (2012) *Community Agreement Guidance*, London, England, p. 14.

117 *Ibid.*, p. 14-15.

118 UNPFII (2007) *UN Permanent Forum on Indigenous Issues International Workshop on Perspectives of Relationships between Indigenous Peoples and Industrial Companies*, New York, p. 10.

G. International Financial Institutions

As important as extractive industries' own internal procedures are for the sector, responsibility also lies with those international financial institutions that fund large-scale industrial projects around the globe.

International Finance Corporation

The International Finance Corporation (IFC) is a member of the World Bank Group and is focused exclusively on supporting the private sector in developing countries.¹¹⁹ In Africa, the IFC has offices operating in every country in sub-Saharan Africa. The IFC has an established policy and performance standards that include, among others: the prevention of adverse effects, consultations and informed participation, impacts on indigenous populations/communities' lands, the relocation of indigenous populations/communities and the use of traditional knowledge for commercial gains. Specifically, Performance Standard 7 on indigenous populations/communities is a powerful standard which has been incorporated into the operating policies of groups like Rio Tinto, Anglo American. Performance Standard 7 recognises that:

Indigenous Peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population. In many cases, their economic, social, and legal status limits their capacity to defend their rights to, and interests in, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. Indigenous Peoples are particularly vulnerable if their lands and resources are transformed, encroached upon, or significantly degraded. Their languages, cultures, religions, spiritual beliefs, and institutions may also come under threat. As a consequence, Indigenous Peoples may be more vulnerable to the adverse impacts associated with project development than non-indigenous communities. This vulnerability may include loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases.¹²⁰

In a break from most other performance standards and operational guidelines in the sector, Performance Standard 7 requires the IFC's clients to seek FPIC when projects impact on indigenous lands and territories, when relocation is involved or when critical cultural heritage is impacted.¹²¹

119 IFC (2014) *About IFC* [accessed on 28 April 2014]
http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc

120 IFC (2012) *Performance Standard 7: Indigenous peoples*, Washington DC, USA, p. 1.

121 *Ibid*, p. 5.

World Bank

The World Bank Group describes itself as a vital source of financial and technical assistance to developing countries around the world and a unique partner in reducing poverty and supporting development.¹²² In real terms, the Bank provides loans and grants to developing countries, often with the support of other banks and private sector investors, and currently has 237 projects in Africa totalling almost \$1 billion.¹²³

Notably, the World Bank's operational policy 4.10 on indigenous populations/communities requires the borrower to engage in free, prior and informed *consultations* with affected indigenous communities and to implement measures which avoid potentially adverse effects and, where such effects are unavoidable, to provide appropriate compensation. In addition, although the World Bank-conducted Extractive Industries Review (EIR) between 2001 and 2003 was generally found to be useful, the World Bank's refusal to incorporate the findings of the review into its own operations has been widely critiqued by indigenous populations/communities and their supporters and even caused the lead reviewer on the World Bank team to call the process 'Business as Usual with Marginal Change'.¹²⁴ One of the strongest criticisms highlighted the World Bank's refusal to incorporate free, prior and informed *consent* within their policy.

African Development Bank

While the African Development Bank (AfDB) recently introduced an integrated safeguards system in 2013, it has nonetheless come in for criticism for its position as the only multilateral development bank that does not have a standalone indigenous populations/communities' policy.¹²⁵ The AfDB has, however, suggested that it is carrying out a study on indigenous populations/communities that aims to investigate indigenous populations/communities' issues and the findings of which will act as a benchmark for developing policy proposals in this regard.

122 World Bank (2014) What We Do [accessed on 28 April 2014]
<http://www.worldbank.org/en/about/what-we-do>

123 World Bank (2014) What We Do [accessed on 28 April 2014]
http://www.worldbank.org/projects/search?lang=en&searchTerm=&countrycode_exact=3A

124 See for example Mackay, F 2004 'Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review', *Sustainable Development Law & Policy*, vol. 4, no. 2 and M Colchester & E Caruso 2005 *Extracting Promises*, 2nd Edition, FPP and Tebtebba, Philippines.

125 See for example, S Ndobe & H Durrell (2012) *Why a standalone indigenous peoples policy within the African Development Bank's integrated safeguards system?*, IPACC and M Cernea (2012) *Safeguard Social Policies in Africa: A continent-wide public debate*, LSE, England.

New International Financial Institutions

In the last two decades Chinese foreign investment, both bilaterally and through lending institutions like the New Development Bank, has increased China's influence on the continent substantially. A key driver for this position of influence is the preferential lending conditions that underwrite the loans they offer African states, which have typically seen a reduction in the human rights conditions demanded. This Chinese influence has forced other international financial institutions to maintain their competitiveness on the global stage through reductions in their safeguards policies. While not yet finalised, the current review of the World Bank's safeguard policy has shocked indigenous populations/communities and civil society as it rolls back much of the human rights progress made over the preceding 20 years.¹²⁶ A great deal of effort will now be required in the coming months and years to ensure that the international financial institutions, both new and old, strengthen their human rights safeguards rather than weaken them, as appears to be their intention.

H. Indigenous Voices

Indigenous representatives have not been silent and have steadily demanded recognition of their rights domestically, regionally and internationally. One forum in which they have been enabled to raise their voices has been the UN Permanent Forum on Indigenous Issues (UNPFII). The UNPFII has held a number of workshops and meetings on the subject of indigenous populations/communities and extractive industries. In addition, indigenous populations/communities have produced a number of key documents, including the International Cancún Declaration of Indigenous Peoples, 2003, the Indigenous Peoples' Declaration on Extractive Industries, 2003, and the most recent Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples, 2009.

While it is impossible to summarise indigenous populations/communities' concerns sufficiently in this small section, it is important to draw from these declarations some common themes that clearly express indigenous populations/communities' aspirations and visions for their futures. Importantly, it is clear that there are almost universal issues with extractive industries, ranging from "violations of Indigenous Peoples' right to self-determination...rights to lands, territories and resources, as well as displacement and violations of the most basic civil and political rights, such as arbitrary arrests and detention, torture, enforced disappearances and killings".¹²⁷

And while there is near universal acknowledgement of the wrongs of extractive industries, there is equal understanding of how this situation can change and how the

126 See for example <http://www.forestpeoples.org/topics/world-bank/news/2014/07/final-statement-draft-world-bank-safeguard-policy>, viewed 26 march 2015

127 Declaration of the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines

rights of indigenous populations/communities can be protected. But first, and until such a time when rights can be protected, indigenous populations/communities have demanded;

a moratorium on further extractive industry projects that affect or threaten our communities, until structures and processes are in place that ensure respect for our human rights. The determination of when this has been realized can only be made by those communities whose lives, livelihoods and environment are affected by those projects¹²⁸

One of the most obvious but poorly experienced recommendations demands that both extractive industries and states, “[r]ecognize and protect our territorial and resource rights and our right to self-determination. The human rights framework should underpin trade, investment, development and anti-poverty policies and programmes”.¹²⁹ Not only should companies “respect international standards on rights in all jurisdictions, especially the minimum standards as set forth in the UN DRIP”,¹³⁰ but states should also “recognize and ensure the demarcation and titling of indigenous lands”¹³¹ and “review laws and policies on extractive industries that are detrimental to Indigenous Peoples”.¹³² That these issues are still unresolved and indigenous rights are not fully protected by nation states and business enterprises is deeply worrying and a key issue preventing productive relations with extractive industries.

And finally, in order to prevent false stereotypes and false polarisation of what is a complex issue, it is important to acknowledge that indigenous populations/communities “do not reject development but we demand that our development be determined by ourselves according to our own priorities. Sustainable development for indigenous populations/communities is secured through the exercise of our human rights, and enjoying the respect and solidarity of all peoples”.¹³³

I. Good Practices and the Absence Thereof

Any attempts to assess the existence of good practices in the extractive industry sector are not easy. As noted earlier, extractive industries did not communicate with the study

128 Declaration of the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines.

129 The International Cancun Declaration of Indigenous Peoples, 5th WTO Ministerial Conference - Cancún, 12 September 2003, Quintana Roo, Mexico.

130 Declaration of the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines.

131 Declaration of the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines.

132 Declaration of the International Conference on Extractive Industries and Indigenous Peoples, 23-25 March 2009, Legend Villas, Metro Manila, Philippines.

133 Indigenous Peoples' Declaration on Extractive Industries, 15 April 2003, Oxford, United Kingdom.

and so examples were not offered. Further, in cases where extractive industries may claim to uphold good practices, indigenous communities may have opposing or alternative views. As a result, there is a need to identify criteria for assessing whether practices were indeed good or not. In line with the United Nations Expert Mechanism on the Rights of Indigenous Peoples' (EMRIP) study on indigenous populations/communities and the right to participate in decision-making, this study will base such criteria on the UNDRIP.¹³⁴ While not exhaustive, some of the points listed below are useful indicators of good practice:

- a. Allows and enhances indigenous populations/communities' participation in decision-making;
- b. Allows indigenous populations/communities to influence the outcome of decisions that affect them;
- c. Realises indigenous populations/communities' right to self-determination;
- d. Includes, as appropriate, robust consultation procedures and/or processes to seek indigenous populations/communities' free, prior and informed consent.

This point is noted elsewhere by an indigenous workshop, which noted:

Participants emphasized that, although the concept of "best practices" or "good practices" is frequently used in the context of extractive industries and Indigenous Peoples, the term remained abstract, as concrete examples were rarely presented. In instances where cases were offered, they were lacking in detail and therefore inadequate for use as examples for emulation by other companies.¹³⁵

As will be seen in the following section, and echoing the sentiments of indigenous populations/communities above, the sheer absence of any kind of best practice was alarming. Where 'Good Practices' were encountered during the research period, they fell markedly short of the minimum requirements demanded under human rights law. As discussed earlier, the prevailing composition of most companies' CSR claims are far short of the Ruggie Framework's insistence that true corporate responsibility should include full support for the fundamental rights of all humans.

Finally, and as mentioned earlier in this report, the basic foundation upon which any equitable relations must be built is the due acknowledgement of indigenous populations/communities' rights to own and manage their lands and territories and their right of self-determination. Such recognition was not observed by any extractive industry during the research period and, as such, the report was not able to recommend any practices as 'good' and therefore worthy of emulation by other companies.

134 UNHRC (2011), *Final Report of the study on indigenous peoples and the right to participate in decision-making*, A/HRC/18/42, p. 4.

135 UNPFII (2009), *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, E/C.19/2009/CRP.8, p. 6.

Despite the glaring lack of practices that agreed on indigenous populations/communities' fundamental right to manage their lands and resources, there are initiatives, such as the Nairobi Process in Kenya, which are at least attempts by all parties to find the common ground needed to build relationships.¹³⁶ The Nairobi Process is commendable for bringing together both major and junior companies, national human rights commissions, civil society, local communities and government agencies under one umbrella. As stated earlier, however, the only way in which such a process can ever be successful is if all parties agree that indigenous populations have a right to manage and determine their lands, development and futures. Without this acknowledgement, it is hard to see how community aspirations will ever be given the same authority as other state and private sector aspirations and, therefore, how such fora can ever build the relationships needed to develop truly equitable futures for all. ○

136 See <http://www.ihrb.org/our-work/nairobi-process.html> for more information.

IV. Countries profiles

This study focuses on three sub-regions only, that is, East Africa, Central Africa and Southern Africa. As there are many countries in these sub-regions, and because of limited resources and time to undertake on-site visits to all those countries, the WGIP selected countries which were representative of a range of issues. The study was, therefore, able to cover both pastoralist and hunter-gatherer communities.

Some of the considerations when determining the on-site locations were:

- Is the presence of indigenous populations/communities and extractive industries overlapping?
- Are there current and pressing threats to indigenous populations/communities' livelihoods and lands as a result of extractive industries?
- Is there sufficient on-the-ground support to help facilitate an on-site visit?
- Is there sufficient access to on-site locations to make a visit productive?
- Does inclusion of the location help to illuminate wider issues facing indigenous populations/communities in Africa?

The on-site visits were used for meeting representatives and gaining perspectives from the following stakeholders: indigenous communities/populations, indigenous populations/communities' organisations, civil society organisations, academic researchers, state representatives, and extractive industries.

The on-site visits were conducted in two distinct phases. The first phase was spent in the capital city of the country and this time was used to canvass opinions from state organs, extractive industries and civil society groups. However, the study took its orientation from the experience of indigenous communities and the main focus was to better understand the issues they face. As a result, the major part of the in-country visits was spent with the communities in their locations.

The following questions were used to shape the in-country visits:

- What issues exist in relation to indigenous populations/communities and extractive industries? How are land rights affected by these issues?
- Are indigenous populations/communities taken into account in the overall context of extractive industries? If so, to what extent are they discussed?
- What are existing frameworks for the protection of indigenous populations/communities' rights with regard to extractive industries? Are they sufficient?

- To what extent are FPIC guidelines understood and adhered to in the extractive industry and African contexts?
- Do best practices that safeguard the rights of indigenous populations/communities within the extractive industry sector exist?
- To what extent are indigenous populations/communities integrated into the design, implementation and monitoring of extractive industry projects on their lands?
- What measures/recommendations can be made to support the land rights of indigenous communities in relation to extractive industries?

A. Uganda: Communal Tenure in Focus

Introduction

Uganda has long been regarded by the donor community as a success story with consistent economic growth, a stable political climate and a recent role in regional diplomacy. However, this diplomatic relationship has been tested by international questions of governance issues and Uganda's protection of certain minority groups. Indigenous populations/communities' issues have rarely broken through into the public sphere and they remain today an unheard voice on the national political and social scenes.

There have to date been only a few ethnic groups which have expressly voiced their indigenous identity on the national and international scene, with the Batwa of the south-west, the Benet of the east and the Karamojong of the north-east being the most prominent. Despite this, there are other groups like the Ik and Basongora who would likely identify as indigenous if given the opportunity.

This section of the report focuses on the Karamoja region of Uganda,¹³⁷ which covers the entire north-east of the country and the present-day districts of Abim, Amudat, Kaabong, Kotido, Moroto, Nakapiripirit and Napak. These districts are populated by a number of ethnic groups, including the Jie, Pokot and Dodoth and together they are referred to as the Karamojong. Other smaller communities that also come under the generic name of 'Karamojong' include the Tepeth, Nyakwe, Ik, Ngipore and Ethur, among others.¹³⁸

The Karamojong are pastoralists and have long practised communal land tenure systems on the grazing lands of their cattle. This rangeland system has inevitably brought the Karamojong into contact with neighbouring peoples in Kenya and South Sudan, like the Turkana and Pokot, a relationship which often involved armed cattle raiding. The advent of cheap and available weapons, as a result of the various conflicts in the region during the 80s and 90s, and their subsequent use in cattle raiding has had devastating effects on communities.¹³⁹

¹³⁷ See Map 2.

¹³⁸ J. Powell (2010) Karamoja: A literature review, Saferworld, p. 2.

¹³⁹ See for example J. Powell (2010) Karamoja: A literature review, Saferworld, p. 10.

In an attempt to disarm the Karamojong and bring 'development' to the area, the Uganda government and up to 15,000 soldiers have carried out a number of forcible disarmament exercises with the most recent taking place in 2001 and 2006.¹⁴⁰ Worryingly, there have been a number of human rights violations, including rape and murder, that have been inflicted on the Karamojong by the Uganda Peoples Defence Force during these forced disarmament exercises.¹⁴¹ As a result, Karamojong warriors have been slow to give up their weapons and violent confrontations have destabilised the region further.¹⁴²

Today, Karamoja is one of the most deprived regions of Uganda and all socio-economic indicators are markedly below the national average. A UN report in 2008 found that 82% of the population was living in poverty and only 46% had access to safe drinking water.¹⁴³ Comparatively, the global acute malnutrition rate in Karamoja was 10.9% compared to a national average of 6% and in some districts of Karamoja it was as high as 15.6% (Moroto). The international emergency threshold is 10%.¹⁴⁴

Uganda is relatively new to the extractive industry sector and the recent discovery of oil in the west of the country has propelled it to the forefront of extractive industry interest. In 2014, levels of insecurity still demanded a continued military presence in the area; however, relative stability is ushering in a wave of investment and development. Long admired as a potential source of natural resources, the relative peace in the area is enticing extractive industries on a scale never before seen in Karamoja. In terms of resources, Karamoja "hosts occurrences of over 50 different economic minerals, including gold, silver, copper, iron, gemstones, limestone, and marble making it one of the most prospective areas of [Uganda]".¹⁴⁵ However, the major focus of exploration in the region currently surrounds gold while the only extraction in the region is conducted by a handful of quarry companies for marble and limestone. At this stage, Karamoja's extractive industry is represented by a number of junior mining companies specialising in exploration, like East African Gold and handful of local companies providing limestone for cement production, such as Tororo Cement. Critically, there are a number of social issues, especially surrounding land tenure, which still remain unaddressed by the state and which are being exacerbated by this early wave of mining interest.

140 See B. Knighton (2002) *Historical ethnography and the collapse of Karamojong culture: Premature reports of trends*, University of Oxford, Oxford, England.

141 *Ibid*, p15.

142 *Ibid*.

143 Quoted in J. Powell (2010) *Karamoja: A literature review*, Saferworld, p.3.

144 *Ibid*.

145 J. Hinton, I. Kabongo, C. Kabiswa, J. Okedi & R. Mbabazi (2011) *The Mining and Minerals Sector in Karamoja Region: Development Opportunities and Constraints*, p. viii.

1. National Setting

Indigeneity

Unusually for an African state, the term indigenous is used in the Constitution when it defines who has right to claim citizenship by birth. Article 10 stipulates that this relates to “every person born in Uganda one of whose parents or grandparents is or was a member of any of the indigenous communities existing and residing within the borders of Uganda as at the first day of February, 1926” as set out in Schedule Three of the Constitution.¹⁴⁶ The third schedule goes on to list 56 separate ethnic groups, including the Jie, Tepeth and Dodoth, among others, who make up the Karamojong.

As a member of the government has been quoted as saying, “The Constitution of Uganda does not make any distinction between any of her communities since all of them are indigenous and listed in schedule 3 of the Constitution”.¹⁴⁷ It is therefore fair to say that, in Uganda, the state’s understanding of the term ‘indigenous’ refers to all black Africans and is used in contrast to a colonial ‘other’ from their history. As such, the term does not meet the obligations set out under international human rights law and its definition and understanding of the term. As a result of the above, there are no state provisions for the protection and promotion of indigenous populations/communities within Uganda.

Despite the above, the Ugandan government made a contradictory and progressive comment in its 2011 Universal Periodic Review report. The report stated that:

Uganda has indigenous communities who include the Batwa in the West; Benet in the Mt. Elgon region; the Tepeth in Karamoja; and others in other remote locations. While it is acknowledged that their situation is still unsatisfactory, Government is actively seized of the matter and continues to pursue the delicate path of accommodative dialogue with them; with a view to minimizing any disruptive approaches to the lifestyle and traditions of the concerned communities.¹⁴⁸

It is as yet unclear whether this statement suggests a new recognition of Uganda’s indigenous populations by the government; however, the lack of any further comments of a similar nature since 2011 suggests otherwise.

146 Government of Uganda (1995), *The Constitution of Uganda*, Kampala Uganda, Article 10.

147 ACHPR & IWGIA (2006), *Report on the African Commission’s Working Group On Indigenous Populations/Communities - Research and Information Visit to the Republic of Uganda*, ACHPR & IWGIA, p. 40.

148 UNHRC (2011), *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1 - Uganda*, A/HRC/WG.6/12/UGA/1, p. 22.

Land

Uganda's 1995 Constitution has been widely applauded for its extensive protection of citizens' human rights and especially its vesting of land ownership in the hands of citizens and not the state (see Box 12 below).

Box 12: Land Tenure in the Ugandan Constitution¹⁴⁹

237. Land ownership.

1. Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this Constitution.

[...]

2. Land in Uganda shall be owned in accordance with the following land tenure systems

- a. customary;
- b. freehold;
- c. mailo; and
- d. leasehold

4. On the coming into force of this Constitution

- a. all Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and
- b. land under customary tenure may be converted to freehold land ownership by registration.

More than just vesting ownership in the people, the Constitution goes further and recognises that most people own their lands under customary tenure and it seeks ways to formalise this interest. This is an important step as it seeks to protect in law the rights of those who have customarily held land for generations and who until then had no formal way of legally declaring their rights. In yet another step that seeks to protect and promote the rights of indigenous communities, the 1998 Land Act states that Communal Land Associations "may be formed by any group of persons in accordance with this Act for any purpose connected with communal ownership and management of land,

¹⁴⁹ Government of Uganda (1995), *The Constitution of Uganda*, Kampala Uganda, Article 237.

whether under customary law or otherwise".¹⁵⁰ This legislation places Uganda in a formidable position of enacting legislation that aims to promote and protect the rights of customary tenure and communal land tenure specifically.

Despite the provision of such strong legislation with regard to community ownership of land, the situation is far different in practice. Since the Constitution was created in 1995 and up until 2013, there seem to have been no urgency on the part of the government to issue any certificates of customary ownership issued in Uganda. Recent reports have, however, suggested that Kasese district in the west of Uganda has received approximately 18,900 applications and, by 2014 16,200 certificates had been issued.¹⁵¹ More worryingly, and despite provision in law for communal land associations, the government has yet to register a single association despite applications by some groups being submitted since 2011.

Further, in his closing address to the annual Mineral Wealth Conference in 2013, which this study attended, the Ugandan President, Yoweri Museveni, informed investors that local communities should not get in the way of their investments,

These are simply peasants who should not give you a headache. If they are frustrating you then I will deal with them directly...In the event where the peasant land owners refuse to vacate the land, investors should look [for] unoccupied nearby areas; drill into the surface, and thereby continue drilling horizontally which will force them out.¹⁵²

This remark came in response to the conference's spokesperson informing the President that the extractive industries' number one issue preventing the expansion of the sector was the problems brought about by local communities.

Unfortunately, the sub-surface rights of communities are not protected in the same fashion as surface rights. The Mining Act 2002 stipulates that:

Subject to any right granted to any person under this Act, the entire property in and control of all minerals in, on or under, any land or waters in Uganda are and shall be vested in the Government, notwithstanding any right of ownership of or by any person in relation to any land in, on or under which any such minerals are found.¹⁵³

In a nod to the Lockean thought discussed earlier in this report, this view was reinforced by the current Minister for Minerals, Hon. Peter Lokeris, at a mineral conference in Kampala when he explained to delegates that "rights are owned by the State because they are not the fruits of the people but were already there...if [mineral rights] stay with the Karamojong the rest of Uganda would stay poor".¹⁵⁴

150 Government of Uganda (1998), *The Land Act*, Kampala Uganda, Article 15.

151 Pers. Comm.

152 Monitor (2013) *Museveni okays eviction of residents in mineral areas*, [accessed on 2nd February 2014] <http://www.monitor.co.ug/News/National/Museveni-okays-eviction-of-residents-in-mineral-areas/-/688334/2018208/-/1327ftnz/-/index.html>

153 Government of Uganda (2002), *The Mining Act*, Kampala Uganda, Article 3.

154 Personal notes, 1st October 2013.

Unfortunately, this means that while communities, at least in legislation, are protected above ground, they have no control of what happens to the sub-surface resources under their lands and territories. Uganda has a number of categories of mining licences available, including prospecting, exploration, location, retention and mining. While the Mining Act is clear that “[t]he rights conferred by a mineral right shall be exercised reasonably and in such a manner as not to adversely affect the interests of any owner or occupier of the land on which the rights are exercised”,¹⁵⁵ it is not clear what that means in practice for indigenous populations/communities. Given that indigenous populations/communities are intimately attached to their lands, it is inconceivable that any external actions taken on their lands without their consent could take place without some form of adverse effect.

All the powers of land is now under the government, now when one [company] is licensed by the government the community has no voice, much as the land belongs to us all the minerals belong to the government.

Katikekile Community

The law states that activities like cattle grazing and cultivation are permitted in areas where sub-surface rights have been granted as long as they do not interfere with the operations of the licensee and that compensation should be provided to the surface rights holder for any damage that is inflicted on the surface as a result of the sub-surface interest. This however clearly favours the sub-surface interests over and above the surface interests and does not allow for the surface interests to be consulted on the sub-surface operations. In effect, the sub-surface and surface rights are treated as two independent interests both legally and physically and this provides not only a practical challenge from the outset but runs counter to indigenous populations/communities' traditional ownership of their lands.

We as a community believe that it was god that put these mineral resources on our land, so we don't understand how government can make a decision to allow us only to have access to the surface and the minerals underneath belong to the government. If that is the case, the government should at least see a way of sharing these resources.

Rupa Community

The division of interests and rights available to surface rights holders in relation to sub-surface interests is further pronounced at the licensing stage. Neither a prospecting licence nor an exploration licence require the licensee to contact the surface rights holder at any point during the planning of activities and there is no requirement for FPIC whatsoever. Further, the only 'consultation' with land owners that is required is by

¹⁵⁵ Government of Uganda (2002), Article 79.

those seeking a mining license and only as the legislation requires the licensee to have “secured the surface rights of the land the subject of his or her application”.¹⁵⁶

The Mining Act goes on to explain that, in the event that landowners are dissatisfied with the amount of compensation made available by the mineral right holder, the dispute will be decided by an arbitrator. It does not say at any stage who this arbitrator is but it does leave the impression that the landowner does not necessarily have a right to withhold consent for the proposed mine and can only dispute the money being offered by the mining company. It should be clearly understood that even those few rights that are protected under the Mining Act only apply to the lawful owners or occupiers of the land in question. Given that indigenous populations/communities’ lands are typically owned under communal tenure and that no communal land associations have been registered by the government, it does not seem possible for indigenous populations/communities to protect their rights to their lands and they are therefore extremely vulnerable to defending their lands from business interests.

In a worrying development that highlights a complete disregard for the rights of indigenous populations/communities and local communities, the President of Uganda, in his speech to the 2014 Mineral Wealth Conference, was quoted as saying that the government would change the law to allow intending investors in the mining industry to access private land that contains minerals without having to negotiate with landowners. He said:

The people who have to give you consent are the people who own the minerals, and that is the government. The other man [landowner] has no consent to give because the property is not his...The mistake has been to make the investors deal with the landowners, they should deal with the government; and then the government will deal with the landowners. You just tell those villagers to get out. You cannot stop the State from accessing its assets. We shall sort it out, we shall amend the Act. In fact, the Constitutional Court should say that Act is unconstitutional.¹⁵⁷

There are a number of other issues that various authors have already highlighted with regard to the division of royalties accrued under mining licenses and corruption within the system, for example.¹⁵⁸ This study does not dispute these issues in general; however, the study would like to point out that these kinds of issue, i.e. ones aimed at making the system run better, go one step beyond the initial focus of this study which is to ask if extractive industries have a legal and legitimate position on indigenous lands. To deviate this report to accommodate issues regarding the operation of extractive industries would move attention away from our core question of the legitimacy of extractive industries on indigenous lands.

156 Government of Uganda (2002), *The Mining Act*, Kampala Uganda, Article 43(3)h.

157 Wesonga (2014) “Owners will lose rights over mineral-rich land” – Museveni, Daily Monitor, Kampala.

158 See for example C. Adoch & E. Ssemakula (2011) *Killing the goose that lays the golden egg: An analysis of Budget Allocations and Revenues from the Environmental and Natural Resource Sector in Karamoja Region*, ACODE, Kampala, Uganda.

As a final point, it is worth mentioning that, in 2006, the WGIP visited Uganda and among others gave the following two recommendations, which are pertinent to our discussion of extractive industries:

- Recognize the Batwa and the pastoralists in Uganda as indigenous populations/communities in the sense in which the term is understood in international law, and make appropriate legislative provision in this respect.
- Provide compensation for lands that were alienated without consultation or consent, as a way of reducing the vulnerability of indigenous populations/communities.¹⁵⁹

At the time of publication of the report, no response has been received from the Government of Uganda to these recommendations.

2. Local Context

Communal Land

As with most pastoralist communities, the Karamojong traditionally managed their lands under communal tenure; however, such management was not homogeneous and smaller parcels of land were nested and owned by families within the much larger communal area:

At present, customary tenure has evolved into individualized and communal sub-tenures, each with distinct characters and resource rights embedded therein for the individuals, households and the community at large. Within communal customary, two sub-tenure types are distinguished; the grazing lands and the shrine areas, while within individualized customary sub-tenure is the arable land and land used for homesteads, where *manyattas* are constructed.¹⁶⁰

The viability of this tenure system has, however, been slowly eroded over the last century to a point where, today, it is fair to say that most Karamojong are legally landless. Many, including the government, have taken advantage of the Karamojong's nomadism to deny them their right to their lands and, in the absence of documented ownership, these more powerful interests have appropriated whatever they have deemed necessary. By 1965, up to 95% of Karamoja was gazetted as conservation areas although,

159 ACHPR & IWGIA (2006), *Report on the African Commission's Working Group on Indigenous Populations/Communities - Research and Information Visit to the Republic of Uganda*, ACHPR & IWGIA, p. 7.

160 M. Rugadya, H. Kamusiime, & E. Nsamba-Gayiyi, (2010) *Tenure in Mystery: Status of Land under Wildlife, Forestry and Mining Concessions in Karamoja Region, Uganda*, Associates Research Uganda, Kampala, Uganda, p. 30.

upon realising that a large percentage of this land was already occupied by Karamojong communities, in 2002 the Parliament of Uganda degazetted 53.8% of the total land area, thereby reducing conservation areas to 40.8%.¹⁶¹ Despite the opening up of these protected areas, the communities still face restrictions on the use of 40% of their lands and many complaints have been raised about cultural and religious sites inside the remaining conservation areas.¹⁶²

One result of the disarmament process was the sedentarisation of the Karamojong people, which has largely disrupted their traditional land management practices and movement patterns. In practice, the violence between government forces and Karamojong warriors forced people to seek security in ever more urbanised and densely clustered communities. This further dislocated the Karamojong from their lands and, despite relative peace today, a large proportion of Karamojong continue to live in urban and semi-urban centres.

While this has been happening, and often with the support of police and army personnel, extractive industries have been conducting exploration activities on ancestral territories regardless of any indigenous ownership.¹⁶³ It is clear that, without any legal claim to ownership of land, the Karamojong peoples have little or no room to claim participation in these activities.

Organisations like the Northern Uganda Land Platform and the Uganda Land Alliance (ULA) have been working on issues of customary ownership of land and communal tenure for a number of years. Part of this work by the ULA has supported communities to form Communal Land Associations (CLA) and apply for Certificates of Customary Ownership (CCO). However, despite this support, these communities have still been unable to receive the legal recognition they desire.

Currently, applications by communities to register their CLAs have lain on the desks of the Ministry of Lands for over two years. This study spoke with a representative from the Ministry on this issue and his response was to suggest that the communities had first to provide him with a management plan for the land before he would be willing to register their association. Such bureaucratic stipulations are highly disruptive and insulting to communities who have been managing their lands effectively for hundreds, if not thousands, of years. It is further this study's impression that the Ministry has no legislation supporting its demands of these communities to develop land management plans. That the right to communally manage these communities' lands was appropriated by the state in the first place is a gross human rights violation. That they now have to provide evidence to the state that they will manage it 'appropriately' adds insult to injury.

Some activists also raise the concern that, even if the government did support the registration of communal land claims under the certificates of customary ownerships

161 Ibid, p. 2.

162 Ibid, p. 6-7.

163 See Human Rights Watch (2014), *How Can We Survive Here? The Impact of Mining on Human Rights in Karamoja*, Uganda, HRW.

model, it is not sufficiently flexible to accommodate traditional forms of land management and would instead weaken traditional authority. Currently, communities are required to form Communal Land Associations in order to register their applications for certificates of customary ownership. Unfortunately, by insisting on this requirement, traditional authorities are being required to adapt their structures to fit into a very restrictive model which only allows “not more than nine nor less than three persons” to sit on the board and ultimately ‘own’ or govern the land held under the certificate. In light of this, there is a real need to amend the Land Act to make much broader social representation structures eligible.

Ultimately, customary land legislation should be designed to provide an additional layer of protection for existing land tenure systems. Despite the existence of customary land legislation in Uganda, it is apparent that the government sees the implementation of this legislation as designed not to protect existing forms of land tenure but rather to adapt traditional systems to fit into narrow and defined models of private individual land ownership. While this approach continues, the Karamojong will face weakened control over their lands and livelihoods and will likely experience a bleak and uncertain future.

Land Management

It is also apparent that the real hurdle to communities gaining legal title to their lands is not so much bureaucratic as ideological. In recent months, attempts have been made to issue CCOs to approximately 10,000 individuals in the east of Uganda. This is being done, however, in a region where customary land is almost exclusively held under individual and not communal tenure, which suggests that the Ugandan government's unwillingness to support communal land ownership and management is in part a result of its policy to see all land privately owned and its belief that communal ownership is outdated and unproductive.¹⁶⁴

As far back as 2002, Oxfam reported that a preoccupation with settled agricultural policies represented a failure of the state to understand the rationale for nomadic pastoralism, while other authors have called on the government to recognise pastoral transhumance as the appropriate livelihood strategy for the ecosystem of Karamoja.¹⁶⁵ Beyond a reluctance to recognise pastoralists' rights, however, it appears that the government in Uganda has a prejudicial development agenda that forcibly discriminates against pastoralism.¹⁶⁶ The Uganda government's Minister for Karamoja, “In a letter to the European Union delegation to Uganda in November 2010...highlighted that ‘the nomadic way of life is ‘outmoded’,’ and her office has pushed for development partners

164 See LEMU (n.d.) Policy Discussion Paper 2 – Titling customary land, Kampala, Uganda.

165 Quoted in J. Powell (2010) Karamoja: A literature review, Saferworld, p. 7.

166 See ACHPR & IWGIA (2006), *Report on the African Commission's Working Group on Indigenous Populations/Communities - Research and Information Visit to the Republic of Uganda*, ACHPR & IWGIA, p. 60.

to support the government's program to 'stop nomadism and settle permanently because that is the Government's focus for now'" .¹⁶⁷ During the research for this study, the delegation attended a UN conference on Natural Resource Exploitation and gave a presentation on the ACHPR and the rights of indigenous populations/communities in natural resource extraction. In response to this presentation, the official representative from Uganda asked, "Every time I hear people like you I keep thinking 'What do you want for these people to do'? Keep surviving on the milk that is not there? Keep being backward?"¹⁶⁸

The government does not currently have its own specific framework for supporting pastoralism and the development of one should be of key urgency. If the Government of Uganda needs any guidance in this endeavour it needs look no further than the African Union, which has developed its own Policy Framework for Pastoralism in Africa aimed at securing, protecting and improving the lives, livelihoods and rights of African pastoralists. This framework is based on a clear acknowledgement not only of the rights of pastoralists but also of the key economic contribution that pastoralism makes to national economies. Recent studies have estimated that pastoralism is worth three-quarters of a billion dollars a year in Kenya alone and that regionally it employs between 7 and 20 million individuals in East Africa and provides 90% of all consumed meat.¹⁶⁹

Objective 1 of the African Union framework seeks to "Secure and protect the lives, livelihoods and rights of pastoral peoples and ensure continent-wide commitment to political, social and economic development of pastoral communities and pastoral areas".¹⁷⁰ Importantly, the framework explicitly recognises the need to "[a]cknowledge the legitimacy of indigenous pastoral institutions":

Pastoralists are facing the challenge of adapting to socio-economic and cultural transformations resulting from globalization and emerging issues such as population pressure, reduced access to rangelands, food price and financial crises, and other trends. This situation imposes the challenge of blending tradition and modernity in pastoral policy development. In this respect, it calls for:

- Recognition by State and local authorities of the important role of traditional pastoral leadership and structures in governance, including conflict resolution, management of land tenure and mobility, and facilitation of interactions between pastoralists and other interest groups such as crop farmers;

167 Quoted in J. Evans and M. Burnett (2014) *The government gave you our way of survival: Consent, Land and Abuse in the Mining of Karamoja, Uganda*, Human Right Watch, p. 31.

168 Personal notes, 20th November 2013.

169 Hesse and MacGregor (2009) *Arid waste? Reassessing the value of dryland pastoralism*, IIED Briefing Paper, IIED, London, p.1.

170 AU (2010) *Policy Framework for Pastoralism in Africa: Securing , protecting and improving the lives, livelihoods and rights of pastoral communities*, AU, Addis Ababa, Ethiopia, p. i.

- The need to address age-old rigidities in traditional beliefs and structures, which discriminate against women;
- Build on and thereby improve indigenous rights to pastoral resources of land, pasture and water;
- The need to acknowledge the legitimate rights of pastoralists to pastoral lands by granting them communal land ownership on a priority basis.¹⁷¹

And that pastoralists' property rights should be recognised and secured by:

- putting in place and enacting laws to recognize pastoralism as production and livelihoods system within its specificities;
- recognizing and reinforcing traditional resource management systems;
- recognizing the rights of pastoral communities to have adequate share of resources and compensation for any dispossession.¹⁷²

The future may usher in land administration reform with the advent of a multi-sector World Bank-funded project that will, among other things, focus on the registration of up to 600 Communal Land Associations in its project lifetime. The project document states the following:

Registration of communal land rights undertaken as part of the project will help to reduce land disputes and uncertainties in land rights, protect the land rights of local communities, and empower local communities to negotiate directly with investors, thereby creating an environment favourable to a win-win situation; this would result in significant investments and increased incomes in Northern and Eastern Uganda, the poorest areas of the country. An economic analysis based on eliminating productivity losses of 10 percent by reducing land disputes and increasing land tenure security through registration of communal and individually owned lands in rural areas yields an economic rate of return (ERR) of 22 percent. Even when the assumed productivity savings are reduced from 10 to 6 percent, the economic analysis generates an ERR of 12 percent which is still above the opportunity cost of capital in many financial markets...¹⁷³

While this project may offer support to legally register communal land rights in Uganda, it is concerning that the language used suggests that the justification for this project is designed to make communal lands more suitable for investment and development. This justification is no different to that of the current government's attitude that seeks to promote individualised ownership, as both approaches seek to liberate land and make it available for economic development. This is concerning from an indigenous rights

¹⁷¹ Ibid, p. 26.

¹⁷² Ibid, p. 29.

¹⁷³ The World Bank, (2013) Project Appraisal Document: Competitiveness and Enterprise Development Project, The World Bank, p. 26-27.

perspective, which would acknowledge indigenous populations as the stewards of their lands. Given the objectives of the World Bank-funded project, it is not clear how it will accommodate communities which have their own visions for the futures of their lands other than 'significant investments'. And with \$14 million dollars being allocated for the land administration reform component and the full weight of the state organs implementing this project behind it, it is not clear what ability marginalised communities like the Karamojong will have to prevent the process from being hijacked by powerful interests seeking to use it to appropriate indigenous lands and territories for financial gain.

Natural Resource Exploitation

The following Maps 1 and 2 are taken from the Uganda Mining Cadastre, which serves as a public record of sub-surface mining rights in Uganda.¹⁷⁴ As can be seen from Map 2, Karamoja - represented as the area to the north and east of the red boundary and running to the border with Kenya and South Sudan - is almost entirely covered by mining licences. Recent research has quantified the scale of the interest in Karamoja and has shown that 17,083.34 sq.km (61.67%) of the 27,700 sq. km total land area of Karamoja region is licensed for mineral exploration and exploitation activities. And, further, that 51 foreign and Ugandan companies hold a total of 136 concessions, both as a result of exploration and exploitation.¹⁷⁵

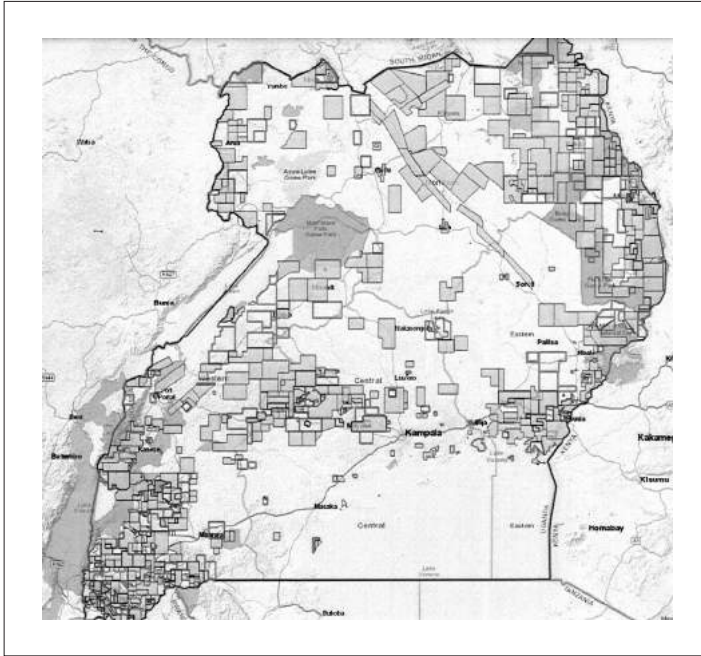
The majority of these licenses are exploration licenses and the map displays those which are both active (dark blue) and pending (light blue). A few active mining licenses in and around Moroto town are also present (red areas) and these are being used to quarry a limited amount of marble and limestone on a commercial basis.

When contrasted with Map 1, which shows the same information for the whole of Uganda, it is clear that Karamoja is one of the most heavily licensed areas in Uganda. This demonstrates a concerted interest in the area on the part of extractive industries and shows they have a clear belief that the region holds potentially lucrative mineral deposits, enough to attract their investment in the exploratory stages of the industry. One of the largest license holders in the area, East African Gold Limited, currently holds 26 exploration licenses covering a total area of 2,093 square kilometres.¹⁷⁶

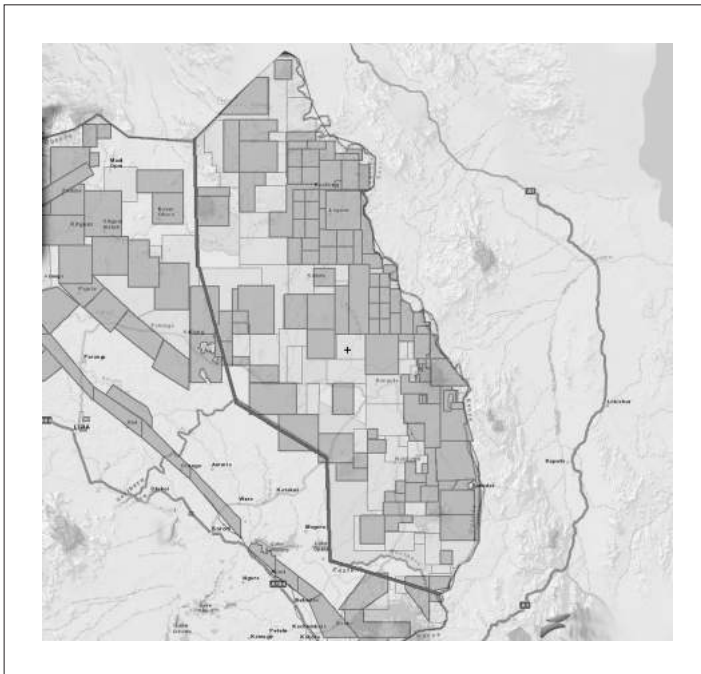
174 A cadastre is a public survey or map of the extent of land ownership of a country, in this case mining licenses.

175 Kabiswa (2014) The Interface between Land And Mining In Karamoja - Presentation to the Northern Uganda Land Platform Meeting: 14-16 July 2014. Kotido.

176 Regal Point Resources (2013) RGU to acquire 100% of Karamoja Gold Project in Uganda, Perth, Australia.



Map 1: Uganda Mining Cadastre¹⁷⁷



Map 2: Karamoja Mining Cadastre¹⁷⁸

A number of conclusions can be drawn from these maps. Firstly, it can be concluded that almost the entire rangelands and territories of the Karamojong people are already under exploration licence or have applications for exploration licences pending. Although a large proportion of these licences are held by companies with real intentions to carry out exploratory activities, it should also be understood that many of these licence holders have no intention of working on-site and are instead “speculators, holding licences with the intent of selling them to larger exploration investors”.¹⁷⁹

Secondly, given that no communities have had any role in the decision-making process that went into the issuing of these licences, it is clear that FPIC has not been sought by mining companies and FPIC has not been given by local communities. This grabbing of ancestral lands is a gross human rights violation and more than simply a failure to protect and promote the rights of its citizens, as noted by the President quoted above, as the state appears to be active in many of these violations of indigenous territories.

As one report stated:

It would not be iniquitous for this report to assert that the state of mining in Karamoja is “covert and stealthy” as “investors” stream in without notifying any local leaders or communities. In the opinion of communities, a lot seems to have been going on between the central government and the companies involved in exploration and prospecting without their participation...¹⁸⁰

Communities that the study spoke to were almost unanimously unaware of mining interests on their lands and territories. Where communities were aware of activity, this was as a result of extractive industry employees who had entered their lands unannounced to begin exploration. In many instances, this involved the placing of boundary markers by the licence holder as a way of showing the limits of their licence.

As one community member is quoted as saying in a recent study:

Eight men in yellow uniforms just entered my garden and started excavating. They said nothing. They just started digging and taking my soil. I just looked at them. I was afraid, so, I couldn't get near them. They stepped on some of our crops and damaged them. I asked them, “Why are you destroying our crops”. They said, “It will be good for your survival. We are looking for something. It will benefit you....” We were afraid and feared to stop them. They moved around like a rooster, like this was their land.¹⁸¹

177 Government of Uganda (2014) Uganda Mining Cadastre Map [accessed on 20th January 2017] <http://portals.flexicadastre.com/uganda/>.

178 Ibid.

179 J. Hinton, I. Kabongo, C. Kabiswa, J. Okedi & R. Mbabazi (2011), p. 8

180 M. Rugadya, H. Kamusiime, & E. Nsamba-Gayiyi, (2010), p. 20.

181 Quoted in J. Evans and M. Burnett (2014), p. 52.

This very tangible overlaying of ownership rights by extractive industries on top of the lands of indigenous populations/communities is both worrying and insensitive and is being conducted in a manner that pays no respect to indigenous populations/communities' fundamental rights to their lands and livelihoods. As a result, recent studies have confirmed that land and minerals are key drivers of conflict in the region,¹⁸² a fact that is all the more worrying in this post-conflict environment. It should be remembered that, in the previous section, it was almost unanimously agreed that even in the absence of adequate state protection, business enterprises have a duty to respect these rights. In Karamoja and Uganda they are not being respected and there is a massive failure on the part of the government and extractive industries to execute their human rights duties.

Other authors have expressed caution, however:

Despite limited, active exploration in the region, as awareness of the minerals sector increases, concerns of mineral rights infringing on land rights seem likely to increase. Many stakeholders seem not to distinguish between different types of mineral rights (in particular exploration versus mining) and – despite the reality of exploration – many express fears of vast “mining” concessions affecting land users (e.g. disrupting cattle corridors, restrictions on current land use, potential to take land), a situation that is heightened when the vast area covered by exploration licenses is cited.¹⁸³

Not all exploration licenses will find commercially viable resources to exploit and will therefore not be converted into mining licences. In addition, some mines and mining technologies have a relatively small physical footprint, suggesting that the impact of extractive industries on the Karamojong may be minor. However, suggesting best-case scenarios of the effects of extractive industries on the rights of indigenous populations/communities denies the reality that, globally, the last two decades have seen the appropriation of lands, loss of livelihoods, and gross human right violations at the hands of extraction industries. It should not be forgotten that the UN SRIP has identified extractive industries as the key concern for indigenous futures globally. As a result, it would seem prudent to begin the process of extractive industry in Karamoja from a foundation that promotes and respects the fundamental human rights of all peoples and use this as a starting point from which to move forward rather than disregarding those rights and suggesting that the effects will be minor.

It is finally worth noting that up to 50,000 Karamojong are believed to be involved in some capacity in small-scale or artisanal mining.¹⁸⁴ There are a number of papers on the subject in Karamoja, which have the space to deal with the unique issues of

182 Kabiswa et al (2014) *The Dynamics Of Conflicts Related To Land And Natural Resources In Rupa Sub-County, Karamoja Region, Uganda*, ECO, ACODE, Riam Riam, Kampala.

183 J. Hinton, I. Kabongo, C. Kabiswa, J. Okedi & R. Mbabazi (2011), p. 20.

184 See J Hinton (2012) *Analysis of formalization approaches in the artisanal and small-scale gold mining sector based on experiences in Ecuador, Mongolia, Peru, Tanzania, and Uganda: Uganda Case Study*, UNEP.

artisanal mining in detail.¹⁸⁵ This study will only add weight to the suggestions that all indigenous populations/communities have the right to develop their natural resources in whatever way they determine and that states should give priority to artisanal mining on indigenous territories over all other forms of extractive industry.

3. Discussion

Two issues are of importance in this study's analysis of Uganda. Firstly, it is alarming that the Karamojong peoples, despite having lived in Karamoja since time immemorial, currently have no single title to land and no official recognition of their land rights under law. What is vastly more worrying is the evidence that many in the government appear to be abusing this vacuum of land titles and manipulating both the communities and the system in order to buy and sell land and licenses from under the very feet of the Karamojong peoples. That the violation of rights of the Karamojong is being publicly supported by the President of Uganda is a worrying issue.

It is the opinion of this study that the biggest issue in Karamoja today is the government's failure to protect the Karamojong's traditional land tenure system and, more importantly, its criticism and often disregard for such a land tenure system. While legislation is currently in place to register customary tenure, it is clear that this is nonetheless designed for individuals who seek to register their customary claims and that the government has no intention of allowing communal claims to gain legitimacy through this system. Given that no communal land claims have been issued with customary certificates, despite their applications for such certificates being submitted, it seems clear that the government is at best indifferent and at worst resistant to communal land claims. This being the case, it is virtually impossible for Karamojong communities to use the existing land registration system in Uganda to defend their lands and livelihoods from violations caused by the creation of national parks, forest reserves or the activity of extractive industries.

Studies have shown that communities in Karamoja rank grazing land, livestock and water as the three key resources in the region and that competition over these resources is a key source of conflict.¹⁸⁶ It should be worrying for the state and wider society in Uganda that an area which has had a history of armed conflict could be drawn into conflict over land and resources by external interests, despite the communities' awareness of the potential ramifications of this process. And yet not only is the current Uganda government failing to protect the rights of its Karamojong citizens but it seems it is actively trying to violate these rights through the often aggressive move to sedenta-

185 See for example J. Hinton, I. Kabongo, C. Kabiswa, J. Okedi & R. Mbabazi (2011) and J. Hinton (2012) *Analysis of formalization approaches in the artisanal and small-scale gold mining sector based on experiences in Ecuador, Mongolia, Peru, Tanzania, and Uganda: Uganda Case Study*, UNEP.

186 In J. Powell (2010) *Karamoja: A literature review*, Saferworld, p. 19.

rise the Karamojong and the unwelcome trade in mining licences in the region. Unless the government takes immediate action to alter its strategy in the Karamoja region, it is feared that increased conflict may return to the region.

Secondly, it is clear that the mining companies working in Karamoja are at best oblivious to the human rights violations taking place and at worst complicit in those violations themselves. As reiterated at several points in this document, business enterprises' responsibility to indigenous populations/communities' fundamental human rights exist independently of states' own protection of such rights. It is clear that Uganda's existing mining legislation does not take into consideration a human rights perspective, nor the inclusion of indigenous populations/communities and their rights to their lands and territories in any way whatsoever. It is therefore necessary for Uganda to reconsider its approach to natural resource exploitation in order to fully comply with international law.

B. Namibia: Whose Sovereignty over Natural Resources?

Introduction

Namibia provides this study with a complex case study. On the one hand, it stands out in Africa for some of the provisions it has made for indigenous populations/communities. On the other, it shows complete disregard for fundamental tenets of indigenous rights in international law. This has left this study's analysis of the state's actions and attitude to indigenous populations/communities, in many ways, completely bewildered. An attempt to unravel some of these deep contradictions will, however, hopefully help to illuminate wider concerns for indigenous populations/communities across the continent. Indeed, as a nation that has founded its economy on extractive industries, Namibia has a lot to teach other nations with much younger mining sectors. Namibia is one of the worlds' largest diamond and uranium producers and has large natural gas and oil deposits. At the same time, Namibia is home to some of the most globally-recognised indigenous populations/communities, namely the San and Himba peoples. Extractive industries and indigenous populations/communities have inevitably clashed over land and natural resources in a number of ways and the following chapter will try to illuminate some of them.

This chapter is heavily indebted to the Legal Assistance Centre (LAC) in Windhoek, which carries out research and provides legal assistance to communities in Namibia on a number of human rights issues.¹⁸⁷ In the past, this support has extended to issues around extractive industries and land rights and their reports and guides are an invaluable roadmap to the human rights situation in Namibia.

187 See <http://lac.org.na/>

1. National Setting

This section summarises the main legislative opportunities available to indigenous populations/communities for the protection of their fundamental rights. As suggested above, however, this legislation creates a confusing and difficult landscape that the confines of this study cannot exhaustively illuminate.

Communal Land

Over one million people and almost half of the land in Namibia is communally owned.¹⁸⁸ However, “the underlying issue is that the majority of Namibians live on the communal lands with no more rights to their land than they held under the South African apartheid-era regime”.¹⁸⁹ At Independence in 1990, the national government claimed ownership of all the communal lands in Namibia; however, it has never been clear what legal basis provided them the ability to do that and it is still unclear how the state actually views its ownership of the land.¹⁹⁰ While it may appear that communal lands are held in trust by the Namibian state, there are examples where the state has removed lands from communities for alternative development without providing compensation, which suggests otherwise. Indeed, when the study asked the Deputy Director of the San Department what the cause of land disputes in Namibia was, he responded by stating that there were no land disputes in Namibia because the Constitution gave all land to the state and equally allowed everyone to freely live where they want. As a result, the Constitution took away peoples’ rights to claim their ancestral lands.¹⁹¹

Instead as other authors have noted:

Under customary law, instead of legal title, communal landholders hold some kind of land-use right, allocated and administered by the local chiefs and councillors...These chiefs and councillors, for example, are now incorporated into the formal government at the local level and are paid for their services under the Traditional Authorities Act 25 of 2000. Legal authority for the allocation and administration of communal lands is now shared by traditional authorities and regional communal land boards resorting under the Ministry of Lands and Resettlement.¹⁹²

And as the UN SRIP more recently found:

188 S. Haring and W. Odendaal (2012) ‘God stopped making land!': Land rights, conflict and law in Namibia's Caprivi Region, LAC, Windhoek, Namibia, p. 4.

189 Ibid, p. 15.

190 Ibid, p. 6.

191 Interview with Gerson Kamatuka, 4th November 2013.

192 S. Haring and W. Odendaal (2012) p. 6.

Problematically, the tenure afforded the occupants of communal lands is one of mere usufruct and not full ownership, in contrast to the freehold titles by which private commercial farms typically are held. Additionally, communal lands of San and certain other indigenous groups, including the Himba, are under a continuous threat of encroachment by larger or more powerful groups who move into lands, raising fences to demarcate areas in which to graze their cattle, despite the fact that the erection of fences within communal land areas is prohibited under the Communal Land Reform Act.¹⁹³

As suggested above, one area of the communal land system that is causing problems for San communities is the instance of external communities invading or encroaching on communal land and conservancies. The Traditional Authorities Act 25 of 2000 gives “jurisdiction over its own people only; if people of a neighbouring tribe move in, they are not under the jurisdiction of the local traditional authority”.¹⁹⁴ This situation is further complicated by Article 21(h) of the Constitution, which allows citizens to “reside and settle in any part of Namibia”. In theory this:

means that any citizen can freely settle on *communal* land anywhere in the country because it is “state land” or “public land”: this provision does not grant any right to settle on the *property* of another. Poor people with cattle have been moving onto the communal lands of other poor...claiming a constitutional right to do so, but this claim obviously denies other citizens living on communal land any secure right to property on that land.¹⁹⁵

As a result, the San communities in the Nyae Nyae and N=ǀa Jaqna conservancies described below have been drawn into legal battles in attempts to remove encroachers who compromise their conservancies and violate their rights to their lands.

Conservancies and Community Forests

Indigenous communities have also engaged in registering their lands as conservancies and community forests to better insulate them from encroachment and degradation. This appears to be a prudent approach as Namibia is at the forefront of community-based natural resource management through its conservancy system, which is “backed by the Namibian Government and legislation that encourages communities to incorporate themselves as communal conservancies and community forests, giving them certain ownership rights over natural resources”.¹⁹⁶ As a result, conservancies alone “make up 52% of all communal land in Namibia, and 18.8% of Namibia’s total land area”.¹⁹⁷

193 UNHRC (2013), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in Namibia, A/HRC/24/41*, para. 24.

194 S. Harring and W. Odendaal (2012), p. 16-17.

195 *Ibid.*, p. 16.

196 *Ibid.*, p. 4-5.

197 *Ibid.*, p. 11.

Yet as the LAC has noted in a case from the Caprivi region:

Making the situation even more complex is the fact that, whatever the underlying issues of communal land ownership or use rights may be, the communal conservancies do not have any right to the land at all. Rather, they have a *property right* to the wildlife...while the conservancy has a right to the wildlife, the cattle herders are destroying the land that is the habitat of the wildlife – and this land is beyond the jurisdiction of both...[the]...Conservancy and, apparently, the...Traditional Authority. This makes for a simply intolerable result.¹⁹⁸

It is important to understand that while “[c]onservancies have some legal use rights over game...[and]...community forests give communities management rights over forests and grasslands”,¹⁹⁹ these rights do not extend over land itself, which remains in the ownership of the state and managed by Traditional Authorities and Communal Land Boards. And vitally that “the[se] underlying land tenure problems threaten the stability of many conservancies”.²⁰⁰

The complexity is entirely debilitating for indigenous communities. As one report acknowledged:

If the traditional authorities have legal power to allocate communal land, but cannot enforce this power, then their power over the communal lands is completely undermined. If the conservancies are legal entities with legal power over natural resources, but cannot enforce this power in court, then the conservancies are not viable.²⁰¹

Extractive Industries

Namibia has a long history in the extractive industry sector, is a key producer of a number of resources, including diamonds, gold, uranium and oil and gas among others, and has extensively licensed its sub-surface resources to mining interests. Namibia, in common with most African states, vests ownership of the mineral wealth of the country in the state itself. Article 100 of the Constitution states that, “Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned”.

The Mineral Act 1992 does provide compensation mechanisms for landowners whose lands may be damaged as a result of exploration or extraction operations. But as Communal Land is vested in the state and indigenous populations/communities in Namibia almost exclusively live on communal lands, in the event of any compensation this would go directly to the state and not indigenous populations/communities. So despite the fact that communities manage resources through community forests and

198 Ibid, p. 43.

199 Ibid, p. 6.

200 Ibid, p. 12.

201 Ibid, p. 27-8.

conservancies, they have no control over whether extractive industry activities take place in their forests or conservancies and have no grounds for compensation.²⁰²

Indigeneity

A crucial final point to acknowledge is the key hindrance to the full implementation of Namibia's responsibilities under international law, which one author has acknowledged as, the "lack of official discourse on 'indigenous peoples' in Namibia".²⁰³ This was observed most vividly in the response from the Deputy Director of the San Department in the Office of the Prime Minister, who stated that there were no indigenous populations/communities in Namibia and that the term was useless in Namibia as all Africans were indigenous to Africa. This view is further reiterated in an official publication of the San Department in the Office of the Prime Minister, which states the following:

In Namibian perspective the term 'marginalised' is more preferable than the term 'indigenous' to apply to communities that have faced particular challenges because of discrimination against their culture and economic activities. 'Indigenous' is a term that is often used to describe the people who lived in an area before it was colonised or became a nation state, so in most African countries the majority of the population would consider themselves to be indigenous. Hence, it would be contradictory to only refer to certain groups as more indigenous than others.²⁰⁴

This stance is all the more difficult to comprehend given Namibia's exemplary actions in the international arena, both in signing the UNDRIP and their work with the ILO in implementing the rights contained in the ILO's Indigenous and Tribal Peoples' Convention 169.²⁰⁵ These steps are all the more important given:

the Namibian Constitution affirms that all treaties binding upon Namibia as well as — general rules of public international law are incorporated into Namibia domestic law. Thus, provisions of international human rights treaties to which Namibia is a party, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as the African Charter on Human and Peoples' Rights, form part of the domestic laws of the land.²⁰⁶

202 See S. Tjiramba and W. Odendaal (2005) *A review of environmentally sustainable land use practices and their benefit to Namibia's communal communities*, LAC, Windhoek, Namibia.

203 ILO (2013) *Promoting and Implementing the Rights of the San Peoples of the Republic of Namibia*, ILO, Windhoek, Namibia, p. 6.

204 OPM (n.d.) *Empowering Marginalised Communities in Namibia*, OPM, Windhoek, Namibia, p. 2.

205 ILO (2013).

206 UNHRC (2013), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in Namibia*, A/HRC/24/41, para. 15.

Namibia's Ombudsman has proven to be a strong supporter of indigenous rights in Namibia and is clearly guided by the work of the African Commission. The Ombudsman produced a '*Guide to Indigenous Rights in Namibia*' which clarifies common misconceptions surrounding indigenous rights in Namibia and Africa. Specifically, the guide clarifies that unlike the misconceptions held by the San Department of the Office of the Prime Minister, "technically speaking, not all Africans are indigenous",²⁰⁷ and gives a clear definition based upon the 2005 ACHPR guidelines elaborated earlier in this report. The guide further clarifies that indigenous rights are not new or special and are instead based in existing human rights law and, crucially, that indigenous populations/communities exist within specific histories that are marked by prejudiced views and marginalisation, causing inequalities in education, health and other public services. And therefore that, "[p]rovisions on indigenous peoples' rights aim at correcting these historical injustices and socio-economic imbalances, by first restating the principle of equality as articulated in all universal human rights instruments and secondly provide not for special rights but special measures with the view to closing socio-economic gaps and taking into account specificities of indigenous peoples".²⁰⁸ That the San Development Division has such strong and clear guidance at its disposal but continues to express an outdated and incorrect definition is deeply worrying given the Division's prime role in coordinating state support for San and Himba peoples.

Both the UN SRIP and a recent programme supported by the ILO to better integrate indigenous rights within government policy and practice have suggested the need for an integrated and specific framework for indigenous populations/communities in Namibia.²⁰⁹ In response, Namibia has begun developing a white paper designed to present a road map for developing an indigenous populations/communities' framework.

Lastly, the study will highlight the Namibian government's failure to fully comprehend indigenous populations/communities' concerns and rights, as accepted internationally, by highlighting their discussion with the ACHPR. In 2005, the ACPHR WGIP conducted a mission to Namibia and published a report of its findings in 2008.²¹⁰ Crucially, the report recommended that Namibia should, among other things, provide the San with "communal land they can call their own".²¹¹ The WGIP felt that securing the San's rights to their lands was "one of the most fundamental interventions that can be made on behalf of the San in Namibia to secure their sustainable livelihood".²¹²

Unfortunately, the Namibian government did not take this recommendation as an opportunity to acknowledge indigenous populations/communities' right to self-determi-

207 Ombudsman (n.d.) *Guide to Indigenous Rights in Namibia*, Ombudsman, Windhoek, Namibia, p. 7.

208 Ombudsman (n.d.) *Guide to Indigenous Rights in Namibia*, Ombudsman, Windhoek, Namibia, p. 10.

209 UNHRC (2013), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in Namibia*, A/HRC/24/41, para. 75.

210 See ACHPR (2008) Report of the African Commission's Working Group on Indigenous Populations/Communities: Mission to the Republic of Namibia, ACHPR & IWGIA, Copenhagen, Denmark.

211 Ibid, p. 51.

212 Ibid.

nation, as implied by the WGIP, and instead directly responded to the recommendation in a 2010 ACHPR state report submitted with the following response:

The Government has relocated and continues to relocate and settle the San and Ovatus people to permanent locations, usually with the intention of "civilizing" them and to provide schooling, running water and modern amenities. Unfortunately, and because the San People are hunters and gatherers and lived nomadic lives for thousands of years, this life-style of coercing them to live in settlement areas has not been very successful.²¹³

It should be clear that this statement from the Government of Namibia is discriminatory in nature and its attitude not consistent with indigenous populations/communities' aspirations for their own self-determination. It shows a glaring inability on the part of the Namibian government to live up to its obligations under international law with respect to indigenous populations/communities.

2. Local Context

As part of this study's visit to Namibia, it was able to meet with two distinct indigenous populations/communities, the Himba and San, and learn from their very different situations. Located in the very north of Namibia, the Himba people are internationally renowned for their red bodies and their images have adorned countless pages of travel magazines across the world. Today they manage to maintain their pastoral livelihoods along the Kunene River despite limited development in their region and the droughts which affect their lands. On Namibia's eastern border exist a very different but equally recognisable people. The San populations living in the Tsumkwe region of Namibia have a variety of histories and many continue to be reliant upon hunting and gathering activities for their survival. Despite such different livelihood strategies, these two communities are today experiencing similar hardships as a result of legislation that seeks to subvert their rights to their lands and livelihoods.

Box 13: The San and the Himba²¹⁴

The San and the Himba both have a special attachment to their land. Access to and rights to traditional lands and natural resources are critical to their survival. For the San, the primary source of survival is land on which to hunt for wildlife

213 GON (2010) Namibia State Report, Government of Namibia, Windhoek, Namibia, p. 7.

214 LAC and DRFN (2014) "Scraping the Pot" San in Namibia Two Decades after Independence, Legal Assistance Centre and Desert Research Foundation of Namibia, Windhoek, Namibia, p. xiii.

and veld fruits. The Himba, on the other hand, need access to traditional lands for grazing their cattle. Meat and milk from their cattle are their main sources of livelihood. Each of these groups has cultures and ways of life that differ from the dominant groups in Namibia. They are separately treated as 'less developed' and suffer discrimination from larger groups. The San, in particular, are subject to severe exploitation and domination by all large groups of people in Namibia. They occupy the remotest parts of the country, have been extensively exploited through land dispossession and made to provide cheap labour. They have no representation at local, regional and national levels in the Namibian government, save for the recognition of two chiefs in the Tsumkwe District. The Himba have remained isolated from national development in their arid Kunene region with little or no participation in national affairs or development programmes.

San – Otjozondjupa Region

There are between 27,000 and 38,000 San peoples in Namibia, divided among a number of communities that each share their own histories, traditions and cultures.²¹⁵ These groups include the Hai//om, Khwe,!Kung, Ju/'hoansi, Naro, †Au//eisi, while smaller San communities include the //Anikwe,!Xǀó, !'Auni, and N|u (/Nu-//en).²¹⁶ Of the various tribal homelands created before independence, only Bushmanland was reserved for San, with the town of Tsumkwe created as its administrative centre. As the UN SRIP writes, Bushmanland "comprised more or less the traditional hunting area (n)lore) of the Ju/'hoansi San and was occupied almost entirely by this group".²¹⁷ Today however, the land is shared with the!Kung San community, which has moved into the western half of Bushmanland. In an attempt to better secure their rights to their lands and livelihoods, the Ju/'hoansi community has organised itself into the Nyae Nyae conservancy, and the!Kung into the Nǀa Jaqna conservancy.

The Nyae Nyae conservancy was created in 1998 and, out of the 79 currently registered, is one of Namibia's most successful conservancies (see Map 2). The conservancies are "in a sense flagship programmes for the Namibian Government and have been promoted as models for community-based resource management".²¹⁸ Some of the benefits to the communities are listed below:

Within the conservancy area, the Ju/'hoansi in Nyae Nyae have rights to manage natural resources and promote tourism, including through safaris and trophy hunting. They also have the right to hunt traditionally with bows and arrows....

215 UNHRC (2013), p. 5.

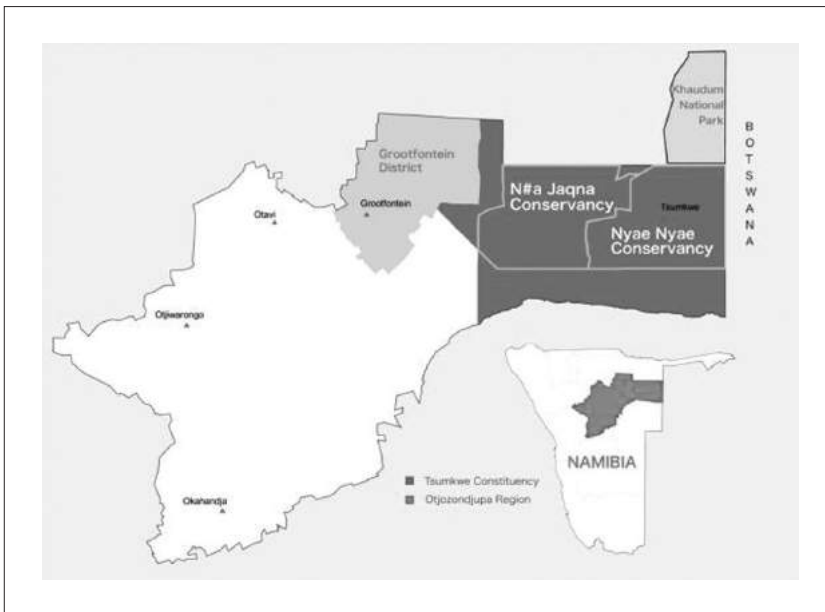
216 Ibid.

217 Ibid, p. 8.

218 UNHRC (2013), p. 9.

Within the Nꞑa Jaqna Conservancy, which was created in 2003 in the western Tsumkwe region, the majority!Kung San people are authorized to harvest wildlife sustainably and collect wild foods. However, this conservancy is located in an area with minimal wildlife or other tourist potential, so it has not been able to draw the same economic benefits as has Nyae Nyae.

Indeed, some of the benefits are notable. The Nꞑa Jaqna Conservancy was awarded the Equator Prize in 2008 for its work in sustainable development and community-based conservation and the benefits these programmes have brought the community.²¹⁹ However, this study, along with other authors, raises serious concerns with regard to the conservancy model.



Map 3: Nyae Nyae and Nꞑa Jaqna Conservancies²²⁰

Importantly, it is clear that the conservancy's provision of rights is limited twofold. In the first instance, the rights conferred on the community are only rights to manage and not to own the resources in questions. In the second instance, the resource in question is the wildlife and plants in the conservancy and not the land itself. In effect, the conservancy status confers the community rights as managers of the wildlife, on behalf of the government, but in no way protects their rights to freely manage and develop their resources as international law demands. And even this right to manage the resources

219 See UNDP (2008) Equator Initiative Case Studies: Nꞑa Jaqna Conservancy, UN.

220 Source: http://www.jdfund.org/attachments/nyae_nyae_conservancy_regionmap.jpg

is limited, with the Ministry of Environment and Tourism having ultimate right to usurp the conservancy's management if necessary.

However, one of the key management issues for the conservancies is the invasion of their lands by livestock owners from outside areas. For example, in Nyae Nyae in 2009, up to 1,200 head of cattle were moved into the conservancy by Herero farmers and, despite support from the LAC, the conservancy struggled to find the legal means to evict the families and their cattle.²²¹ And despite most of the illegal grazers being prevented from residing inside the conservancy, many have simply relocated to Tsumkwe town, which lies in the middle of the conservancy and whose town limits are outside its jurisdiction. This enables the cattle grazers to keep their cattle within the town limits and yet still have access to the grazing lands, albeit illegally. Without the resources to continually monitor the cattle and continually seek court orders to have them evicted, and with no powers to arrest the owners, the grazing continues.

And grazing is not the end of the problem. Illegal fencing inside the conservancies is a problem that the conservancies' management teams struggle to control. In practice it takes a long and often legal process to have people evicted when they have illegally built properties and erected fences inside the conservancies. In addition, and particularly in N \ne a Jaqna, the conservancies are struggling to prevent unwanted and often illegal developments from taking place.²²² These developments - of buildings and farms - take place not only through private individuals but also through projects initiated by the government. The communities have responded by seeking additional layers of rights to their lands through the registration of community forests with the Ministry of Agriculture. Recently, the Nyae Nyae conservancy has gone one step further and requested the right of leasehold for the land on which the conservancy is situated from the Communal Land Board.

And yet there is one further issue which increases the complexity of the situation in the former Bushmanland. As one author has noted, "[i]n this mix the diamond prospectors are just one more layer of occupation of San lands".²²³ In N \ne a Jaqna, B2Gold are exploring for gold and, in Nyae Nyae, the Mount Burgess company are exploring for diamond deposits. In Nyae Nyae specifically, Mount Burgess own, "100% of one [exclusive prospecting licence (EPL)], 90% of eight EPLs...and 85% interest in four

221 See J. Hays (n.d.) *The invasion of Nyae Nyae: A case study in on-going aggression against indigenous hunter-gatherers in Namibia*, University of Tromsø.

222 See W. Odendaal (n.d.) *San Communal Lands Contested: The battle over N \ne a Jaqna Conservancy*, LAC, Windhoek, Namibia, UNHRC (2013), *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in Namibia*, A/HRC/24/41, para. 28 and ACHPR, CHR & ILO (2010) *Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples: Namibia*, ACHPR, p. 30-31, 41.

223 S. Harring (n.d.) *Diamond Exploration and the San in Namibia: Toward a legal history*, CUNY School of Law, New York, US, p. 20.

more EPLs".²²⁴ In both cases, and as consistently witnessed by this study, the two communities have not enjoyed their rights as directed by UNDRIP and international law and have neither been consulted nor had their consent sought by either company. The licences to carry out exploration inside the conservancies are awarded by the Ministry of Mines and Energy; however, the companies are nonetheless required to submit Environmental Impact Assessments to the Ministry of Tourism and Environment, the very same Ministry that regulates the conservancies.

The effects of this exploration are unclear but, in the case of Nya Jaqna, 26% of its area is covered by the exploration licences; in Nyae Nyae the figure is approximately 80%.²²⁵ and, given the licences are situated in the core wildlife areas of the conservancies, there are real concerns as to the effects of the exploration on their ecosystems. In addition, without coordination and information from the companies of their work plans, there are additional concerns that the exploration will have negative effects on tourism and professional hunting interests within the conservancies, which forms the core business of each conservancy.

Himba – Kunene Region

The SRIP's recent report on Namibia states that the Himba (or Ovahimba) people number approximately 25,000 and live exclusively in the mountainous Kunene region of the North, formerly known as Kaokoland.²²⁶ Although the region is famous for its Ovahimba communities, it is also home to Ovatue, Ovatjimba and Ovazemba indigenous communities who share a common history with the Ovahimba peoples but today live as distinct ethnic groups. The study was fortunate enough to be able to meet with Ovatjimba, Ovazemba and Ovahimba communities; however, for ease, and due to their common history and the human rights issues affecting them, the report will refer to all these communities collectively as Himba.

All three communities had a number of issues affecting them, including political representation and interactions with extractive industries on their lands. However, by far the biggest issue affecting these groups currently is the state's proposal to construct a dam on the Kunene River. Plans for a dam on the Kunene River originated in 1969 when the Portuguese and South African governments signed agreements on the future management of the water resources; however, this was never operationalised until 1992 when initial technical and environmental studies were undertaken.²²⁷ The initial dam was proposed at a section of the river named Epupa and plans were in place

224 Ibid, p. 7.

225 S. Harring (n.d.) *Diamond Exploration and the San in Namibia: Toward a legal history*, CUNY School of Law, New York, US, p. 6.

226 UNHRC (2013), p. 5.

227 Harring (2008) *That Dam Question: The Epupa Debate*, LAC, Windhoek, Namibia, p. 1.

to create a 11.5 billion cubic metre reservoir that would flood an area of 380 square kilometres.

The expected impacts on the Himba peoples were extensive and included the flooding of 110 permanent dwellings as well as 160 graves. In addition, the flooding would impact 1,000 permanent residents of the land as well as another 5,000 residents who rely on that section of the river in times of drought.²²⁸ As one author has noted:

Himba opposition to the dam does not stem from a blind rejection of all forms of change, or from a lack of understanding of the project. Himba people living in the vicinity of the proposed dams engage in detailed discussions about various prospects for development, and have shrewd opinions about the costs and benefits of a dam as far as they are concerned...the Himba pastoralists in the project area see no prospect of tangible benefit from the dam, but only the loss of resources, the loss of control over their land and the erosion of socio-economic structures which have sustained them in a successful and independent existence for decades.²²⁹

The Himba organised themselves and, with the support of international organisations, they were able to mount a concerted appeal to have the plans for the dam stopped. This appeal appeared to work and, for well over a decade, the governments of both Angola and Namibia sought alternative plans to meet their demands for electricity.

This reprieve appears to have been only temporary as recent plans to dam the Kunene River have once again been tabled, this time for a much smaller dam downstream of the original Epupa site. This new Baynes site would generate less electricity and flood a much smaller area (57 square kilometres) and have much reduced impacts on the Himba people. In 2013, public consultations were organised and an Environmental and Social Impact Assessment (ESIA) shared with the public.²³⁰ The ESIA predicated the following socio-economic impacts:

- Loss of land and natural resources;
- Disruption to social networks and rapid cultural change;
- Loss of cultural heritage;
- Pressure on social infrastructure;
- Disturbance due to dust, noise and safety hazards from traffic;
- Impact on the local economy; and
- Impacts on fishing.²³¹

Despite acknowledging these impacts, the ESIA concluded in a way that seems to suggest that community consent for the project was attractive but not necessarily impe-

228 Ibid, p. 7.

229 Ibid, p. 13.

230 See <http://www.erm.com/BaynesESIA>

231 ERM(2013) ESIA Non-technical Summary, ERM, Windhoek, Namibia, p. xvi.

rative for the progress of the project, ...it is now imperative that the Governments commence with negotiations with the local indigenous population, with the objective of reaching binding contractual agreements which would lead to free, informed and prior consent for the construction of the project. The project proponent must do everything in its power to obtain such agreements before involuntary resettlement is considered. Due process has been followed throughout the preparation of the ESIA, and recognising that final negotiations between the two governments and the local indigenous population are outstanding, such a step may be considered, provided that all approved mitigation measures related to the socio-economic impacts on the local indigenous population, as reflected in the draft SEMP, are retained and implemented.²³²

In response to this new interest in damming the Kunene River, the Himba have once again rallied to the defence of their lands and territories. They presented a declaration to the UN SRIP, who visited them as part of his mission to Namibia in 2012. Among other concerns, they spoke clearly in regards to the proposed dam:

In the recent past we have successfully opposed the construction of the Epupa Hydroelectric Dam...Today, we now also hear that the Government of Namibia wants to build again a dam in our territory, this time at Baynes Mountains, downstream of Epupa area. But as we have done so in the past, we strongly oppose and object to this. Again, the affected communities and traditional leaders have not been consulted, nor have we been included in any steps of the planning and decision-making levels. We will never give our consent to have our river being blocked, the life in the waters and dependent of it being threatened, and to have our environment being destroyed and our land being taken away from us.

We would lose our graveyards and sacred places in those areas that would be flooded or destroyed through the construction of the dam. The population would become refugees, forced to move away with their animals to other areas that are already inhabited by others from our community...Moreover, the beneficiaries of the hydro-electricity will be those who live in the cities and not us.²³³

It is currently unclear what stage the project is at but it seems likely that it will go ahead and Himba communities will be involuntarily resettled without their consent.

3. Discussion

In the case of the San communities living in the east of the country, their ability to freely manage and develop their natural resources is one of the most complex issues this study has come across. While the government clearly lists the many ways in which legislation protects the rights of indigenous populations/communities to manage their lands and livelihoods, it is the opinion of this study that any such rights offered in exis-

232 ERM(2013) ESIA Non-technical Summary, ERM, Windhoek, Namibia, p. xxi-xxii.

233 Various (2012) Deceleration by the Traditional Leaders of Kaokoland in Namibia, Opuwo, Namibia.

ting legislation fall far short of those rights demanded by international law. Further, it is clear that the Namibian government only sees indigenous communities as beneficiaries of their lands and not as owners of such. In practice, they manage forests that are owned by the state via the Ministry of Agriculture, they manage wildlife owned by the state via the Ministry of Tourism and Environment, and they manage land through their traditional authorities but owned by the state (albeit in trust). And, finally, they are not granted any management or beneficiary rights over their sub-surface resources, which are owned by the Ministry of Mines and Energy. As a result, this report agrees with the concerns of the Convention on the Elimination of Racial Discrimination (CERD) Committee which stated in its Concluding Observations on Namibia in 2008,

The Committee reminds the State party of its general recommendation No. 23 (1997) on the rights of indigenous peoples, in particular paragraph 5, which calls on State parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their lands and territories. It therefore encourages the State party, in consultation with the indigenous communities concerned, to demarcate or otherwise identify the lands which they traditionally occupy or use, and to establish adequate procedures to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant indigenous customary laws.²³⁴

As a result of this fractioning of land management, indigenous communities like the San are forced to play a frenetic game to secure their rights through the auspices of more than four separate ministries and numerous legislative frameworks and yet none of it will even broach the one fundamental issue which is their rights to own and freely manage their lands and territories, regardless of state legislation to the contrary. Without the resolution of this key question, the communities are left for all intents and purposes defenceless against external threats to their lands from illegal cattle grazers and extractive industries. It is the fear of this study that, if any resources were discovered on their land, the communities would have no weapons to prevent the wholesale and illegitimate development of their lands by outside forces.

In Kunene region in the north, another compounding issue is being experienced by the Himba peoples. Not only are their land rights not recognised by the state in much the same way as the San peoples are but they are also affected by large-scale developments in the form of hydropower dams. This report therefore suggests that any discussion of extractive industries should be broadened to include other natural resource exploitation, such as dams. For not only is hydropower on this scale destructive of indigenous lands, carried out in much the same manner and causing the same effects as extractive industries but, ultimately, the demands for power are vastly increased by the activities of the extractive industry sector, which has accounted for up to 40%

234 CERD (2008) *Concluding Observations: Namibia*, August 2008, UN Doc. No.: CERD/C/NAM/CO/12 para 18.

of Namibian consumption.²³⁵ It is clear then that any study of extractive industries in Africa has to widen its scope to include industries placed downstream in the value chain (i.e. oil refineries or processing plants), support industries which help to service extractive industries (i.e. power generation), and other natural resource extraction activities whose projects pose equal threats to indigenous populations/communities' lands and livelihoods. In an attempt to include this within this study, the next two chapters will investigate these contexts in Kenya and Cameroon.

C. Kenya: Moving Downstream

Introduction

Kenya has approximately 40 million people and 43 separate ethnic groups. Some of the many indigenous populations/communities in Kenya include the Maasai, Samburu, Ogiek, Endorois, El Molo, Yaaku, Borana, Sengwer, Gabra, Orma, Pokot, Rendille, Aweer-Sanye and Turkana. Of those groups, pastoral communities like the Turkana and Maasai (988,592 and 841,622 in 2009)²³⁶ are the most numerous while hunter-gatherer groups like the Aweer-Sanye (7,602 in 2009) and fishing communities like the Bajuni (69,110 in 2009) number far fewer.²³⁷

A number of these ethnic groups are numerically small and politically weak and, in their recent history, have encountered a new wave of infrastructure developments on their lands that are unlike anything that has gone before. These developments include mega dams, vast irrigation schemes, colossal deep sea ports, and natural resource exploitation across the breadth of the country. This next section of the report will try to understand a range of these projects and how they form a particular understanding of development, as suggested by Abraham below, an approach that denies the rights of indigenous populations/communities and further marginalises them in Kenyan society.

1. National Setting

Kenya's ambition is to become a newly industrialized, 'middle-income country ... by the year 2030'. To achieve this goal, the Kenyan State has designated series of flagship programmes (known as *Vision 2030*), a number of them for areas occupied by minority and marginalized groups. These mega-projects, while having the potential to engender growth, can have harmful impacts on the livelihoods and cultures of indigenous groups, threatening not only their identities but also their very survival...This approach has exac-

235 Haring (2008), p. 18.

236 Abraham (2012) *Kenya at 50: unrealized rights of minorities and indigenous peoples*, MRG, London, p. 6.

237 Government of Kenya (2010) Kenya's 2009 National Housing and Population, Volume 2, p.397, Nairobi Census Report.

erbated inequalities between and within communities, displaced communities from land traditionally held by them, and often intensified the poverty and vulnerability of certain communities.

Korir Sing'Oei Abraham²³⁸

Kenya's history has not been kind to its indigenous populations/communities. A Minority Rights Group report in 2005 concluded that "minorities and indigenous populations/communities are in dire need of positive action to improve their lot".²³⁹ And yet, seven years later, a subsequent report found that, "the prevailing experience of minorities in Kenya is increased vulnerability",²⁴⁰ despite a whole range of new legislation that, on paper at least, provides increased support for indigenous populations/communities.²⁴¹ For example, the new Constitution contains numerous inclusions for marginalised communities. Indeed, the very conception of the term 'marginalised' could be said to mirror the international understanding of indigenous (see Box 14). It is credible to suggest that this reference to indigenous populations/communities as marginalised peoples within the Constitution is an attempt by the state to acknowledge the socio-economic situation of indigenous populations/communities without having to engage in or concede to the politics of indigenous populations/communities' sovereignty and self-determination, in effect a neat legal sidestep of complex issues at the heart of indigenous struggles.

Box 14: Constitution of Kenya 2010²⁴²

"marginalised community" means—

- a. a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- b. a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- c. an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
- d. pastoral persons and communities, whether they are—
 - nomadic; or

238 Abraham (2012), p. 15.

239 Makoloo (2005) *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, MRG, London, p. 34.

240 Abraham (2012), p. 3.

241 See for example Abraham (2012) *Kenya at 50: unrealized rights of minorities and indigenous peoples*

242 GOK (2010) *The Constitution of Kenya*, Nairobi, Kenya, p. 162-3.

- a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;

“marginalised group” means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4);

Such intricate legal manoeuvring is symptomatic of the situation in Kenya, where an increase in policy supporting indigenous populations/communities is present yet, at the same time, human rights violations against indigenous populations/communities continue. And, like Uganda, although the new Constitution in Kenya has introduced the category of communal land ownership, it is yet to be seen whether the soon to be finalised Community Land Bill will support alternative ways to own and manage lands or simply provide a mechanism for the individualisation and privatisation of communal land in Kenya. Recent reports in the media have sounded ominous warnings for the bill’s ability to defend indigenous rights. In one, the oil firm Tullow (currently operating in Turkana region) suggested that the proposed bill should be revised. One newspaper quoted Tullow as saying:

Fossil fuels are vested in the national government and held in trust for all the people of Kenya and not just the ‘host community’. Therefore, [Tullow] argued that the role of the communities with respect to community land should be seen as landlords, licensors or gatekeepers but not sole owners or custodians.²⁴³

More worryingly, the draft bill sent to the Senate for debate “was an earlier version that did not contain views of stakeholders including the National Land Commission, Ministry of Lands and interest groups”.²⁴⁴ As such there are concerns that the bill that will be presented to the Senate will neither represent the aspirations of local communities nor the potential of the Community Land Bill to fully protect the rights of communities in Kenya.

- It is worth noting that, in 2010, the ACHPR WGIP visited Kenya and, among others, made the following recommendations relating to indigenous populations/communities, extractive industries and land rights to the government:

243 Standard (2014) *Tullow Oil’s move on land Bill opposed*, [accessed on 3 May 2014] http://www.standardmedia.co.ke/m/story.php?articleID=2000110108&story_title=Tullow-Oils-move-on-land-Bill-opposed

244 The Star (2014), *Experts punch holes in community land bill*, [accessed on 3 May 2014], <http://www.the-star.co.ke/news/article-154911/experts-punch-holes-community-land-bill>

- Review its overall approach and orientation towards the state of its indigenous populations/communities. To this end and for a wider impact, the government should organize a national conference on issues that affect the indigenous populations/communities of Kenya, in which prominent and knowledgeable persons on Indigeneity take active part.
- Observe the standpoints of the African Commission on Human and Peoples Rights on Indigeneity and the rights of indigenous populations/communities in Africa as stipulated in the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities adopted by the African Commission at its 28th Ordinary Session in 2003.
- Recognize the pastoral communities and hunter-gatherer communities of Kenya as indigenous.
- Adopt the United Nations Declaration on the Rights of Indigenous Peoples and ensure its incorporation, through the parliament, into domestic laws.
- Implement the rulings of the African Commission on the case of the Endorois people, return their ancestral land and respect their right to unrestricted access to Lake Bogoria.
- Consult indigenous communities prior to exploring for exploitation of natural resources on their ancestral and traditional land. Indigenous communities should receive an equitable share of benefits obtained from the exploration and exploitation. Full compensation should be paid to indigenous communities in case of adverse environmental impact on their land, natural resources and traditional livelihoods resulting from these economic activities.
- The state through the Ministry of Justice should provide legal assistance to indigenous communities perhaps through the recently launched legal aid scheme in order to access justice on a variety of human rights issues such as in defending and reclaiming their traditional land rights and resources.²⁴⁵

And, finally, it is vital that any discussion about Kenya acknowledges the hugely important Endorois case at the ACHPR. As mentioned earlier in the report, the Endorois were evicted from their ancestral territories in 1973 to make way for a protected area and, after years of legal action, in a landmark ruling in 2010 the ACHPR made the following legal recommendations:

- Recognize rights of ownership to the Endorois and restitute Endorois ancestral land.
- Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.

245 ACHPR (2010) *Report of the African Commission's Working Groups on Indigenous Populations/Communities: Research and information visit to Kenya*, ACHPR & IWGIA, Copenhagen, Denmark, p. 84-87

- Pay adequate compensation to the community for all the loss suffered.
- Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.
- Grant registration to the Endorois Welfare Committee.
- Engage in dialogue with the Complainants for the effective implementation of these recommendations.²⁴⁶

Unfortunately, however, and in another sign of Kenya's reluctance to show real commitment to respecting indigenous rights, five years after this landmark ruling, and despite initial comments suggesting it would comply with the findings of the Court, the only recommendation to have been implemented is the registration of the Endorois Welfare Committee. Further, in 2013, the government failed to attend a workshop convened by the ACHPR to discuss the implementation of the Endorois decision despite the presence of members of the ACHPR, the UN SRIP and the event being located in Nairobi. As pointed out by the ACHPR, "the absence of Government officials from such deliberations was a serious cause of concern for the Endorois community and the African Commission on Human and Peoples' Rights".²⁴⁷

2. Local Context

This report has suggested that many of the issues facing indigenous populations/communities are not the result of extractive industries in isolation but of other industries that provide support to the extractive industry sector. Examples of this could be the development of refineries to process extractive industry products or the creation of hydro-power projects to support the energy needs of extractive industries. This study earlier framed this discussion by using the analogy of a river to differentiate extractive industry (upstream) from support activities (downstream). In order to bring this set of issues home, the report will focus on the Northern Region of Kenya, stretching from Turkana in the north-west of Kenya, bordering South Sudan and Ethiopia, to Lamu in the north-east, bordering Somalia. This entire area is currently on the precipice of a new dawn. According to the government, it is a new dawn of prosperity and development for the north and the whole of Kenya yet, for many of the indigenous populations in this region, this dawn brings uncertainty, fear and the possibility of the complete annihilation of their lands and livelihoods.

²⁴⁶ Abraham (2012), p. 10.

²⁴⁷ ACHPR (2014) *Final Communiqué of the Workshop on the Status of the Implementation of the Endorois Decision of the African Commission on Human and Peoples' Rights*, [accessed on 4 May 2014] <http://www.achpr.org/news/2013/10/d96>

Turkana

Like the Karamoja region along its western border, the Turkana region has similarly been viewed as a vast economic wasteland by various governments and interests and yet, at the same time, it is listed as a World Heritage site for its physical beauty. Populated by the pastoralist Turkana people, the availability of cheap weapons from neighbouring Ethiopia and Sudan has seen periods of armed conflict with neighbouring populations over the last couple of decades. In addition, the arid nature of this desert area has hindered economic development and the Turkana have continued their way of life relatively unimpeded. This situation is currently changing on a level never seen before with the introduction of vast hydropower, agro-industry and oil projects in the coming years.

Of key concern is the proposed Gibe III hydropower dam, which is being constructed 600 kms upstream from Lake Turkana in Ethiopia.²⁴⁸ Indigenous populations/communities in Ethiopia, whose territories will be flooded by the 200 square kilometre reservoir, will be catastrophically affected by the dam and there will be knock-on effects further upstream in Kenya. As one researcher has noted, "Gibe III will permanently alter the natural hydrological cycles upon which the flood plains ecology, the productivity of Land Turkana's fisheries and the livelihoods of the local population have always depended".²⁴⁹ And further:

By regulating the flow of the river, the dam will also make possible large-scale commercial irrigation schemes in the Lower Omo...One of the schemes now being implemented will almost equal in extent the entire current irrigated area of Kenya. Irrigation development on this scale will require a huge rate of water abstraction from the Omo, which is a trans-boundary river and the source of 90 per cent of Lake Turkana's freshwater...

The result could be another Aral Sea disaster in the making, with up to 50 per cent of the lake's Omo inflow being abstracted for irrigation alone.²⁵⁰

And yet, in the face of a potentially retreating lake and water shortages, the Kenyan government is planning its own commercial irrigation schemes to match Ethiopian plans and is "investigating the potential of 10,000 hectares of irrigated agriculture...on the NW shore of Lake Turkana".²⁵¹

A second source of natural resource exploitation in Turkana can be found in recent oil exploration in the area for which the study was able to find little information in the

248 S. Avery (2013) *What Future for Lake Turkana?*, University of Oxford, African Studies Centre, Oxford, p. 3.

249 Ibid.

250 Ibid.

251 S. Avery (2102) *Lake Turkana & the Lower Omo: Hydrological Impacts of Major Dam & Irrigation Developments*, University of Oxford, African Studies Centre, Oxford, p. 2.

public domain or in the hands of the communities. Although this study was not able to travel to Turkana in person, other authors have concerns with the activities of companies like Tullow Oil, which leases the 3.1 million hectare Ngamia-1 oil block and which has not sought the consent of indigenous Turkana communities before commencing its activities.²⁵²

There is a growing tension over access to resources that is accompanying the lack of information and participation in the oil exploration in Turkana. During the study's fieldwork in Kenya, ethnic clashes between Turkana and Pokot youths erupted.²⁵³ At the time, reports suggested that Pokot youth were claiming an area formerly under Turkana administration as being under Pokot administration. While this may be entirely accurate, many people the study spoke to suggested the real cause for the violence was the communities' desperation to receive benefits from oil exploration and a race to claim ownership of contested areas. If communities continue to be uninformed and are kept distanced from oil exploration in the region then it can only be assumed that this will heighten tensions and exacerbate unresolved wounds between neighbouring ethnic groups.

In addition, an area to the south of Lake Turkana is being developed for a proposed 300 MW wind farm that will be fully operational by 2016 and which will include 365 wind turbines.²⁵⁴ The proposed farm will cover an area of 162 square kilometres, will cost €600 million and will provide Kenya with the equivalent of 20% of its current capacity. Once constructed, it will be the largest wind farm in Africa. The scale of this project, combined with the oil exploration and commercial irrigation, is on a scale that not even Africa has seen before. That the indigenous populations/communities who own the land upon which these projects are being located and which are irreversibly being changed are in no way included within the management and decision-making processes is of grave concern.

And the issues facing the Turkana people do not end there. In addition to the draining of Lake Turkana for hydropower, the loss of rangelands to commercial irrigation projects, the prospect of oil production and the development of Africa's largest wind farm, Turkana has also been identified as one of the key staging posts of the Lamu Port South Sudan, Ethiopia Transport Corridor (LAPSSET). This will involve the construction of an airport, resort city and oil pipeline, road and rail network. And all of this will take place in an arid desert previously only populated by a nomadic pastoral community whose largest settlement currently stands at 1,000 people.

252 Sena (2012) *Lamu Port South Sudan Ethiopia Transport Corridor (LAPSSET) and Indigenous Peoples in Kenya*, IWGIA, Copenhagen, p. 18.

253 See Standard Media (2012) *Armed Pokot militiamen holding three police camps and GSU hostage in Turkana County* [accessed on 2 February 2014] http://www.standardmedia.co.ke/?articleID=2000098532&story_title=armed-pokot-militiamen-holding-three-police-camps-and-gsu-hostage-in-turkana-county&pageNo=1

254 See Lake Turkana Wind Project (2014) [accessed on 2 February 2014] <http://ltpw.co.ke>

Lamu Port South Sudan Ethiopia Transport Corridor

The LAPSSET project is one of the main flagship projects in Kenya's Vision 2030, the long-term framework aimed at transforming Kenya into a mid-level country with 10% annual growth by the year 2030.²⁵⁵ The project will comprise seven main components, including a new deep sea port, railway line, highway, crude oil pipeline, oil refinery, resort cities and airports for the purpose of creating better linkages between Ethiopia and South Sudan, and form part of the proposed equatorial land bridge that will run from Cameroon to Kenya (see Box 15 for more details).

Box 15: Key LAPSSET figures²⁵⁶

Railway

- Able to accommodate 79 trains per day at its busiest.
- Handle a volume of 14.4 million tons of cargo.
- Will need 25 tunnels. 62.5km in distance.
- Cost: US\$7,100 million.

Highway

- Initially dual lane
- 880 km in length
- Cost: US\$1,396 million

Oil Pipeline

- 1,288km in length in Kenya and 427km in South Sudan
- Crude oil capacity of 500,000 barrels per day
- Refined capacity of 100,000 barrels per day
- Cost: US\$ 3,950million

Resort Cities

- One each in Lamu, Turkana and Isiolo.
- Lamu City will for example feature water sports, country club, convention center, and amusement. Additional services will include a Conventional Center, Fishermen's Wharf, Cultural Center, and Amusement Center. Finally eco-villages are proposed at Kipini, Bawaya, Manda Island, Pate Island, and Kiwaiyu Island.
- Cost: US\$970 million in Turkana, US\$200 in Isiolo and US\$42 million in Turkana.

255 Rift Valley Institute (2013) *LAPSSET: Transformative project or pipe dream?* Rift Valley Institute, Nairobi, Kenya, p. 3.

256 Japan Port Consultants (2011) *LAPSSET Corridor and New Lamu Port Feasibility Study and Master Plans Reports*, Nairobi, Kenya.

Airports

- One each in Lamu, Turkana and Isiolo.
- Lamu will be international.
- Cost: US\$506 million.

Refinery

- Capacity of 125,000 barrels per day
- Cost: US\$2,800 million
- Lamu Port
- 32 berth deep sea port
- Cost: US\$3,095 million

Additional Services

- High Grand Falls Dam
- Tana River area
- Supply both demand for 2211 MVA of electricity
- Supply demand for 300,00 m³/day of water
- Cost: US\$2,500 million

TOTAL COST: US\$ 23 billion

The government clearly views the northern area of Kenya as largely unexploited and underutilised and sees it as the vehicle by which to propel Kenya into the ranks of middle-income countries. However, others have likened LAPSSET to the great Kenya-Uganda Railway project of 100 years previously, which was described at the time as a 'gigantic folly' and a 'foolish and wild adventure'.²⁵⁷ And yet others have questioned how such a project can ever bring development to a nation when so many people will have their rights violated, lands appropriated and cultures weakened. Other studies have suggested that the LAPSSET project will affect the Awer, Sanye, Orma, Wardei, Samburi, Borana, Turkana and El Molo indigenous populations/communities²⁵⁸ by reducing access to drinking water and rangelands as well as resulting in loss of lands and forced evictions.

A local consortium of community organisations called Save Lamu has been formed in the last couple of years to "engage communities and stakeholders to ensure participatory decision-making so as to achieve sustainable and responsible development and preserve the environmental, social and cultural integrity of the Lamu community".²⁵⁹ This mission has largely been carried out in response to both oil and gas exploration in Pate Island and the proposed Lamu Port development.²⁶⁰

257 Rift Valley Institute (2013) *LAPSSET: Transformative project or pipe dream?* Rift Valley Institute, Nairobi, Kenya, p. 2.

258 See Sena (2012).

259 Save Lamu (2014) Homepage [accessed on 2 February 0214] <http://www.savelamu.org/>

On 5th October 2013, Save Lamu supported representatives from along the full length of the LAPSET corridor to travel to Lamu to discuss their issues.²⁶¹ As part of their workshop, they asked the participants to list anything they had observed in connection with the LAPSET project or oil and gas exploration. The response was illuminating and the sheer scale of the developments which are taking place without the communities consent became clear (see Box 16).

Box 16: LAPSET Corridor Community Issues²⁶²

Marsabit

- Chinese National Oil Corporation present
- Road construction
- Boundary survey and presence of beacons
- Lake Turkana wind power company installing wind mills
- Bubisa wind survey - done by KenGen
- Uranium - five companies have obtained licences for exploring uranium deposits. The community has not been consulted

Golbo Division (South Moyale)

- Exploration of uranium - a number of companies have been given licenses to mine uranium, and 5 companies have come to do geological survey.

Tana Delta

- Kenya Meat Commission
- Chinese National Oil Corporation
- Jatropha plantation project-(Bedford International Biofuels)
- Minjila power sub-station (by KenGen)
- Mumias sugar-these are wetland areas which can have a lot of impact on reduced water levels
- Tarda rice expansion
- Gas exploration in Chara
- Qatar fruits and vegetable project
- Insecurity as communities fight over resources

260 This report is indebted to Save Lamu for its impressive documentation and source of information on the LAPSET project and oil and gas exploration in Lamu County. Whilst their struggle is relatively unknown, they have availed an incredible amount of information on their website to those would like to know more.

261 Save Lamu (2013) Forum on Human and Environment Rights Monitoring and Grievance Mechanisms for Local Communities, Lamu, Kenya.

262 Ibid.

Baringo

- Geothermal power project (KenGen), supported by WB, AFDB in the area of Siaya and Paka Hills
- Tullow for exploring oil and gas
- Uranium company
- Mining of phosphor

Lamu

- From Lamu to Ethiopia, 200m wide corridor will be constructed (road, railway, pipeline)
- Perimeter wall around the port
- Buildings/multiple stories
- Mangrove destruction
- Dredging
- Influx of foreigners including the Chinese and the other Kenyan from up-country
- Land grabbing/speculation/displacement

Turkana

- Will be connected to Lamu through pipeline
- Chinese National Oil and Gas and Tullow companies present
- Wind power survey - KenGen
- Exploration and drilling of water by National Water Corporation
- Gibe Dam
- Everybody wants to buy Turkana land. People are poor, but they have wealth under the land, but do not know how to use it
- People were told for so many years that there is no water. Now Chinese have come and there are so many boreholes.
- Produce our own lawyers to know our issues and can protect our interests.

Isiolo

- Exploration of oil and gas by Africa Oil and Gas
- Already a well in Isiolo
- Roads construction without consultation
- Chinese National Oil and Gas Corporation
- 80% completed International airport
- KenGen wind power exploration
- Construction of crocodiles dams
- Land speculation

- Surveying for oil refinery
- Railway survey
- 600 ha. area marked for resort city

It is clear that the varied and complex projects observed by the communities in Box 16 have equally complex impacts on the communities. Some of the issues that Save Lamu have documented in their repeated communications with the Kenyan government include, but are not limited to, the following:

- Failure by the state to recognise natural resource rights of local communities
- Misuse of state powers to grab community land without consent and compensation
- Lack of community ownership of and involvement in LAPSSSET project
- Threat to indigenous populations/communities' culture and World Heritage site status
- Displacement, domination and loss of the cultural identity of Lamu peoples
- Negative impact on the Aweer community
- Impact of overpopulation and the speed of the population explosion
- Displacement of peoples from their homes and lands
- Unresolved land issues
- Increased land grabbing
- Increased ethnic tensions

It is clear that not only is the sheer scale of the project causing issues for many indigenous communities but, more importantly, the speed with which the government is trying to get the project up and running is damaging their participation. With no sign that the government has any plans to reverse its present course and engender community ownership of this project, it is unlikely that the community will benefit in any meaningful way from the LAPSSSET project. The worst case scenario, however, involves the loss of priceless cultures, the homelessness of thousands of people, renewed ethnic violence in competition for increasingly scarce resources and a widening gap between rich and poor in Kenya.

Aweer

One of the groups that is most affected by the LAPSSSET project is the Aweer (also known as Boni), a hunter-gatherer group who are seen as the original inhabitants of the coastal forests of East Africa and who number approximately 3,500 people. A USAID-funded project, which has worked with the Aweer for a number of years, had the fo-

llowing to say:

The Boni, or Aweer, have been called the forgotten people of Kenya...Like other hunter-gatherers in Kenya, since Kenyan independence (1963) the Boni have been buffeted by historical forces outside their control. During and after the Shifita War (1963–1967) the Boni were forced into villages for security reasons. In 1977, Kenya banned hunting, the Boni's primary livelihood. Not long afterwards, the gazettelement of the Boni and Dodori National Reserves resulted in their exclusion from traditional hunting, gathering, and religious sites. The precipitous drop in the Boni population reveals the profound connection between the people and the forest as their territory has been reduced. Since independence, their numbers have dropped dramatically, from an estimated 20,000 (this figure should be verified) people to just 3,500–4,000 according to the 1999 census data. Today, both the Boni culture and the Boni people are considered endangered.²⁶³

The USAID project concluded that the Aweer's main problems include a lack of land tenure, exasperated by questionable land transactions, limited and controlled access to natural resources, human-wildlife conflicts, insecurity and lack of essential services and made the recommendation that the number one priority for the government should be to secure legal recognition of the Aweer's customary land rights.²⁶⁴

There are two issues of prime concern for the Aweer in relation to the LAPSSSET project. Firstly, while the Aweer's lands have gradually been reduced over time, what little land they have remaining is under serious threat. One report estimates that over 70% of the land currently occupied by the Aweer will be taken by the new project.²⁶⁵ Secondly, what little if any land remains after the government's appropriation is under extreme pressure from land grabbers who are attempting to buy prime real estate in and around the LAPSSSET facilities.

Both the USAID-funded project mentioned above and other studies have qualified the Aweer's particular attachment to their forests and ancestral lands. As well as providing honey, medicine, plants and meat for the Aweer people, the lands under threat are also areas of extreme religious and spiritual importance. The USAID project alone identified 15 sacred sites and said that the traditional knowledge the project documented "tells of a dependent relationship and coexistence between the Aweer and their environment...[which is]...particularly under threat from illegal logging, poaching, slash

263 USAID (2010a) *Endangered Forest, Endangered People: The case of the Boni*, USAID, Kenya, p. v.

264 See USAID (2010a), USAID (2010b) *Dubious Deals in the Dunes: The case of Mkokoni*, USAID, Kenya, USAID (2010c) *From Shifita to Shifting: Land Tenure and Resource Governance in Kiunga*, USAID, Kenya and USAID (2012) *Natural Resource Utilization in the Boni-Lungji-Dodori Forest Areas of Lamu County, Kenya*, USAID, Kenya.

265 Nunow (2012) *The Displacement and Dispossession of the Aweer (Boni) Community: The Kenya government dilemma on the new port of Lamu*, Paper presented at the International Conference on Global Land Grabbing II, October 17-19, 2012, Cornell University, Ithaca, NY.

and burn and shifting agricultural practices, irregular land acquisition, and large-scale development projects".²⁶⁶

A further investigation carried out by the Kenya Human Rights Commission concludes that:

Incidents of displacement of members of the Aweer community have been reported in Lamu. The Aweer are being forced to abandon their traditional cultural lifestyle and to assimilate into the "mainstream" society through forcible removal from traditional lands and territory to make way for the LAPSET infrastructure. They are losing their shrines to land-grabbers and a government policy that is not keen on tempering its wildlife policy with the historical and developmental needs of local communities.²⁶⁷

As a result, it is this report's concern that the proposed LAPSET project will radically alter the Aweer's remaining lands to the extent that it will prevent the Aweer from having any future relationship with them. As a result, it is important to conclude that the LAPSET project will spell the end of Aweer culture. This report implores the international community to acknowledge the events unfolding on the Aweer's land as a violation of their basic human rights and recognise that urgent action is needed before the last of the Aweer's lands have been stolen and their culture irreversibly damaged. That this damage has been inflicted on the Aweer at the hands of the Government of Kenya should be equally recognised and condemned.

Sanye

Any discussions of the Aweer should also include the Sanye, a hunter-gatherer group also found in Lamu County and numbering approximately 500 people. This study was only able to find a few individuals to talk to but its findings concur with previous studies, which have said the following:

The Sanye, the most marginalized community in the area are found in small pockets... [and suffer from a]...Lack of clear land tenure, limited livelihoods options, exclusion from Tana River's political space, low literacy levels among other challenges is driving poverty, high population growth rate, prostitution and HIV/AIDs among the Sanye. The Sanye have lost their hunter gather identity and have no civil society organization. The government occasionally distributes relief food and a couple of NGO's have constructed water collection points. The only clear step undertaken so far by the government to address the plight of the Sanye, is to allocate them the current land they live as a safeguard against the pastoralist and agricultural communities expansionism. However, the Sanye

266 USAID (2012) *Natural Resource Utilization in the Boni-Lungi-Dodori Forest Areas of Lamu County*, Kenya, USAID, Kenya, p. iv.

267 KHRC (2014) *Forgotten In The Scramble For Lamu: A Position Paper on the LAPPSET Project In the Case of the Aweer and the Fisherfol*, Kenya Human Rights Commission, Nairobi, p. 23.

have not been given title to the land. While the pastoralist and agricultural communities in both Tana River and Garissa counties are very organized economically, socially and socially, the Sanye have no organized structures that will enable them to participate in the socio-economic life of Tana River. And like the pastoralist communities in Tana River, the Sanye are also unaware of the constitutional protections that protect such marginalized groups.²⁶⁸

The Sanye inhabit lands in close proximity to the Aweer and it is likely that the Sanye's lands will also be affected by the LAPSSET development as a result of land grabbing and rapid growth in the population as a result of the project.

Orma

The Orma are pastoralists believed to number approximately 7,000 people occupying a region south of Lamu Island in the fertile Tana Delta region. In 2013, 160 people lost their lives in ethnic violence which a government judicial commission attributed to "land tenure, use and conflict over resources".²⁶⁹ While this violence erupted between two different ethnic groups, its origins - like recent clashes between the Pokot and Turkana - are much more complex and have little to do with ethnic rivalries and much more to do with poverty and competition for limited resources. Indeed, organisations like the Kenya Land Alliance have suggested that an attempted acquisition of 100,000 acres of land in the Delta by the Qatari government is one of the real causes of the conflict.²⁷⁰

The Tana Delta has always been a fertile area with a high volume of fresh water, arable and grazing lands which, in the past, were used by overlapping ethnic groups. However, recent developments have drastically reduced the availability of these resources and acted as incubators for rising conflicts. Over the years, successive governments have built dams to manage the water resources in the area but this has, in turn, altered water availability and forced some communities to seek watering points for their animals in areas previously belonging to their neighbours.

The LAPSSET project, as a result of its need for both water and electricity, is funding the construction of the High Grand Falls Dam, which will create a 165 square kilometre reservoir and provide fresh water and up to 700MW of power for the Lamu Port, Resort City and Refinery. The dam will reduce available grazing lands for the Orma and alter the availability of surface water irreversibly. In addition, a wave of energy projects is entering the Delta, further increasing competition for resources. Cordison International is constructing four wave farms in Lamu County to supply 350 MW of power, one

268 Sena (2012), p. 15.

269 Daily Nation (2013) *Report reveals Tana strife causes*, Published on 19 July 2013, Nairobi, Kenya.

270 The Standard (2013) *Scramble for Africa's 'idle' land intensifies*, published on 24 October 2013, Nairobi, Kenya.

of which is on Orma land. The Orma community that this study spoke to had not been consulted prior to the project commencing and has threatened to remove equipment belonging to Cordison if the company does not vacate their lands.

Oil and Gas Exploration

On a final point, it should be noted that the largest concentration of oil and gas licences are to be found in and around Lamu County. Unfortunately, the study was not able to meet with any company that was currently carrying out exploration in the region but communities have had various interactions over the last few years. Communities that this study spoke to on Pate Island confirmed that they had not been consulted by any of the exploration companies and had a number of complaints. Further, they decried the land grabbing that was taking place on the island as a result of external interests purchasing land in order to speculate on its future value to oil and gas companies. The Bajuni communities we spoke to on Lamu further suggested that much of the land grabbing was being facilitated by local officials at all levels, from the village chiefs up to Members of Parliament.

Some of these concerns were raised with the Kenya National Commission on Human Rights (KNCHR) who sent a team to Pate Island in 2012. The subsequent investigation caused the Commission to contact the Zarara Oil and Gas Company with a number of concerns (see Box 17).

Box 17: KNCHR concerns raised with Zarara Oil and Gas Company²⁷¹

During our visit, we learnt about your operations with (deep) concerns primarily because of the threat they pose to the human rights of the locals and because of allegation of violation of the human rights of the local community. Notably, these are the issues we took concern with;

- Lack of adequate, if not total lack of, information about the activities of your company by the community despite your very operations directly impacting on community since your activities are conducted on their farms and the fact that such operations involve dangerous installations both to human life and possibly to their animals and crops (coconut plants).
- Failure of your company to secure deadly installations (as per your company's markings on the installations) despite their proximity to homesteads

271 KNCHR (2012) Letter: 'Zarara Oil and Gas company-Pate Island, Lamu', Dated: 24 August 2012.

and the possibility of unrestricted access by both animals and persons especially children.

- Failure by your company to seek **FREE AND INFORMED** consent from the owners of land on which you are conducting your activities despite the communities willingness to engage with you (Zarara Oil and Gas). Note, we appreciate your earlier efforts to engage the community, however, the impression from the ground is that the consultation with the community was a dictation/direction to them and in essence meant merely to inform them of your operations in their land and by your terms (compensation terms which you (Zarara) deem appropriate irrespective of their contending view).
- Failure or delay by your company to compensate the affected community even on the terms you gave them.
- Perceived hostility of the company towards the locals especially due to the pronounced presence of heavily armed police who brutally manhandle the locals at the slightest of 'provocation'.
- Allegations that you use the government machinery (Police and the Provincial Administration) to threaten and install fear as a means to silence any discontent by the locals against your company's operations.

It is not clear if any response was received by the KNCHR but what is clear is that exploration is ongoing in Pate Island and the local communities' experiences have not changed since the letter was issued in 2012.

3. Discussion

The situation in Kenya is an extreme example of the impact of large-scale developments on local populations when their rights, needs and views have not been considered in the ownership, planning and management of a project. This chapter has highlighted the increase in ethnic tensions over land insecurity in Turkana as a result of interest from oil exploration and promises of wealth the peoples of the north have long demanded. More importantly, however, it is clear that focusing on upstream activities in the extractive industry value chain misses a huge number of human rights violations that take place further downstream in Kenya. In Lamu County, in the Coastal region of Kenya, communities like the Orma, Sanye and Aweer have seen increased land

Box 18: Petroleum Blocks and Companies in Kenya in 2014 ²⁷²

Operator/Contractor	Block No.	Basin Name
Afren/Lion	1	Mandera
Afren/EAX	L17/L18	Lamu Offshore
Simba Petroleum	2A	Mandera
Lion Petroleum	2B	Mandera
Vanoil Resources	3A/3B	Anza
Africa Oil	9	Anza
Tullow Oil/Africa Oil	10A	Anza
Tullow Oil/Africa Oil	10BA/10BB/12A/13T	Tertiary Rift
Tullow Oil/Swala Energy	12B	Tertiary Rift
ERHC	11A	Tertiary Rift
Adamantine	11B	Tertiary Rift
NOCK	14T	Tertiary Rift
A – Z Petroleum	L1A/L3	Lamu Onshore
CAMAC Energy	L1B	Lamu Onshore
CAMAC Energy	L16	Lamu Offshore
CAMAC Energy	L27/L28	Lamu Deep Offshore
Imara Energy	L2	Lamu Onshore
Zarara/SOHI Gas	L4	Lamu Onshore
Zarara/SOHI Gas	L13	Lamu Offshore
Anadarko/Total/Cove	L5/L7/L11A/L11B/L12	Lamu Offshore
Flow Energy/Origin Energy	L6	Lamu Offshore
Apache	L8	Lamu Offshore
Ophir/Dominion Petroleum	L9/L15	Lamu Offshore
BG Group	L10A/L10B	Lamu Offshore
Lamu Exploration	L14	Lamu Onshore
Rift Energy	L19	Lamu Onshore
Pacific Seaboard Investments	L20	Lamu Onshore
ENI	L21/L23/L24	Lamu Deep Offshore
Total	L22	Lamu Deep Offshore
OPEN BLOCKS	L25/L26	Lamu Deep Offshore

272 Ministry of Energy and Petroleum (2014), Petroleum Blocks and Companies, [accessed on 1 February 2014] <http://www.energy.go.ke/index.php/2013-04-24-07-18-47/2013-04-24-07-22-53/petroleum-energy/104-blocks-and-operating-companies-in-kenya>

grabbing at the hands of investors and national projects aimed at supporting extractive industries. The evidence of this chapter shows the catastrophic consequences of communities whose rights have not been duly protected by the state and whose lands are coveted by competing interests. It is an indictment to the Government of Kenya that their proclaimed attempts at creating increased wealth for Kenya instead threatens priceless cultures, makes thousands of people homeless, increases ethnic tensions and widens the gap between rich and poor. This may not be the kind of vision the state had hoped for but it seems it is the likeliest one they will achieve by 2030, if not sooner.

D. Cameroon: Beyond Oil, Gas and Minerals

Introduction

Cameroon is a multifaceted country with 20 million inhabitants representing 280 different ethnic groups.²⁷³ Of these people, approximately 44,000 rely on hunting and gathering for their livelihoods and include the Baka, Bagyeli, Bakola and Bedzang peoples.²⁷⁴ A further one million are classed as Mbororo pastoralists made up of the Wodaabe, Jafun and Galegi. What these indigenous populations/communities share with communities throughout Africa is the persistent and complex attempts to appropriate their lands from sectors such as logging, mining, oil and gas as well other less obvious sectors like conservation, biofuel and agro-industry.

1. National Setting

This report has suggested that attempts to understand the impacts of extractive industries on indigenous populations/communities' lands and livelihoods need to go beyond an analysis of the typical industries associated with the extractive sectors, such as oil, gas and mining. As outlined at the start of this report, the effects of industries such as logging, agro-industry and conservation on indigenous populations/communities' futures is strikingly similar and follows consistent patterns to those of the extractive industries sector. Key to these similarities are the claims made regarding the most valid use of indigenous lands, which uniformly denounce indigenous management of their lands and aggressively impose their opposing plans.

273 AIWO-CAN, MBOSCUA, CADDAP & PSED (2013) *Issues and recommendations on the situation and rights of indigenous peoples in Cameroon: In relation with the Periodic Review of Cameroon*, May 2013, p. 1.

274 CED, RACOPY, MBOSCUA, IWGIA and FPP (2013), *The rights of indigenous peoples in Cameroon – Supplementary report submitted further to Cameroon's third periodic report*, 54th ordinary session, October 2013, Banjul, Gambia, CED, RACOPY, MBOSCUA, IWGIA and FPP, p. 5.

In 2011, the Government of Cameroon reported that they had issued five companies with mining licences, 51 with quarry licences and 176 with exploration licences for a list of metals and minerals that included iron, aluminium, manganese, copper, gold, platinum, diamonds and sapphires.²⁷⁵ And while the majority of oil deposits being exploited in Cameroon were offshore, the impacts of the 1,000-kilometre Chad-Cameroon pipeline on indigenous populations have been widely documented.²⁷⁶ These include a lack of FPIC, forced displacement, destruction of cultural and religious sites, and the strengthening of existing inequalities between the indigenous communities and their ethnic neighbours.²⁷⁷ If we look beyond the oil, gas and mining sectors, however, we also find a number of other sectors competing for land in Cameroon.

A report by IWGIA in 2012 stated that, between 1980 and 1995, as much as ten per cent of Cameroon's forest area was lost, that between 1996 and 1998 an average of 1.7 million cubic metres of lumber was exported and that, by 1999, 76% of the total forest area had been included in existing or planned logging operations.²⁷⁸ And even when Cameroon's forests are being protected, indigenous populations' rights to their lands are being equally violated. Indeed, some of the earliest land grabbing in Cameroon was carried out at the behest of conservation interests. Studies in 2003 in the Dja, Boumba Bek and Campo Ma'an protected areas unanimously found indigenous populations/communities' land rights violated and their livelihoods irreparably damaged.²⁷⁹ And recent attempts by the government to harness the potential income from Reducing Emissions from Deforestation and Forest Degradation (REDD) schemes has only served to marginalise indigenous populations further.²⁸⁰ In 2011, the nine existing REDD projects in Cameroon were assessed as "lack[ing] transparency, meaningful participation or free, prior and informed consent... and disregard[ing] issues of land tenure, customary rights and benefit sharing".²⁸¹

The presence of extractive industries in Cameroon is also of concern for the Mbororo pastoralists. The Adamawa Region, with its impressive plateaux and grazing lands, has for the past decade attracted sapphire and gold mining and, more recently, a new bauxite mine in Faro and Déo Divisions. The Eastern Region of Cameroon has gold, diamond and iron ore mines while the Northern Region has marble and limestone mi-

275 Republic of Cameroon (2013), *EITE Committee: Report on the reconciliation of cash flows and volumes relating to the exploration and exploitation of oil and solid minerals for the fiscal year 2011*, Yaoundé, Government of Cameroon, p. 14.

276 FPP (2007), *Securing indigenous land rights in the Cameroon oil pipeline zone*, Moreton-in-Marsh, UK, FPP.

277 Ibid.

278 A. Pyhälä (2012), *What Future for The Baka? Indigenous Peoples' Rights and Livelihood Opportunities in South-East Cameroon*, IWGIA, p. 23.

279 Nelson & Hossack (2003), *From Principles to Practice: Indigenous peoples and protected areas in Africa*, Moreton-in-Marsh, UK, FPP.

280 Freudenthal, Nnah and Kenrick (2011), *REDD and Rights in Cameroon: A review of the treatment of indigenous peoples and local communities in policies and projects*, Moreton-in-Marsh, FPP.

281 Ibid, p. i.

nes. The consequences of these activities are grave on the Mbororo and include the expropriation of Mbororo grazing lands without prior informed consent and without compensation as well as the destruction and pollution of pastures, transhumance corridors and water points for cattle and humans. Cattle are also being lost falling into unprotected and abandoned mines.

Arguably the most pressing concern for indigenous land rights in Cameroon, however, is the threat being posed by agro-industry, and the palm oil industry in particular, which is bringing increased demand for land to an otherwise contested landscape. Given that the value of palm oil is so low that production can only become profitable on a massive scale, the concessions in Cameroon are vast. The BioPalm/Siva palm concession is reportedly 200,000 hectares in size and the Herakles concession further north is over 70,000 hectares. Two reports noted that in both cases communities had not been informed in advance by these developments of decisions regarding their land and they had not given their consent for the use of their lands by an industry that would irreversibly destroy their forests.²⁸² As one report noted:

The communities living near the plantation reported that they had lost access to their customary lands, lost their forest livelihoods, been arrested for trespassing...and got very little in return. One Bulu woman said 'We have lost everything. The children no longer know the names of trees, animals and fish. The loss of this area [to palm oil] is a disaster for us'.²⁸³

At the same time as this increase in land grabbing of indigenous territories, a number of legislative changes have come about which may offer the opportunity to support and enshrine Cameroon's indigenous population's fundamental human rights. Crucially, Cameroon has been repeatedly urged by the African Commission, among others, to integrate the rights of indigenous populations/communities into its national legislation.²⁸⁴ However, like other countries in Africa in this report, Cameroon continues to resist the domestication of internal law and has so far failed to accept regional and international definitions of Indigeneity.

In the past, Cameroon has sought to deal with indigenous issues through the creation of a law on marginalized populations. And while it seems to have shelved this proposed law, in response to regional pressure, and replaced it with a study aimed at specifying criteria for identifying indigenous populations/communities, the lack of

282 Freudenthal, Lomax & Messe (2012) *The BioPalm oil palm project: A case study in the Department of Ocean, Cameroon*, Moreton-in-Marsh, UK, FPP and Nelson & Lomax (2013) "They want to take our bush": An independent assessment of processes to obtain the Free, Prior, and Informed Consent (FPIC) from communities in the Mundemba and Nguiti Subdivisions on South West Cameroon, for palm oil developments overlapping their customary territories, Moreton-in-Marsh, UK, FPP.

283 Freudenthal, Lomax & Messe (2012), p. 16.

284 CED, RACOPY, MBOSCUDA, IWGIA and FPP (2013), *The rights of indigenous peoples in Cameroon – Supplementary report submitted further to Cameroon's third periodic report*, 54th ordinary session, October 2013, Banjul, Gambia, CED, RACOPY, MBOSCUDA, IWGIA and FPP, p. 7.

participation of indigenous populations in that study has worried many observers and human rights advocates.²⁸⁵ Equally the government's review of its Forest Law and Land Tenure Law has been highly criticised for its lack of indigenous participation and failure to account for the bare minimum of international law pertaining to indigenous populations.

This report therefore joins the appeals of others in civil society and urges the Cameroonian government to systematically recognise and include the rights of indigenous populations/communities in its domestic legislation. Otherwise, it is feared that if the government fails to utilise these opportunities to secure its citizens' rights to lands and livelihoods, the situation described below will become ever more widespread and will signify a complete failure on the part of the government to secure its indigenous population the most basic of human rights.

2. Local Context

Cameroon's Océan department is a clear example of the widespread and complex violation of indigenous land rights in Cameroon, having long suffered the disastrous effects of large-scale encroachment onto lands and territories.²⁸⁶ Océan department encapsulates the many issues emanating from this study and, in particular, the need to understand natural resource exploitation beyond the mining, oil and gas sectors and the need to understand the damaging effects of natural resource exploitation all the way down the value chain.

While the focus of this section is on the newly-proposed Mballam iron ore mine, Océan department is suffering from a cornucopia of land-use pressures, including seven logging concessions, at least six mining concessions, a number of forest reserves, oil palm concessions, the Chad-Cameroon pipeline and the Campo Ma'an national park. As one report has acknowledged, "[t]he multiple and cumulative threats to the forests lands and territories of the Bagyéli, and the associated loss of hunting grounds, homes and villages, medicinal plants, cultural sites, and food sources, threatens the whole cultural and physical survival of the Bagyéli people".²⁸⁷

Mballam itself is one of three iron extracting sites in the Congo Basin that will be operated by Sundance Resources Ltd. This iron mine is located in the large TRIDOM forest zone (Ie Dja Odzala Minkebe Tri-national park) which is six times the size of Belgium, 20% of the area of which is protected and which therefore has a vital role in mitigating climate change. This project will use an open cast mine to extract the iron, which will create holes of more than 100 metres in width and a train track of 500 km in length from Mbarga Mount to the deepwater port of Kribi (which has yet to be

285 Ibid.

286 Ibid, p. 46-49.

287 Ibid , p. 21.

constructed).²⁸⁸ The first 100 km of train tracks will cross untouched and virgin tropical forest. Its construction will damage the immediate forest where the track will be laid but it will also make a much larger area of forest vulnerable to illegal logging and resource extraction as a result of its construction. This study estimates that between 20,000 to 25,000 persons will be brought in to construct the train line and that this influx of outsiders will support the expansion of agriculture, poaching and the exploitation of natural resources in the region.

Mballam mine will also require a large amount of energy and it is understood that a dam will be built for this purpose. An agreement has been reached between the Sinohydro Company and the governments of the Republic of Congo and Cameroon for the construction of the Dja Dam, which will create a reservoir covering more than 14,000 football fields²⁸⁹ and will threaten the Challet waterfalls, which are a sanctuary for gorillas and elephants.

Generally, the study found that FPIC principles were not being respected by either the government or extractive industries. The Mballam mine, which is to be launched soon, is creating a raft of concerns among the communities, mainly because of the potential forest destruction, the air and water pollution and the forced displacement of communities. These perceived threats are also the result of an absence of any real contact between the extractive industries and the communities, which has resulted in a lack of viable information. In terms of social and environmental responsibility, some signs of willingness were observed in the extractive industries; however, those that were observed did not go far enough in meeting the required standards outlined in international law.

The commercial logging companies are perceived by the communities as the most destructive external actor for the territory:

"They destroy our yams and our remedies, the water is polluted by waste from trees cutting, the animals would go away due to the noises, the types of remaining trees have no value."

Nevertheless, the commercial logging companies are paying an annual forestry fee, part of which is to be delivered back to the communities affected by their activities. This fee is managed, at local level, by a community committee, chaired by the mayor; however, the reality is quite different. Up to now, none of this money has benefited Baka villages, and they are instead advised to associate themselves with their non-indigenous but much larger Bantu neighbours in order to submit common projects and demands. However, due to the existing relationship of discrimination between the two groups, this would seem impossible. In general, the dialogue with the forestry companies still appears to be constrained and some interviewees explained the diffi-

²⁸⁸ Ibid.

²⁸⁹ For more information see <http://www.heartofiron.org/>

culty in expressing their opposition to the commercial logging enterprises, which are threatening their sacred sites:

“The company tells us: we have already bought your rights, what else do you want!”

In addition, the activities of conservation organisations in the region are threatening the Baka's life due to the restrictions being placed on access to their natural resources and the lack of collaboration and dialogue. Above all, the objective of conservation activities is not clear for the indigenous populations/communities:

“The eco-watchmen are assuring the protection, but of whom? The Baka are not allowed to come in the forest, they are denying us our fishes and our animals, but they let the forestry companies pass!!”

Indeed, the extractive industries, along with the conservation activities, are strongly limiting indigenous populations/communities' access to the forest, as well as their rights, first and foremost their right to self-determination. The indigenous populations/communities are, on the one hand, anxious, yet also resigned to their fate:

“It is thanks to this small field, that we are surviving, since the forest is not accessible anymore”

The government is seen as the most powerful actor, responsible for problems linked to land rights, territory and natural resources and, as such, the first point of call to find a possible solution. However, it is also seen as a remote actor, unreachable, which does not know or does not recognise the indigenous populations/communities' problems.

“The Government is sharing the forest and giving concessions to those whom it wants: we don't understand anything anymore.”

“The Authorities remember us and recognize us only before elections, for the census, but not when it is a question of giving us the fees”

Finally, all the communities have reported the existence of serious problems in their relationship with their ethnic Bantu neighbours. This situation has (partly) historically been created by a power imbalance between the two groups that is currently getting worse, due to increased restrictions on Baka access to their ancestral territory created by the extractive industries and conservation activities. The Baka communities mentioned the grabbing of the lands by the Bantu, and the exploitation of the indigenous communities through poor working conditions:

“Before the mining companies came here, life was hard, there were no roads, we could sell the wild animals at lower price in exchange of gasoline for the lamp or clothes. After, the road was opened, we can sell the products at a better price but life became more

difficult due to the destruction of the forest, we hardly find wild animals, and our living space is reduced, with more conflicts with the Bantu, since we have to go to work for them and this creates conflicts due to the exploitation"

Free, Prior and Informed Consent

"We know that the company is there, but we do not know what they do. They also do not know us"

On the ground, evidence was found of the systematic violation of the right to FPIC by the state as well as by extractive industries. Indeed, the lack of application of this rule leads to a total lack of self-determination for the Baka; life in the forest is no longer a choice for them:

"It is no longer possible for us to live for years in the forest as before, because we are disturbed and threatened everywhere"

A weak effort to provide information (but not consultation) from CamIron (a Sundance Resources Ltd's subcontractor) was documented in one of the five indigenous communities surveyed. Nevertheless, in the following testimony, we note the delay in transmitting information on decisions already taken (without consultation), the randomness of the promises made and the one-way direction of the communication:

(Village chief): The mining company came often to chat with us after beginning work. They say that when they will destroy the forest they will build for us a school, a health center, a water well, they will bring the electricity. This is not compensation because they will divert rivers and streams, destroy our fields etc.

Were you been able to discuss with them the negative effects of the destruction of the forest before their installation?

(Village chief): No, because they came to visit us only after.

When they come, they discuss with the whole community or just with the Chief?

(Village): Before they came to discuss with the community, now we see them only passing by with their cars.

You have identified the school, the health centre, the water well etc. as compensation or it is they who have suggested?

(Village): It is we who have proposed, but the proposed solutions are not equal in value to the effects of their activities in the forest.... it's just an aid, not a real compensation for the damage.

Notwithstanding the negative experiences expressed by the indigenous populations/communities, we should not assume that the interests of extractive industries and of indigenous populations/communities are always opposed. In fact, during our mission in the field, we found that despite the fear and sense of helplessness and resignation to these mega-projects, indigenous communities do not have a completely detrimental vision of the company and remain open to discussion in relation to the extraction of natural resources on their territory in a way that can be beneficial to them and that can respect their rights.

“What impressed us when the company came in 2009 is that they bought all our yams, cassava, cocoyam, plantain everywhere from the Bantu villages as from the Baka people, they bought all we had, you only had to show them a few things! It brought us money. Now as there is a stop on the activities since 2012, it is more difficult to get money and we are obliged to go work for the Bantu for our 500 FCFA. “

However, in most cases, the indigenous communities consulted consider that the value of their forest, their freedom of movement within their own territory and their freedom to collect their natural resources would never be fully compensated by public utility works or by work stations (although they have not yet benefited from neither of them).

“I do not see remarkable benefits resulting from the installation of the company, by cons I see many risks and problems. The forest is a durable good, a perpetual provision! The work, even if they offer us, it is not sustainable, it cannot replace the forest. Besides, the money paid by the company would be used to buy food”

Given the invasive nature of natural resource extraction on this industrial scale and the lack of application of FPIC, indigenous rights are and will be clearly affected by the mining activities to be carried out in their territory. The operating model that is emerging is not aimed at respecting indigenous rights, especially self-determination, property and cultural rights in relation to affected land and resources.

“Mines workers strictly forbid us from crossing the barrier of their concession”

Despite the lack of consultation, the Assoumindélé indigenous community and the mining company's Baka workers have spread the information they have collected on the impacts that the mine will have on their land and their lives to the other villages, and people now have a dark vision of their future. Their greatest anxiety is about their forced displacement:

“They dig the earth and they do it in order to find stones for their benefit. We will have problems with the pollution, the smell will be toxic and we will be forced to leave. We know that we will be evicted, but we do not know how it will happen and how we will start our life anew... We have spent years and years here, the graves of our ancestors are

there in the forest and we will have to abandon them because of the mine. The future of our children is in danger"

"In the future, there will be the stone (iron). The stone will generate the pollution of water and air, death and disease, eviction. We will be treated as foreigners where they will relocate us, because there we do not have land, we should start all over again. The future is too dark, nothing is clear. If I were asked to choose between the mine and the forest, even if they offer me a job... the work will finish but the land and the forest will not finish. The land and the forest worth more than the iron mine. I'm not afraid of losing the job, I will always remain Baka"

With regard to expropriation and forced displacement, it should be recalled that under international law, even when the state can demonstrate that there is a valid reason for the limitation of property or other rights on indigenous territories (and then only in the context of the fulfilment of other human rights), this restriction must be necessary and proportionate to the reason. In determining necessity and proportionality, the importance of the consequences for the survival of the peoples concerned must be taken into account.

"The meat, the trees, the remedies go away. How will we live?! It will be the end of the world"

"Children's lives will be difficult without the forest bit because it is our first school. The Baka culture will be extinguished"

Corporate social responsibility

The mining company has indeed hired some of its workforce locally and provided some public utilities for the neighbouring villages; however, it is noted that these initiatives are directed almost exclusively at the Bantu population of the area, excluding Baka villages, and thus discriminatory towards them.

"With the arrival of the company I thought I could be hired to feed the family. But I could not get a job. Only one Baka works with them. Few others were involved as trackers in the beginning, but after they were abandoned"

However, we found three exceptional episodes in the Baka community of Assoumindélé. Firstly, the company pays the primary schoolmaster of Assoumindélé through the intercession of an influential friend of the community. Secondly, the company has compensated a family for the death of a nine-year-old girl by paying a sum of money and building a concrete house for her family (after the case was brought to court and they were required to pay compensation). And, finally, the company has been paying expenses to a Baka worker suffering from hernia. The company has also distributed gifts to

villages on a few occasions, although these gifts were almost entirely requisitioned by their more powerful Bantu neighbours.

The Baka people, however, believe that neither the gifts nor the compensation they may receive, in the form of work stations or community development projects, can replace their loss, as all these initiatives are much less valuable than their lands.

"The railway will go through our forest and passing by, it will destroy all: will we get the equitable reward for all the damage?"

3. Discussion

This study of Cameroon has managed to coalesce the main issue of this report in a very immediate way, and located it in the very real concerns of the indigenous populations of Océan department, who have experienced wave after wave of appropriation of their lands and livelihoods. These communities are currently facing new appropriations as a result of palm oil plantations and iron ore mines at the same time as they come to terms with historical appropriations at the hands of conservation interests and logging concerns. The vast forests of such communities are increasingly shrinking while they are forced to stand silently and watch from the outside as processes they have no control over change their lives forever. The Government of Cameroon has a responsibility not only to oversee the actions of the companies it allows to operate within its borders but more importantly to support its citizens to freely determine and manage a future that fully meets their aspirations and needs. That this is not being achieved for Cameroon's indigenous populations is not only a human rights violation of the grossest kind but also a damning testament to the national, regional and international community's ability to defend the rights of those suffering the worst violations and in most need of their support. ○

V. Conclusion

This report paints a troubled picture of the situation of indigenous populations/communities in Africa.

It highlights the alarming role of extractive industries in unconstitutional land grabbing and violation of fundamental human rights, often with the complicit support of national governments. In Uganda, the Karamojong do not enjoy recognition of their land rights and it appears that the government sees neither pastoralism as a valid use of their lands nor any urgency in accommodating indigenous livelihoods within national legislation. This situation was mirrored in Namibia where it is clear that the Namibian government only sees indigenous communities as beneficiaries of their lands and not as owners of such. The situation of the San communities living in the east of the country and their ability to freely manage and develop their lands and the natural resources they contain is one of the most complex this study has come across. While the government can clearly list the many pieces of legislation protecting the rights of indigenous populations/communities to manage their lands and livelihoods it is the opinion of this study that any such rights offered fall short of those rights of ownership of their lands and livelihoods demanded by international law.

In terms of the sheer scale and magnitude of the problem, the report widens the exploration of human rights abuses at the hands of extractive industries beyond those that extract natural resources to include other business enterprises that are involved in either the exploratory stages of extractive industries, support industries such as hydro dams, or downstream industries like deep sea ports and refineries. The example of the Himba populations in Namibia clearly identifies the human rights violations caused as a result of activities indirectly related to natural resource extraction, such as the energy needs of existing mines which, in the Namibian case account, for almost 40% of the country's electricity demand.

Kenya, however, presents an extreme case in which the potential impacts of the entire value chain of natural resource extraction were considered. These impacts include the desertification of one of Africa's most important lakes and the complete appropriation of the Aweer community's lands for the purpose of agro-industry projects and the construction of an oil pipeline and deep sea port, among others. Such large-scale human rights violations suggest that natural resource extraction is not only an issue at the local level but also at the national level where, in the case of Kenya, an entire country's future is being built upon a project which violates human rights at every turn. That this national 'development' should come at the expense of the very citizens of the nation is deeply worrying.

In addition, this report expands the meaning of extractive industries to include all those industries which rely on natural resource exploitation and which violently impose themselves upon indigenous populations in Africa. The study of Cameroon coalesces the main issues of this report around the very real concerns of the indigenous populations in Océan department who are currently facing new threats against their lands as a result of palm oil plantations and iron ore mines all while they are trying to come to terms with existing appropriations at the hands of conservation interests and logging concerns.

That this should be happening in the shadow of a fundamental shift in how extractive industries are obliged to operate is all the more alarming. Organisations like the IFC and the ICMM have made important breakthroughs in including indigenous rights within their operating principles. However, there continues to be broad resistance to this inclusion and many of the leading actors, like the World Bank and Rio Tinto, continue to resist a fully consistent human rights approach. The Ugandan case study also suggests that the local and junior mining companies working in Karamoja are at best oblivious to the human rights violations taking place and at worst complicit in the violations themselves. And while this participation may result from a lack of awareness of international human rights, this study is clear that business enterprises' responsibility to indigenous populations/communities' fundamental human rights exists independently of states' own protection of such rights and, as such, extractive industries have a responsibility to make themselves aware of their duties to indigenous populations/communities.

The report's findings when faced with such blatant and whole-scale appropriation of lands is that not only are the governments of Africa, and the companies they furnish with access, entirely to blame for the violations carried out against the indigenous populations of Africa but that, even more worryingly, the national, regional and international community's ability to defend the rights of those suffering the worst of these violations is ineffective at best.

This report is a call to arms, to governments, extractive industries, the international community and indigenous populations/communities throughout the continent. Governments continue to have the opportunity to support their citizens in their quest to achieve a truly sustainable future and extractive industries may have a role in that process of self-realisation and prosperity. In order for that to happen, however, Africa's citizens, including its indigenous populations, must be allowed a seat at the table where their views, aspirations and values are not only heard but, more importantly, used to guide and determine the course of each country's development. The international community equally must enable this process, not only through support to active engagement between indigenous populations and those more powerful forces involved, but also by stepping back and accepting their own culpability in the natural resource sector due to their insatiable demand for Africa's resources. ○

VI. Recommendations

Most, if not all, of the recommendations that follow have been expressed previously by indigenous populations/communities, civil society and extractive industries themselves in various reports and declarations. This should not, however, detract from their significance and their inclusion here is vital to reinforce their significance.

A. African states

As the primary duty bearers tasked with the protection and promotion of the rights of indigenous populations/communities, the study makes the following recommendations to African states:

- I. States should put in place frameworks that safeguard indigenous populations/communities' rights to customary ownership and control over their lands, especially as this is a fundamental precondition for a people's FPIC in relation to extractive industries. In doing so, states must recognise the authority of indigenous populations/communities in this process to manage, conserve, and develop their resources according to their own customary institutions and laws. This may include the following:
 - a. in consultation with indigenous populations/communities, states must enact and amend their laws and constitutions and take all necessary legislative and administrative measures to assure that indigenous populations/communities enjoy ownership of and benefits from the natural resources on or under or otherwise pertaining to the lands they historically occupy and use, and address the urgent need for the genuine recognition of indigenous religious, cultural and spiritual rights, including their sacred sites in the context of extractive projects;
 - b. ratify, where applicable, and implement human rights safeguards and frameworks including, but not limited to, ILO 169, the World Conference on Indigenous Peoples Outcome Document²⁹⁰ and the Ruggie Framework;

290 UN (2014) Outcome Document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, A/RES/69/2, 25 September 2014.

-
- c. endorse the UNDRIP if they have not already done so and, for those states that have, uphold and implement the rights articulated therein as minimum standards.
- II. Support the efforts of indigenous populations/communities to develop economic alternatives to extractive industries;
 - III. Ensure that the legislation governing the granting of concessions includes provisions on consultation and FPIC, in line with international standards;
 - IV. Require social, cultural and human rights impact assessments to be undertaken for all extractive industry projects impacting indigenous populations/communities. Social impact assessments should be required by law and should be undertaken prior to any phases of any extractive industry project. Assessment should be monitored to ensure full compliance at all stages of the project;
 - V. Demand the expectation that all business enterprises domiciled in its territory respect human rights throughout their operations;
 - VI. Ensure that indigenous populations/communities who are actually or potentially impacted by business activities have complete and timely access to all relevant information in order to ensure they are able to participate effectively in the key decisions that affect them and put in place grievance mechanisms that are accessible to indigenous populations/communities in the event that their rights are violated;
 - VII. Recognise indigenous populations/communities' customary laws and traditional mechanisms of conflict resolution and carry out capacity-building for indigenous populations/communities to develop their own representative structures, to ensure they are able to participate effectively in the key decisions that affect them;
 - VIII. States must ensure transparency and accountability, especially in governance institutions and bodies that deal with indigenous communities. Cases of alleged corruption must be addressed;
 - IX. Reinforce the capacity of judges, lawyers and prosecutors to address grievances brought by indigenous populations/communities related to business activities; ensure that mandatory training for judges and lawyers includes standards relating to business and human rights and indigenous populations/communities;

- X. Devote adequate human, financial and technical resources to national human rights institutions, and increase their capacity to effectively monitor and address impacts on indigenous populations/communities' rights;
- XI. Carry out awareness-raising campaigns, together with relevant stakeholders, to increase the ability of indigenous populations/communities to access the legal and non-legal remedies available to them;
- XII. Open themselves up to international monitoring of the human rights situation in their country in relation to extractive industries.

B. Business Enterprises

In keeping with international law and the findings of the Ruggie Framework, this report confirms the responsibility of the private sector and recommends that:

- I. Always regard indigenous communities as having control and ownership of their lands and territories, regardless of whether these rights are recognised by the relevant governments or not;
- II. Business enterprises should comply with and support the findings of the Ruggie Framework;
- II. The EITI should expand its standards to include protection of the human rights of local and indigenous communities affected by extractive industries;
- IV. Develop and enforce a standalone policy on indigenous rights if they have not already done so and, for those business enterprises that have, uphold and implement the rights articulated therein as minimum standards consistently across continents and geographical locations. This should be consistent with international human rights safeguards and frameworks including, but not limited to, ILO 169, the World Conference on Indigenous Peoples Outcome Document,²⁹¹the Ruggie Framework and the UNDRIP;
- V. Submit to independent and credible monitoring and ensure full transparency in all aspects of their operations, and especially ensure affected communities have full access to information in forms and languages they can understand;

291 UN (2014) Outcome Document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, A/RES/69/2, 25 September 2014.

- VI. As part of operational policy, provide capital for a global indigenous populations/communities' fund that can be accessed by indigenous populations affected by extractive industries who need to retain the services of lawyers, geologists, economists, engineers, doctors, etc.

C. International Financial Institutions

This report acknowledges the key role financial institutions play in funding and enabling extractive industries and therefore in ensuring that those projects which are funded comply with international law pertaining to indigenous populations/communities and recommends that:

- I. Adopt a rights-based approach in all project financing that impacts indigenous populations/communities and take steps to secure and guarantee rights of indigenous populations/communities in all projects they fund. These considerations should apply not only to upstream activities but also all downstream activities attached to extractive industries;
- II. Develop and enforce a standalone policy on indigenous rights if they have not already done so and, for those institutions that have, uphold and implement the rights articulated therein as minimum standards. These policies should include as a minimum the following:
 - a. endorsement of the UNDRIP and acknowledgement of indigenous populations/communities' rights to enjoy ownership of and benefits from the natural resources on or under or otherwise pertaining to the lands they historically occupy and use;
 - b. provisions on consultation and FPIC, in line with international standards and which recognise the right of indigenous populations/communities to say no;
 - c. requirements for social, cultural and human rights impact assessments to be undertaken for all financed projects impacting indigenous populations/communities and that require indigenous populations/communities' active participation in the development and implementation of such assessments;
 - d. appropriate accountability and grievance mechanisms for indigenous populations/communities to access and provision of training to indigenous populations/communities on how to use them;
 - e. independent monitoring of participatory processes, negotiations and verification of successful outcomes of such processes in all financed projects for all impacts on indigenous populations/communities.

- III. The AfDB should follow the lead of every other multinational development bank and develop a standalone indigenous populations/communities' policy.

D. Indigenous populations/communities

While indigenous populations/communities do not have responsibility for the human rights violations that are brought upon them by the extractive industries sector they do have responsibility for how they choose to respond to these violations. This study recommends that:

- I. They work with the African human rights system, including the ACHPR, to submit cases where indigenous populations/communities' rights have been violated as a result of extractive projects;
- II. Continue to insist that indigenous populations/communities' customary laws and ownership of their lands and natural resources be respected by states and business enterprises without exception;
- III. Assert their right to control the authorisation of projects, and where FPIC has been given, the conducting of extractive activities on indigenous lands and territories through the use of indigenous customary laws;
- IV. Strengthen their institutions, through their own decision-making procedures, in order to set up representative structures, including both men and women, that facilitate their relationship with business activities, in particular in relation to processes of consultation and FPIC, as well as those dealing with their right to redress or compensation and/or benefit-sharing from the same activities;
- V. Further strengthen their work in organising and raising the awareness of their own communities so that they are in much better positions to decide collectively on how to deal with extractive industries. This may include, among other things, developing their capabilities to understand and use existing instruments such as the UN Treaty Bodies and the grievance mechanisms of the Multilateral Financial Institutions, e.g. Inspection Panels of the WB and the ADB, the Ombudsman of the IFC, OECD Guidelines for Multinational Enterprises, etc.;
- VI. Discuss and design their self-determined development strategy for their lands and livelihoods and identify the role of extractive industries in this, if any;

- VII. Share information on extractive industries in their territories with others and build relationships with indigenous and non-indigenous groups and movements concerned with extractive industries, nationally and internationally, to find common ground.

E. Civil Society Organisations

Civil society has an important role to play in monitoring the protection and promotion of indigenous populations/communities internationally and, more importantly, at the national level. This study recommends that they:

- I. Use the leadership and guidance of indigenous populations/communities to develop activities and support for indigenous populations/communities in their relationships with extractive industries. This should include the developing of guides and monitoring tools that can be used by indigenous populations/communities to better protect their fundamental human rights as well as provide support for indigenous populations/communities to develop their own extractive industries;
- II. Endorse the UN Declaration on the Rights of Indigenous Peoples as a minimum standard to guide any work that impacts indigenous populations/communities and raise awareness of the UNDRIP;
- III. Help establish more legal resources which indigenous populations/communities can access when they bring cases against extractive industries in courts or which can help draft contracts that will ensure that benefit-sharing agreements are fair;
- IV. Support campaigns of indigenous populations/communities on extractive industries by facilitating the participation of indigenous populations/communities in relevant bodies dealing with issues of extractive industries.

F. National Human Rights Institutions

National Human Rights Institutions should be one of the strongest defenders of the indigenous populations whose rights are being violated. This study recommends they:

- I. Monitor the situation of indigenous populations/communities and extractive industries to ensure that they comply with laws and policies both domestically, regionally and internationally;

- II. Receive and investigate cases of human rights violations among indigenous populations/communities as a result of extractive industry projects and accompany indigenous populations in procedures before human rights mechanisms;
- III. Lobby for law reform on legislation and policy governing land and extractive industries so that it is in line with international human right obligations;
- IV. Lobby for the ratification and implementation by states of instruments related to the rights of the indigenous population;
- V. Follow up and evaluate the implementation of different recommendations to the state in relation to the promotion and protection of the rights of the indigenous population.
- VI. Popularise recommendations from the study on extractive industries, property rights, the rights of communities and indigenous populations;
- VII. Create awareness and build capacity among indigenous populations/communities on their rights, including land rights and how to demand those rights and seek redress.

G. African Commission on Human and Peoples' Rights

As a key partner in ensuring the compliance of African states in their duty to protect and promote the rights of their citizens, this study recommends that the ACHPR carries out the following:

- I. The ACHPR should urge Member States to put in place frameworks that safeguard indigenous populations/communities rights to customary ownership and control over their lands, especially as this is a fundamental precondition for a people's FPIC in relation to extractive industries. This may include the following:
 - a. in consultation with indigenous populations/communities, states must enact and amend their laws and constitutions and take all necessary legislative and administrative measures to assure that indigenous populations/communities enjoy ownership of and benefits from the natural resources on or under or otherwise pertaining to the lands they historically occupy and use, and address the urgent need for the genuine recognition of indigenous religious, cultural and spiritual rights, including their sacred sites in the context of extractive projects;

- b. ratify, where applicable, and implement human rights safeguards and frameworks including, but not limited to, ILO 169, the World Conference on Indigenous Peoples Outcome Document²⁹² and the Ruggie Framework;
 - c. endorse the UNDRIP if they have not already done so and, for those states that have, uphold and implement the rights articulated therein as minimum standards.
- II. Demand the full and effective participation of indigenous populations/communities in all discussions and decisions pertaining to extractive industries at the national, regional and international level and facilitate dialogue between indigenous populations/communities, investors, fund managers, extractive industry corporations, states and consultants;
 - III. Develop guidance material and provide training for indigenous populations/communities on how they can use the ACHPR to seek redress for human rights violations in relation to extractive industries.
 - IV. In particular, the guide should seek to establish procedures which provide indigenous communities with the opportunity to request the relevant ACHPR mechanisms to assist them in monitoring and seeking justice in regard to human rights violations committed by states in relation to extractive industries;
 - V. Develop guidance material for states explaining their duties under international law with respect to extractive industries and paying specific attention to indigenous populations/communities.
 - VI. In particular, the guide should elaborate mechanisms and procedures for states to implement the minimum standards set forth in the UNDRIP, including in particular the right to FPIC;
 - VII. Develop guidance for business enterprises operating in Africa on their responsibilities under international law with respect to extractive industries and paying specific attention to indigenous populations/communities;
 - VIII. Recommend to the AfDB in every way possible that they should follow the lead of every other multinational development bank and develop a standalone indigenous populations/communities' policy;

292 UN (2014) Outcome Document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, A/RES/69/2, 25 September 2014.

- IX. In line with the recommendations of the Addis Ababa Roadmap,²⁹³ develop greater partnerships and collaborations with the UN Human Rights Council in highlighting the situation of indigenous populations/communities on the continent. ○

293 UNHR and ACHPR (2012) Dialogue between Special Procedures Mandate-Holders of the UN Human Rights Council and the African Commission on Human and Peoples' Rights: Road Map, Addis Ababa.

