

# ACCOUNTABILITY IN AFRICA

HARM FROM INTERNATIONAL  
FINANCIAL FLOWS AND  
STRATEGIES FOR SUPPORTING  
COMMUNITY-LED ACCESS TO REMEDY

OCTOBER 2020

accountability  
counsel

AFRICAN  
ACCA  
COALITION FOR CORPORATE ACCOUNTABILITY

# ACCOUNTABILITY IN AFRICA

## Harm from International Financial Flows and Strategies for Supporting Community-led Access to Remedy

### ACCOUNTABILITY COUNSEL AND AFRICAN COALITION FOR CORPORATE ACCOUNTABILITY (ACCA)



### ABOUT THE AUTHORS

Accountability Counsel amplifies the voices of communities around the world to protect their human rights and environment. As advocates for people harmed by internationally financed projects, we employ community driven and policy level strategies to access justice.

African Coalition for Corporate Accountability ("ACCA") is a coalition of organizations based in Africa supporting our communities and individuals whose human rights are adversely impacted daily by the activities of corporations, both multinational and domestic. To date, there are 123 ACCA member organisations from 31 African countries.

### ACKNOWLEDGEMENTS AND SUPPORT

ACCA would like to thank the following people who have contributed to the research and writing of this report, including Attiya Waris, and contributions from Guillaín Koko, Josua Loots, Damian Oaks, and Jonathan Kaufmann. We are deeply grateful for the time and insights contributed by ACCA members. Funding for this report has come from the support of the Ford Foundation. Funding for ACCA's work was provided by Open Society Foundations, 11th Hour Project, Fund for Global Human Rights, Wellspring Philanthropic Fund, and other anonymous donors.

Accountability Counsel would like to thank the following people who have contributed to the research and writing of this report, including lead authors Sydney Speizman and Natalie Bridgeman Fields, and contributions from Sarah Singh, Robi Chacha Mosenda, Meetali Jain, Emilia Siwingwa, Emily Jones, and Kathryn Pettit. We are deeply grateful for the time and insights contributed by our interviewees, including Florence Sitwamina, Alfred Brownell, Omar Elmawi, John Mwebe, Chinwike Chinwike, Moussa Gueye, Freddy Kasongo, Joseph Kibugu, Aly Sagne, Gretchen Gordon, Christian Bwenda, Nomonde Nimembe, Vuyo Mtshonini, and Okoho Umo. Support for Accountability Counsel's work in Africa leading to this report was provided by The 11<sup>th</sup> Hour Project.

### RIGHTS AND PERMISSIONS

This work is licensed under a  Creative Commons Attribution-NonCommercial 4.0 International License. Attribution — You must give appropriate credit, provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use. Non Commercial — You may not use the material for commercial purposes. No additional restrictions — You may not apply legal terms or technological measures that legally restrict others from doing anything the license permits. Citation: Accountability Counsel & African Coalition for Corporate Accountability, *Accountability in Africa: Harm from International Financial Flows and Strategies for Supporting Community-led Access to Remedy* (2020), <https://www.accountabilitycounsel.org/research/>.

---

# EXECUTIVE SUMMARY

---

# 1

SECTION

## DOCUMENTING HARM IN AFRICAN COMMUNITIES FUELED FROM ABROAD

**E**very year, hundreds of billions of dollars flow into Africa from abroad. Regardless of motivations, these financial flows can have both positive and negative impacts on local people and the environment. A ‘negative impact’ may mean that a family’s home and farmland is taken by force, they are forced to flee from their ancestral land, and children and grandchildren suffer the multigenerational poverty that results from a loss of the resource base that sustained their family’s life and livelihoods.

Much of the harm we see in our collective work at Accountability Counsel and African Coalition for Corporate Accountability (“ACCA”) member organizations exists across all sectors and modes of finance. This harm often begins with decisions about financial flows starting from abroad, rather than beginning with community-led decision making. Investments that fail to engage in social and environmental due diligence often exist within a national context of prioritizing corporate and elites’ interests over public interest protections. Such failures early in a project cycle often ignore local context, resulting in a lack of appropriate consultation with and consent from local communities.

When foreseeable social and environmental impacts are not accounted for, communities and the environment suffer the consequences. We also see harm from explicit choices to silence locally affected people with repressive laws and/or violence, to steal land from families, and to commit a variety of overt human rights abuses in order to facilitate advancement of foreign-funded projects.

## A WIDE RANGE OF OPTIONS FOR REMEDY, BUT NOT ENOUGH ACTUAL REMEDY

**T**his report explores the avenues available to communities to raise grievances, with a goal of understanding how to increase the rate of remedy that results. Too few of these avenues regularly result in remedy in cases where foreign finance and investment has led to human rights or environmental abuse.

Because the source of an investment in a project will likely determine a community’s options for accountability, this report helps communities and their advocates understand the chain of actors and common sources of financing behind financial flows in Africa. We focus on the upstream part of an investment chain, including parent companies, project companies, investors and shareholders, lenders, and governments. We focus on three types of accountability options: national courts, quasi-judicial regional commissions and courts, and non-judicial accountability offices at the site and international levels.

Where a domestic corporate operator causes harm in an African community using foreign investment, communities may be able to hold the domestic corporation accountable in local courts. Barriers vary greatly across geographies and settings, but can include the cost of legal support, lack of available public interest lawyers experienced in using the range of accountability tools, and often the geographic distance from investment sites to lawyers and courts. Once in a legal proceeding, judicial corruption and lack of judicial resources to move a case through completion quickly are additional barriers. Where the operator is a foreign corporation, communities face yet further barriers, although examples exist of communities using domestic or foreign courts—in particular where a European or United States corporation is involved. However, there are more examples of judgments from foreign courts than of remedy actually delivered as a result of them.

There are fewer known examples of quasi-judicial regional commissions, tribunals, and courts leading to judgments to remedy harm from foreign investment, and we have not identified cases of actual remedy in response to corporate or development finance abuses. The lack of enforcement power of these bodies is a contributing factor, as is the lack of willingness of states and corporations to engage with quasi-judicial mechanisms.

There is an increasing set of examples of non-judicial venues facilitating agreements to provide and actually deliver remedy, including: (1) the independent accountability mechanisms (“IAMs”) tied to international financial institutions; (2) the National Contact Points (“NCPs”) mandated for OECD states; (3) project-level or operational-level grievance mechanisms; and (4) other voluntary initiatives and codes of conduct. Although these venues are relatively unknown and underutilized, they—and particularly IAMs—have potential to provide meaningful alternatives to courts. Barriers to using accountability offices tend to be lower than using local and regional courts in terms of costs and accessibility, though the number of trained advocates available to support communities to use accountability offices is far fewer than for use of local courts. Unlike domestic courts, accountability offices do not have the power to enforce the outcomes they produce. Nonetheless, they can be powerful, and relatively quick and inexpensive, tools for communities if they are supported to use them as part of larger strategies that put pressure on the stakeholders to use the process to remedy harm.

Despite the wide range of avenues communities can pursue, access to remedy for human rights and environmental abuses tied to international financial flows remains rare. Additional barriers that impede access to remedy include threats and violence against rights defenders, formal legal structures that fail to protect community rights, lack of access to information, and insufficient advocacy support. In the rare victories where communities’ and their advocates’ strategies effectively overcome these barriers and result in remedy agreed to on paper, our research finds that whether or not remedy was actually provided that was proportionate to the harm experienced remains largely undocumented and requires attention.

## RECOMMENDATIONS FOR CHANGE

**W**e conclude with recommendations for the stakeholders involved in international financial flows, including communities, advocates, and civil society; state governments, both in African host countries and the home countries of corporations and institutions; companies and investors; and philanthropic funders. They are:

- 1 Strengthen rules and regulations that protect community rights, promote access to information, and guarantee accountability;**
- 2 Grow advocacy support for African communities seeking remedy;**
- 3 Focus attention on provision of actual remedy, in addition to access to remedy; and**
- 4 Prevent harm through community-led decision making about rights and resources.**

## TABLE OF CONTENTS

|                                                                               |    |
|-------------------------------------------------------------------------------|----|
| Section 1: Introduction                                                       | 5  |
| Section 2: Harm From International Investment                                 | 8  |
| Case Study: Buchanan Renewables in Liberia                                    | 10 |
| Case Study: Lamu Coal-Fired Power Plant in Kenya                              | 13 |
| Community Complaints About Harm From International Financial Flows            | 17 |
| Section 3: Understanding the Actors Behind Internationally-Financed Projects  | 29 |
| Understanding Company Structures                                              | 30 |
| Trends in Financial Flows into Africa                                         | 31 |
| Case Study: Investment Chain for the Lamu Coal-Fired Power Plant              | 33 |
| Section 4: Venues Available to Access Remedy                                  | 37 |
| National Courts                                                               | 39 |
| Host Country Domestic Litigation                                              | 40 |
| Home Country Foreign Litigation                                               | 41 |
| Regional Commissions, Tribunals, and Courts in Africa                         | 43 |
| Non-Judicial Accountability Offices                                           | 44 |
| Independent Accountability Mechanisms of IFIs                                 | 45 |
| OECD National Contact Points                                                  | 48 |
| Project-Level Grievance Mechanisms                                            | 49 |
| Other Voluntary Initiatives and Codes of Conduct                              | 50 |
| Section 5: Barriers to Access to Remedy in Africa and Civil Society Responses | 59 |
| Attacks on Rights Defenders and Retaliation                                   | 59 |
| Formal Legal Structures that Fail to Protect Community Rights                 | 60 |
| Lack of Access to Information                                                 | 61 |
| Insufficient Advocacy Support                                                 | 63 |
| Section 6: Recommendations                                                    | 68 |
| Conclusion                                                                    | 76 |

## KEY ACRONYMS

|               |                                                 |
|---------------|-------------------------------------------------|
| <b>ACCA</b>   | African Coalition for Corporate Accountability  |
| <b>ACHPR</b>  | African Commission on Human and Peoples' Rights |
| <b>AfCHPR</b> | African Court on Human and Peoples' Rights      |
| <b>AfDB</b>   | African Development Bank                        |
| <b>CSO</b>    | Civil Society Organization                      |
| <b>FPIC</b>   | Free, Prior, and Informed Consent               |
| <b>IAM</b>    | Independent Accountability Mechanism            |
| <b>IFI</b>    | International Financial Institution             |
| <b>IFC</b>    | International Finance Corporation               |

|             |                                                                |
|-------------|----------------------------------------------------------------|
| <b>MSI</b>  | Multi-Stakeholder Initiative                                   |
| <b>NCP</b>  | National Contact Point                                         |
| <b>OECD</b> | Organization for Economic Cooperation and Development          |
| <b>OPIC</b> | U.S. Overseas Private Investment Corporation*                  |
| <b>UNGP</b> | United Nations Guiding Principles on Business and Human Rights |

*\*Note: OPIC was subsumed by the U.S. Development Finance Corporation (DFC), which began operations in 2020.*



Sarah Monopoloh, a leader of  
Liberian charcoal producers  
harmed by international investment

---

# INTRODUCTION

---

**S**arah Monopoloh made a living as a charcoaler in Liberia, harvesting mature rubber trees and burning them into charcoal to sell for fuel. A combination of public development finance through the U.S. Overseas Private Investment Corporation, Swedfund, Vattenfall, the Multilateral Insurance Guarantee Agency, and the privately owned Pamoja Capital led to a series of events that crumbled the meager foundation Sarah had built for herself. As a result of the foreign investment into a biomass project in her region of Liberia, the rubber trees were harvested to make wood chips, with any remaining twigs and branches available only if she agreed to have sex with the workers employed to harvest rubber trees at the plantation. She was coerced into transactional sex. Sarah became far worse off than before as a result of the foreign investment. The project ultimately failed and the biomass company abruptly withdrew from the project area, leaving behind devastated local communities that had previously been self-sustaining farmers and charcoal producers. No biomass energy was ever provided in Liberia. Investors all along the investment chain, as well as the local operators, are responsible for the project's failures and abuses.<sup>1</sup> For Sarah, her community, and the communities throughout Africa harmed by international investment, what options are there to speak up and seek redress? What mechanisms could have prevented the harm in the first place?

International financial flows into African countries take a variety of forms, including through multilateral development finance, bilateral public finance, private finance and investment, and more recently, impact investment. Financial flows are increasingly combined in public private partnerships ("PPPs"). While investment is critically needed to advance the range of public and private priorities at the regional, national, and local levels, most foreign investment decisions that impact local communities take place in the absence of local voices. Decisions made in foreign capitals often have multi-generational impacts on communities and their climate and environment. When it comes to negative impacts of foreign investment in Africa, there is a long history of exploitation of local people and their resources. But the dynamics around preventing harm and seeking remedy are changing.

This report focuses on that change: specifically, what can be done to avoid, mitigate, and remedy negative impacts of international financial flows into Africa through emerging accountability systems. Together, the African Coalition for Corporate Accountability ("ACCA") and Accountability Counsel present this report as part of our collective work to strengthen access to remedy<sup>2</sup> and eliminate obstacles to justice. This report comes in response to a multitude of requests for information and advocacy support from African communities and their allies to ACCA and its members, and Accountability Counsel. We seek to prevent harm leading to these requests in the first place, and where harm occurs, to increase the number of advocates capable of supporting communities. Together, we are working to improve the systems that communities require to deliver remedy in an independent, fair, transparent, accessible, effective, and predictable manner.

We first explore the harmful impacts of foreign investment on people and the environment in Africa (Section 2). Then, we discuss the actors behind internationally-financed projects (Section 3). Next, we look at the potential venues for remedy (Section 4), followed by a discussion of the barriers

that exist for African communities to seek remedy (Section 5). Finally, we provide recommendations (Section 6). Throughout this report, we focus on research and recommendations from, and appropriate to, the African context, with case studies from the extractive sector, and mining in particular.

ACCA was launched with the support of Global Rights in November 2013. To date, there are 123 ACCA member organizations from 31 African countries. ACCA operates as a coalition of organizations based in Africa supporting communities and individuals whose human rights are adversely impacted daily by the activities of corporations, both multinational and domestic. The ACCA declaration takes the following position in line with the United Nations Guiding Principles on Business and Human Rights (“UNGPs”) third pillar on access to remedy:

- **There is a need to strengthen remedies and eliminate obstacles to justice;**
- **Those affected by corporate-related human rights abuses must have a clear, effective and independent means of seeking remedy, both judicial and non-judicial; and**
- **Facilitating access to regional and international remedies must be a priority, especially where State remedies are weak or non-existent.**

ACCA's work on this report emerged from the failure of many businesses to appropriately apply the UNGPs in the African context. This report seeks to help bridge this gap in access to remedy by mapping existing forms of financial remedy provided in Africa, receiving input from grassroots and civil society organizations across Africa on appropriate forms of judicial and non-judicial remedy, and identifying key factors that are particular to Africa in the context of remedy that need to be included in any remedial framework in the continent. ACCA's research explored the following questions:

- 1 What are the standards, (mechanisms, practices and forms) that have been applied in terms of access to remedy in Africa?**
- 2 Would African communities benefit from different forms of remedy, and if so, how?**
- 3 What are the contributing/ prohibiting factors when it comes to access to remedy in Africa?**
- 4 Would the proposed context-specific forms of remedy improve access to remedy in Africa?**

Accountability Counsel began the research informing this report nearly a decade ago. To date, lawyers in Accountability Counsel's Communities program have supported communities and their advocates in 17 African countries to raise grievances tied to harm from projects financed from abroad. Accountability Counsel has conducted trainings and advised communities and their advocates across the continent. The methods these communities have used to speak out to receive redress reflect some failures, some successes, and lessons throughout. Accountability Counsel's approach is unified by a focus on supporting communities to use non-judicial accountability offices tied to international investment as part of wider advocacy strategies. While judicial remedies that result from judgments or out-of-court settlements can be powerful and are a necessary part of access to justice, they are also rare due to a host of barriers. Accountability Counsel's non-judicial accountability focus advances an additional and complementary system for communities who may benefit from it, and is not a replacement for rule of law and the domestic legal processes that governments have promised and owe their citizens.

At the policy level, Accountability Counsel has engaged with advocates at the regional and national levels through a variety of networks, seeking a strong and robust system of accountability tied to international investment, regardless of the source or type of assets. Accountability Counsel works on accountability for harm caused by multilateral development finance flowing into Africa, bilateral aid and investment causing harm, as well as harm from private financial institutions and corporations. And increasingly, Accountability Counsel is advancing calls for accountability for harm from impact investment into the region. Accountability Counsel's scope is as broad as the wide breadth of finance leading to harm, though throughout, focused on non-judicial accountability policy and practice.

This report also draws on Accountability Counsel's interviews with civil society organizations, the data coming from accountability offices serving African communities, and the needs of civil society organizations partnering with Accountability Counsel working to advocate for the rights of local people across Africa.

Finally, we note that these complex topics are challenging to cover in a way that does justice to the scope of the issues, regions, and types of actors discussed. To start, Africa is a deeply diverse continent, with each region, subregion, and country meriting its own report. We endeavor not to paint the world simplistically, but to pull data, analyze trends, tell stories we have been a part of, and share information in a way that advances an understanding of how this complexity can be understood and acted upon to advocate for change. Our hope is that this report can serve as a resource for communities and their advocates, funders seeking to invest in positive change, investment decision makers, project operators, and the community of practice seeking a more just and sustainable world that respects the rights of local people to have a voice in decisions affecting them.

The threats to local people and environmental consequences of the current unaccountable model of foreign investment in Africa make this work urgent. We dedicate this report to Sarah and the many people like her across the African continent, bravely demanding to be heard and respected.



---

## ENDNOTES

- 1 For further information, including a video, on this project, see Liberia: Biomass Project in Buchanan, Accountability Counsel, <https://www.accountabilitycounsel.org/client-case/liberia-buchanan-renewable-energy/> (last visited July 15, 2020).
- 2 Access to remedy is enshrined in the third pillar of the United Nations Guiding Principles on Business and Human Rights. U.N. Human Rights Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. HR/PUB/11/04 (2011), [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf). See infra section "The Building Blocks of the Right to Remedy."

Worker for Buchanan  
Renewables, an internationally  
financed biomass company  
in Liberia, with a photo  
of workplace injuries



# HARM FROM INTERNATIONAL INVESTMENT

## 2 SECTION

International investors and corporations are increasingly looking toward Africa as a source of natural resources and profit, particularly in the extractives, infrastructure, and energy sectors.<sup>3</sup> This investment—whether motivated by the opportunity for financial gain, development, social or environmental benefits, or a combination—can have both positive and negative impact. Here, we focus on the negative impacts of international finance on local communities and the environment.

Bilateral or multilateral development finance and commercial investment in Africa typically prioritize the interests of the state or investor, which may benefit local people, or may conflict with or undermine local interests. Likewise, even impact investment or philanthropic efforts meant to *benefit local people or the environment* can cause harm. Top-down investment that follows external priorities is easy to get wrong and difficult to get right without consultation with local communities in the initial design phase of the investment.

Harm from investment varies in scope, from impacts like pollution and displacement that are direct, project-specific, and hyper-local, to changes in public policy that have repercussions on a national or regional scale. Much of the harm we have seen in our collective work across all modes of investment is a result of negligent due diligence that ignores the local context and fails to appropriately consult with local communities or obtain consent from Indigenous communities, thus failing to account for foreseeable social and environmental impacts. We have also seen harm stem from explicit choices to silence locally affected people, sometimes violently, to steal land from Indigenous and traditional peoples, and to commit a variety of overt human rights abuses meant to facilitate advancement of foreign-funded projects.

We begin this chapter with two in-depth examples of internationally financed projects: one in Liberia where harm occurred, and one in Kenya where communities are working to prevent harm. We then contextualize these stories by exploring harmful impacts of internationally financed projects across the African continent, as documented in community-led complaints.

## CASE STUDY: BUCHANAN RENEWABLES IN LIBERIA

A biomass company funded by the U.S. and other international donors that caused serious human rights, labor, and environmental abuses, including sexual abuses by company employees of local women.



A sign for Buchanan Renewables reads: “Renewable biomass: a clean and sustainable ‘natural and incredible’ energy source ... Fulfilling Our Promise.”

**B**eginning in 2007, biomass company Buchanan Renewables (“BR”) cut down rubber trees for biofuel and was supposed to rejuvenate family farms and create sustainable energy for Liberia. Instead, the project harmed its intended beneficiaries. As a result, hundreds of Liberian charcoalers, farmers, and workers are worse off than they were prior to the project.

Between 2008 and 2011, the U.S. Overseas Private Investment Corporation (“OPIC”) approved three loans to BR totaling US\$216.7 million. BR was owned by Pamoja Capital, the private investment firm affiliated with the McCall MacBain Foundation and under the leadership of a Canadian national. OPIC stated that its support for BR would have a strong development impact in Liberia by rejuvenating rubber farms and creating sustainable and renewable energy through converting old rubber trees into biofuel to be used in a BR-constructed power plant.

Instead, because of a lack of community consultation and due diligence, the project was characterized by serious abuses and drove impacted communities further into poverty.<sup>4</sup> The project ultimately failed, and BR abruptly withdrew from the project area in early 2013, devastating local communities. Moreover, BR’s model was designed in a way that prevented previously self-sustaining farmers and charcoal producers from providing for their own welfare once the project began.

By the time of OPIC’s last loan to BR in 2011, hundreds of Liberians were worse off than they were when BR arrived. For example, Indigenous, smallholder farmers who had subsisted on



What is left of a natural forest, harvested by BR. The forest was previously used by charcoalers.

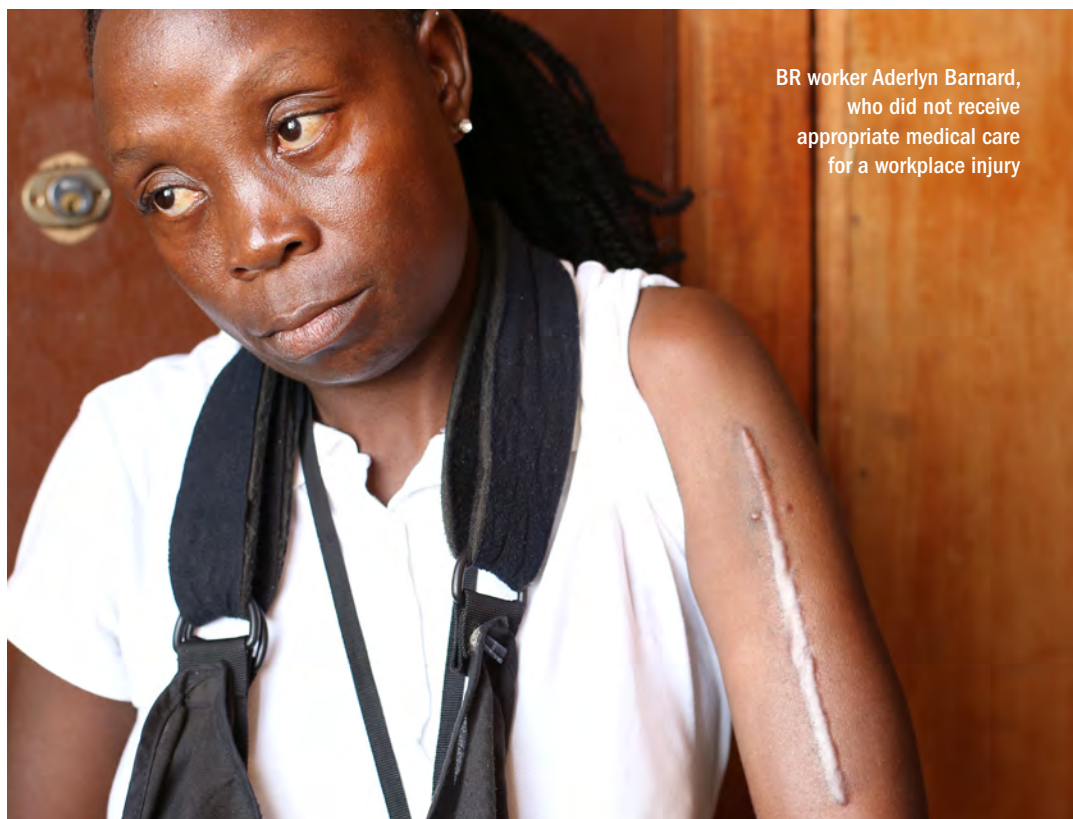
income from their rubber trees were left struggling to satisfy basic needs after the company cut down their trees. The company wood chipped and chemically treated the trees. Having no permitted power plant, they instead shipped wood chips to Europe and dumped excess chips back on family farms, harming community drinking water. Family members attribute the death of at least one child to the company's contamination. Communities still lack access to clean water.

At the same time, BR's harvesting of old rubber trees at the Firestone plantation ran into direct conflict with charcoal producers, the most vulnerable population in the area. These charcoal producers used the same trees that BR chipped and chemically treated to produce charcoal, Liberia's most important fuel source. Within a few years of BR's arrival in Liberia, the cost of charcoal production had nearly tripled, and the native charcoal producers struggled to make a living.

Additionally, BR employees abused subsistence charcoal producers by demanding bribes—or sex from women—to access wood the company had promised to give them for free.

Finally, BR workers suffered from rampant labor rights violations. BR systematically failed to provide workers with adequate protective equipment and safety training, exposing them to life-threatening working conditions. Many workers suffered debilitating and permanent injuries from workplace accidents—including being trapped under fallen trees and having limbs broken—and did not receive adequate medical care or compensation. Some workers doing

**The failed due diligence violated OPIC's social and environmental rules, as well as Liberian laws.**



BR worker Aderlyn Barnard, who did not receive appropriate medical care for a workplace injury

**“Most of the bosses were having sex with the women in our department. They said that if you didn’t agree to have sex with them, you would be the first person to get her name on the list for termination.”**

— Female worker employed by Buchanan Renewables

full-time jobs for BR were unpaid and called “volunteers” for up to two years. Several female agriculture workers reported that their male supervisors sexually abused them and retaliated if they refused their supervisors’ sexual advances.

BR’s project suffered from a lack of transparency and due diligence from the start. BR failed to obtain and analyze baseline data to inform the project’s design or seriously assess potential negative effects of its activities on local communities’ ability to subsist. The question ‘what could go wrong?’ was never asked or answered, and plans were accordingly not made for those foreseeable failures. The U.S. Embassy in Monrovia went so far as to question at the time, in a leaked 2009 diplomatic cable, why “the company has yet to share an environmental impact assessment, projections of income-generation for small holders, or an engineering feasibility study, stating only that they submitted documents to OPIC’s satisfaction.”<sup>5</sup>

This example of harm shows the importance of due diligence and local information throughout the lifecycle of a project. Appropriate due diligence in this case would have, at a minimum, included consultation that ensured that local people were provided with accurate information about the project and potential risks. The failed due diligence violated OPIC’s social and environmental rules, as well as Liberian laws.<sup>6</sup> These circumstances resulted in a failed project—for the people who still today suffer at the local level, for the investors, the project company, and all intended beneficiaries.

# CASE STUDY:

## LAMU COAL-FIRED POWER PLANT IN KENYA

Anticipated climate impacts and local harm from foreign-funded coal-fired power plant.



Traditional fishing boats and the rich marine ecosystem in Lamu

Lamu, Kenya is a bio-cultural wonder. It hosts critical wildlife corridors, pristine beaches, and internationally-recognized forest and marine reserves, including 70 percent of Kenya's mangroves.<sup>7</sup> It is also home to Lamu Old Town, a United Nations Educational, Scientific, and Cultural Organization ("UNESCO") World Heritage site renowned for its traditional Swahili architecture and customs.<sup>8</sup> Thousands of artisanal fisherpeople and tourism operators ply their trade on traditional dhow boats, while farmers, semi-nomadic pastoralists, and Indigenous hunter-and-gatherer communities continue to carve out livelihoods utilizing the area's rich and diverse natural resources.

This is the proposed location for East Africa's first coal-fired power plant—a 1,050 megawatt coal plant planned for a 975-acre site on the Lamu coastline, adjacent to vitally important mangrove forests and approximately 20 km from Lamu Old Town. In September 2014, the Kenyan government awarded the contract for the construction and operation of the coal plant to Amu Power, a company established by Kenyan firms Centum Investment and Gulf Energy. The majority of the financing for the US\$2 billion project will come from China. Amu Power's shareholders—Centum and Gulf Energy—are also expected to contribute around US\$500 million. Although the coal plant has attracted, and is still seeking, significant international investment, serious doubts remain about the necessity and economic viability of the project.<sup>9</sup>

Local communities face devastating impacts on their health, food security, environment, cultural heritage, and livelihoods from the construction and operation of the coal plant. The Lamu plant would result in serious air, water, and land pollution, a decline in marine resources, and destruction of internationally-recognized natural habitats. Tourism and artisanal fishing, the two most



Hassan, a fisherman  
whose livelihood is at risk  
from the Lamu coal plant



Farmers in Kwasasi who were displaced by the coal plant access road

important industries in Lamu, face existential threats from the plant's potentially dramatic disruption of the distinct character of the area and the productivity of its marine environment, threatening the livelihoods of thousands of residents. Indigenous communities are being further marginalized, losing access to critical natural and cultural resources. In the words of a Lamu resident, "We, the community of Lamu, rely on our natural resources to survive—for nourishment, shelter, healthcare, to worship in our sacred spaces, and to continue our cultural traditions. Our environment is our wealth. When our environment is healthy, we are healthy. When our environment suffers, we suffer."<sup>10</sup>

The land for the coal plant is being compulsorily acquired from local farmers, who, years after displacement was announced, continue to face uncertainties around the extent and type of compensation and resettlement support they will receive.<sup>11</sup> Although construction of the coal plant itself has yet to begin, development of a site access road has resulted in the displacement of at least 109 farmers and their families, without any consultation or compensation. In total, thousands of farmers, pastoralists and other land users, fisherpeople, and tourism operators, including Indigenous and other vulnerable communities, are expected to be displaced, with no comprehensive resettlement or compensation plans in place.

Despite the significant risks, project developers have not consulted affected communities and have ignored their concerns for years. Information provided in the few community meetings that were held was superficial, inaccessible, inaccurate, and unbalanced. Subsequent project documents failed to genuinely respond to any of the comments and concerns that were expressed during those earlier community meetings. Some affected groups, including the farmers displaced by the site access road, were not consulted at all. And shockingly, a pattern of intimidation by

**Despite the significant risks, project developers have not consulted affected communities and have ignored their concerns for years.**

Coalition training, including members of Save Lamu



**This lack of meaningful consultation or due consideration of the coal plant's risks violates Kenyan law and institutional funders' social and environmental requirements.**

government officials has impeded attempts by local groups to hold information sessions to engage and discuss project impacts as a community.<sup>12</sup> This lack of meaningful consultation or due consideration of the coal plant's risks violates Kenyan law and institutional funders' social and environmental requirements.

In June 2019, Kenya's National Environmental Tribunal ("NET") agreed, invalidating the coal plant's environmental license for lack of effective public participation, among other reasons.<sup>13</sup> In the wake of this decision, UNESCO called for revised impact assessments that focus on impacts to Lamu's "Outstanding Universal Value" prior to proceeding with the project. This decision validated years of struggle by Save Lamu, a Kenya-based umbrella organization that represents over 40 organizations from Lamu, and a broad coalition of other groups to document the project's profound risks and consultation failures. Community members and activists are continuing their efforts to stop the coal-fired power plant and prevent the irreversible harm it poses to Lamu's unique character, culture, and environment.<sup>14</sup>

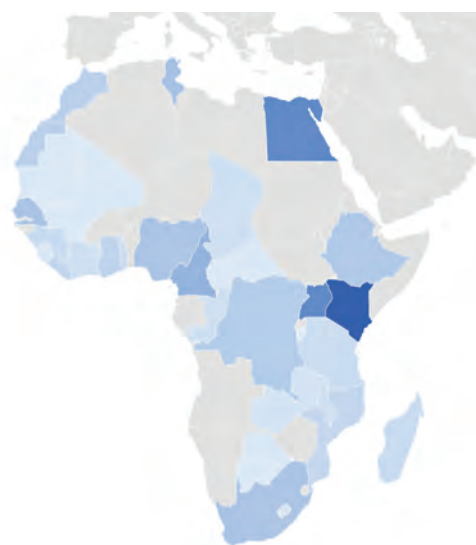
# COMMUNITY COMPLAINTS ABOUT HARM FROM INTERNATIONAL FINANCIAL FLOWS

The devastating impacts like those caused by the Buchanan Renewables project in Liberia and posed by the Lamu port and coal plant in Kenya are all too common. Millions of people every year are affected by internationally financed projects such as mines, dams,<sup>15</sup> and roads that displace entire communities, destroy natural resources, disproportionately impact women and children, and contribute to climate change.

While there is no aggregate data on the type of harm resulting from all internationally financed projects, there is information available regarding the likely small portion<sup>16</sup> of harm that is documented through community complaints filed to offices known as independent accountability mechanisms (“IAMs”). IAMs are points of contact within development finance institutions that were established to receive community complaints about social and environmental harm caused by projects funded by these institutions. For example, when the African Development Bank (“AfDB”) funded the Sendou coal-fired power plant in Senegal, local people harmed by the impacts of the plant filed a complaint to the AfDB’s IAM.<sup>17</sup> Often, these projects also involve commercial funding through co-financing arrangements. IAMs, as part of the wider grouping of accountability offices, are explored in more detail in Section 4, below. While IAM complaints do not represent a complete account of harmful projects globally, they provide valuable insight into the negative impacts of international financial flows on local communities and environments.

Globally, there have been 1,262 community complaints to IAMs in the past 25 years about a range of projects across sectors and funded by every major development finance institution.<sup>18</sup> Of those, 229 involve projects in Africa. These complaints have come from 31 African countries, representing over half the continent. However, these complaints are largely concentrated in just a few countries, with Kenya, Uganda, and Egypt accounting for nearly half of all complaints in Africa.

Notably, a significant number of complaints in Africa focused on just two projects. First, Kenya’s Mombasa-Mariakani road project has been the subject of 17 separate IAM complaints, all filed to the European Investment Bank’s (EIB) IAM.<sup>19</sup> Second, Uganda’s Bujagali hydroelectric dam has been the subject of 15 complaints, filed to the AfDB’s, EIB’s, International Finance Corporation’s (IFC), and World Bank’s mechanisms.<sup>20</sup> Complaints about each of these projects have been supported by coalitions of community activists, local civil society organizations, national and international advocates.<sup>21</sup> Together, these two projects account for 14 percent of all IAM complaints in the continent.

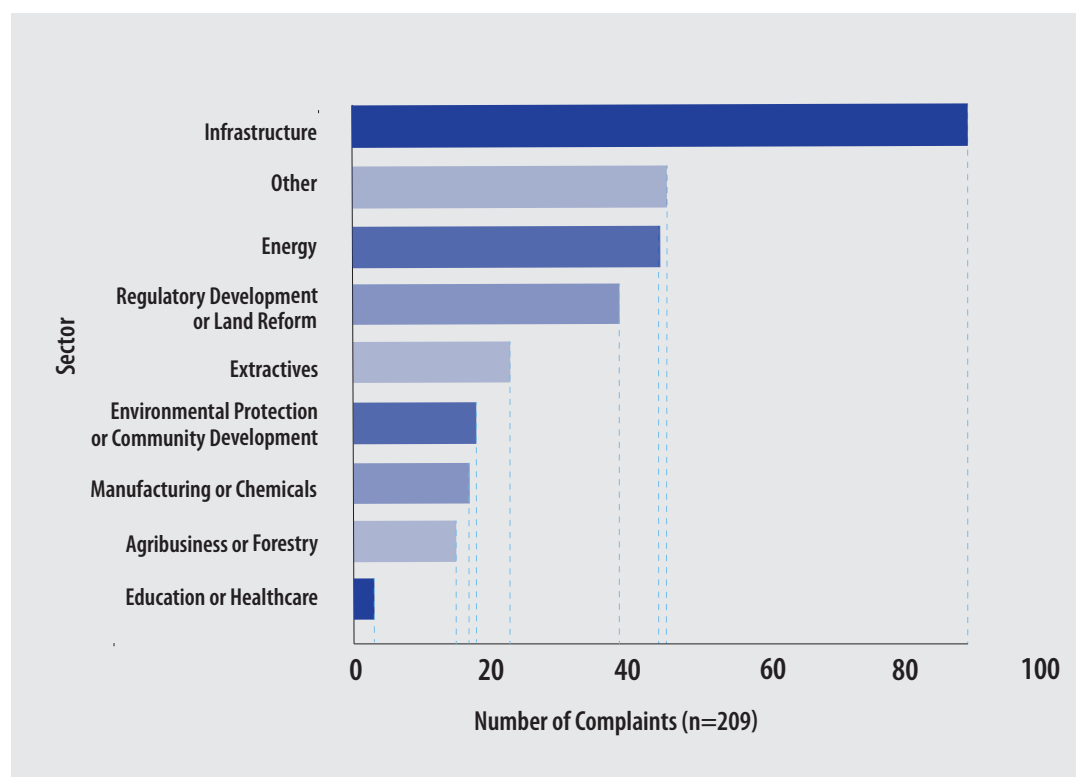


**Figure 1: African Complaints by Country**  
(n=229)

1 41

| African Countries        | Cases |
|--------------------------|-------|
| Kenya                    | 41    |
| Egypt                    | 26    |
| Uganda                   | 26    |
| Cameroon                 | 15    |
| Tunisia                  | 11    |
| Nigeria                  | 10    |
| Senegal                  | 10    |
| South Africa             | 10    |
| Ethiopia                 | 9     |
| DRC                      | 8     |
| Morocco                  | 7     |
| Ghana                    | 6     |
| Liberia                  | 5     |
| Mozambique               | 5     |
| Guinea                   | 4     |
| Madagascar               | 4     |
| Mauritius                | 4     |
| Tanzania                 | 4     |
| Togo                     | 4     |
| Chad                     | 3     |
| Ivory Coast              | 3     |
| Malawi                   | 3     |
| Republic of Congo        | 3     |
| Lesotho                  | 2     |
| Zambia                   | 2     |
| Botswana                 | 1     |
| Burundi                  | 1     |
| Central African Republic | 1     |
| Mali                     | 1     |
| Mauritania               | 1     |
| Sierra Leone             | 1     |

# 1. SECTORS



**Figure 2: African Complaints by Sector**

As shown in **Figure 2**, IAM complaints in Africa span projects in a broad variety of sectors. Complaints can mention multiple sectors, as many projects involve more than one sector. For example, a transmission line would be recorded as both energy and infrastructure.

■ **INFRASTRUCTURE AND ENERGY** stand out as the most frequent sectors receiving complaints, raised in 43 and 22 percent of complaints respectively. The prominence of these sectors is unsurprising, as large-scale infrastructure and energy projects often have substantial direct impacts on local communities, and therefore carry heightened risks of human rights and environmental abuse. The myriad harms posed by the Lamu port and the proposed Lamu coal-fired power plant demonstrate the severe impacts that infrastructure and energy projects can have. The prevalence of infrastructure and energy complaints will likely continue, as “there is an increasing investment in energy and infrastructure, but also a corresponding increase in awareness amongst civil society organizations,” according to John Mwebe, a land rights and community organizer in Uganda working for International Accountability Project.<sup>22</sup>

■ Similarly, **EXTRACTIVES—including OIL, GAS, AND MINING**—pose severe risks to nearby communities and ecosystems and were the subject of 11 percent of complaints. Conflict and human rights and environmental abuses often come with natural resource extraction, especially

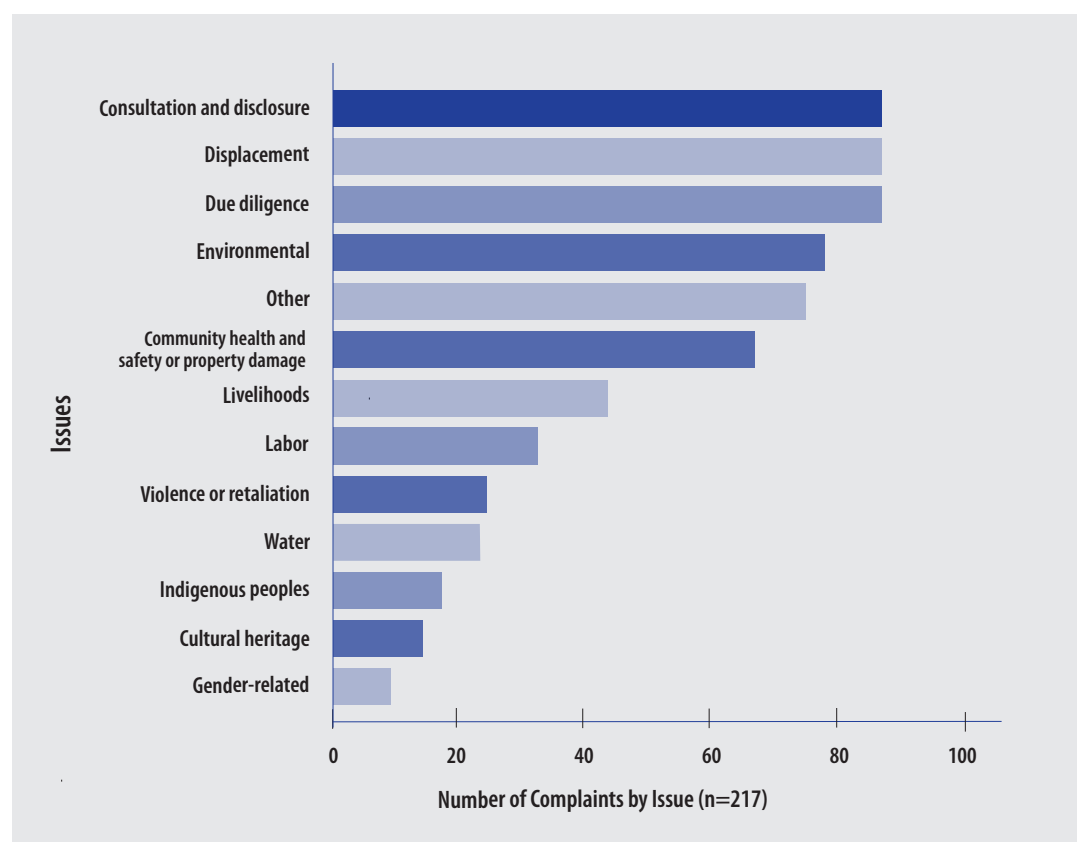
where governance of extractive sectors is weak. A new category of extractives has emerged as the world transitions to a low-carbon economy: mining of “transition minerals” needed to produce green technologies such as solar panels and electric vehicle batteries. Sub-Saharan Africa is being particularly impacted by the rising demand for transition minerals,<sup>23</sup> which has been accompanied by the human rights and environmental abuses that are all too common in the mining sector. Take the example of cobalt, a mineral used in the batteries of most electronics, in the Democratic Republic of Congo, which is home to nearly two thirds of the world’s cobalt mines. Cobalt mining in the DRC has resulted in severe human rights abuses, including child labor, exposure to toxic chemicals without protection, and serious injury and death of workers.<sup>24</sup> Demand for cobalt to power green technologies is projected to surge,<sup>25</sup> likely leading to an increase in both cobalt mining and associated labor abuses, community health impacts, and environmental harm. This pattern is likely the case for the many other transition minerals required for low-carbon technologies<sup>26</sup> if commensurate protections and accountability systems are not implemented as demand continues to intensify.

■ **REGULATORY DEVELOPMENT, OR DEVELOPMENT FINANCE AIMED AT CHANGING NATIONAL OR LOCAL REGULATORY POLICIES, AND LAND REFORM** are the subject of 19 percent of complaints in Africa. These policy changes, which are often aimed at creating a favorable environment for business and private investment, can pave the way for harm on a national scale by prioritizing external or corporate interests over those of local communities.<sup>27</sup> For example, international actors such as the World Bank Group, US and EU governments, and Bill and Melinda Gates Foundation have worked to formalize property rights across Africa in order to pave the way for large-scale corporate agriculture and foreign investment—at the expense of the smallholder farmers and pastoralists who rely on the land for their communities’ livelihoods and food security.<sup>28</sup>

■ Projects in the **MANUFACTURING & CHEMICALS AND AGRIBUSINESS & FORESTRY** sectors were subject to eight and seven percent of complaints respectively. While financing to both of these sectors has historically been relatively low, both have been identified as investment priorities by the continent’s development agendas. For example, the African Development Bank’s “High 5s” include Feed Africa, which promotes investment in Africa’s agribusiness sector, and Industrialize Africa, which seeks to develop the continent’s manufacturing sector.<sup>29</sup> Therefore, it will be important to monitor complaint trends in these areas going forward if these development priorities succeed in attracting greater investment to manufacturing and agribusiness.

■ Finally, it is important to note that complaints also arise from projects specifically geared towards creating positive social and environmental benefit, including **ENVIRONMENTAL PROTECTION AND COMMUNITY DEVELOPMENT PROJECTS**,<sup>30</sup> which were raised in nine percent of complaints. There are numerous examples of conservation efforts enforced at the cost of Indigenous and traditional peoples across the continent, including gang rape and murder by eco-guards in Democratic Republic of Congo’s Salonga National Park, and beatings and torture by eco-guards in Cameroon’s Lobéké National Park. Both parks are managed by the World Wildlife Fund (“WWF”) with support from international donors. In Cameroon, WWF failed to remedy severe abuses despite a 2015 internal investigation that revealed massive problems at Lobéké National Park.<sup>31</sup>

## 2. ISSUES



**Figure 3: African Complaints by Issue (n=217)**

Figure 3 presents the issues raised by people affected by internationally financed projects in Africa, many of which are related to human rights violations, excluding complaints where no information on issues is available. The grievances raised in complaints are often interrelated, with harm in one issue area exacerbating impacts in another. For example, lack of consultation can result in displacement, which can lead to loss of livelihoods and destruction of cultural heritage. Therefore, multiple issues are frequently raised in one complaint.

The three most common issues were each raised in 40 percent of complaints: lack of consultation and disclosure, inadequate due diligence, and physical and economic displacement.

■ It is frequently the case that community grievances stem from **LACK OF ACCESS TO SUFFICIENTLY DETAILED AND ACCURATE PROJECT INFORMATION AND INADEQUATE CONSULTATION**. In her work with of Centre de Recherche sur l'Environnement, la Démocratie et les Droits de l'homme (CREDDHO), Florence Kaswera Sitwaminyo says that “the biggest hurdle is the lack of transparency and access to the [project] contracts.”<sup>32</sup> Such insufficient access to information and community consultation often begins in the earliest project stages and negotiation processes. Although many countries have now adopted community development

agreements or similar arrangements in their laws, companies still often deal directly with central government agencies, bypassing local stakeholders altogether. In some cases where limited community consultation does take place, companies may privilege relations with elites or traditional leaders, whose interests can diverge considerably from those of the community. In such situations, elites may capture supplier contracts, employment opportunities, and other benefits.<sup>33</sup> This pattern of inadequate consultation and information disclosure feeds into broader **FAILURES IN THE SOCIAL AND ENVIRONMENTAL DUE DILIGENCE** that is meant to assess project risks and mitigate harm.

■ The issue of **DISPLACEMENT OF LOCAL COMMUNITIES FROM THEIR TRADITIONAL HOMES AND LIVELIHOODS**, and the subsequent violation of their environmental and human rights to create room for corporations, is a common feature of many projects requiring land. Such issues have, for instance, been well documented in relation to mining in Ghana,<sup>34</sup> South Africa,<sup>35</sup> Zimbabwe,<sup>36</sup> and Uganda<sup>37</sup>. Resettlement and compensation schemes for displacement are often inadequate or nonexistent, providing little or no reprieve. We have seen farmers lose their source of income and food, Indigenous peoples forced from their traditional lands and way of life, and entire communities driven into poverty. These land grabs have social, economic, and environmental impacts that are felt for generations, as families can no longer afford to send their children to school, natural resources are strained, and women and girls are disproportionately harmed.

■ **ENVIRONMENTAL ISSUES SUCH AS POLLUTION, LOSS OF BIODIVERSITY, AND DEFORESTATION**, are also prevalent, raised in 35 percent of complaints. The impact of these issues is both local and global in scale and can result in cascading impacts on communities. While many sectors can cause environmental impacts, the extractive industry is particularly well-known for these problems, and accounts for 17 percent of IAM complaints raising environmental issues in Africa. The devastation that the extractive industry activity can have on local environments and communities is clear in the situation that has unfolded for Ogoni communities in Nigeria's oil-rich Niger Delta. As a result of oil and gas extraction, Ogoni lands, streams, and creeks are severely polluted; the atmosphere is poisoned with toxins from gas that has been flared continuously, in very close proximity to human habitation; and acid rain, oil spillages, and oil blowouts have devastated Ogoni territory.<sup>38</sup> Environmental degradation has also been a major factor in perpetuating oil-related conflict for over two decades, first in the form of community protest against oil industry operations, and then as the main driver of the petro-violence associated with insurgency and counter-insurgency responses by state security forces.<sup>39</sup>

At the same time as projects are causing local-level environmental destruction, they are also often contributing to catastrophic global warming through deforestation and heavy greenhouse gas emissions. Scientists predict that Africa will be the continent most severely struck by the impacts of climate change, resulting in flooding and the spread of waterborne diseases, droughts and decreases in food production, and loss of biodiversity due to changes in natural ecosystems.<sup>40</sup> Often, the communities bearing the brunt of harm from internationally financed projects are also those who are most vulnerable to the worst effects of climate change.<sup>41</sup>

## ISSUES CONTINUED

■ In addition to damaging the environment, internationally financed projects can threaten the wellbeing of the people living and working nearby. **COMMUNITY HEALTH, SAFETY, AND PROPERTY DAMAGE** are raised in 30 percent of complaints from Africa, and issues related to **WATER** are raised in 11 percent of complaints. Risks to community wellbeing are especially acute when projects poison the air and natural resources and/or cause an influx in population that strains social services. Both factors are evidenced in communities affected by large-scale gold mining in Mali. When the Sadiola mines opened in 1996, skilled labor migrated to the area to work in the mines. As a result of mining activities, people living and working in the area experienced severe health impacts, including paralysis, blindness, and high rates of miscarriages due to groundwater contamination by mercury and cyanide, and respiratory diseases triggered by intense dust. The population influx and spread of disease resulted in an overburdening of the already-limited social facilities, and the Sadiola district's health facilities were incapable of responding to the communities' needs.<sup>42</sup>

Marginalized groups such as Indigenous peoples, women, and children often bear the brunt of harmful impacts from internationally financed projects. Although abuses experienced by marginalized groups are raised less frequently in IAM complaints than the harmful impacts discussed above, understanding and addressing these issues is critically important in preventing further marginalization.

■ Issues related to **INDIGENOUS PEOPLES** are raised in eight percent of complaints in Africa, reflecting the encroachment of extractive and infrastructure projects on Indigenous land as demand for resources and energy intensifies. In many rural stretches across the continent, hunter gatherers and pastoralist communities' way of life is deeply interwoven with and reliant upon access to their traditional lands and natural resources.<sup>43</sup> These Indigenous communities have inherent rights to self-determination and participation in decisions about how the land and resources they steward are used, including the right to free, prior, and informed consent ("FPIC").<sup>44</sup> Despite these rights, internationally financed projects affecting Indigenous and traditional communities often go forward without consent, consultation, or even notice. There are countless examples of projects that fail to respect Indigenous peoples' rights<sup>45</sup>—threatening the survival of their traditional way of life and culture.

■ **GENDER-RELATED ISSUES**, which are raised in four percent of complaints, are important to note as well. Women and girls are often the least likely to be consulted about projects that affect their livelihoods, yet bear the brunt of impacts such as denial of access to water, food security threats, and physical and sexual abuse. These heightened risks are exemplified by the experience of women and girls affected by a World Bank-financed project to update Uganda's Kamwenge-Kabarole road. The road project disrupted the social fabric of the community, bringing an influx of workers and money to a formerly rural area. A study by civil society organizations Bank Information Center and Joy for Children, Uganda found that project workers "sexually harassed and assaulted teenage girls, resulting in a significant increase in rates of teenage pregnancy, HIV/AIDS, and girls dropping out of school."<sup>46</sup> This increase in sexual exploitation was verified by the World Bank's own IAM.<sup>47</sup> In many cases, women and girls who are experiencing gender-related harm like those affected by the Kamwenge-Kabarole road face barriers to having their voices heard by those with the power to make change and stop abuse.



Charcoalers affected by BR's operations, who were not consulted prior to the project

■ Complaints data likely fail to capture many cases where speaking up about abuse was simply too dangerous, or attempts to do so resulted in silencing of would-be complainants. Therefore, while **VIOLENCE AND RETALIATION** were raised as grievances in 11 percent of complaints from Africa, we suspect that these issues are even more pervasive. Communities facing the most intense or extreme abuses are sometimes the least able to file complaints themselves or seek advocacy support due to fear of and actual retaliation. There are well-documented cases of human rights and environmental defenders in Africa and globally who have been killed, tortured, and received death threats for speaking up to protect their rights when they are affected by internationally financed projects.<sup>48</sup> In the Democratic Republic of Congo, local communities affected by Feronia palm oil plantations and activists are facing violence and harassment as they speak out to demand justice for land rights violations dating back to the early twentieth century. Tragically, in July 2019, Joël Imbangola Luneu, a member of Congolese land rights CSO RIAO-RDC, was murdered by a security guard employed by Feronia.<sup>49</sup> Attacks like this on rights defenders, and the barrier this violence and intimidation poses for communities to access justice, are discussed in greater detail in Section 5.

The relative prevalence of each of these issues in African complaints is nearly identical to that of other world regions. All too often, the actors responsible for these human rights and environmental abuses are never held accountable. The following sections examine who these actors are, and the avenues available for communities to defend their rights and demand recourse. ●

## ENDNOTES

- <sup>3</sup> For more information about trends in international financial flows into Africa, see Coalition for Human Rights in Development, *Development and Investment in Africa* (Oct. 2017), [https://rightsindevelopment.org/wp-content/uploads/2017/12/Development\\_and\\_Investment\\_in\\_Africa\\_OCT2017.pdf](https://rightsindevelopment.org/wp-content/uploads/2017/12/Development_and_Investment_in_Africa_OCT2017.pdf).
- <sup>4</sup> Accountability Counsel & Green Advocates International, *Fueling Human Rights Disasters: An examination of the U.S. Overseas Private Investment Corporation's Investment in Buchanan Renewables* (Jan. 22, 2014), <https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/Fueling-Human-Rights-Disasters-smaller-file.pdf>.
- <sup>5</sup> U.S. Embassy in Monrovia, Diplomatic Cable, *Liberia: Buchanan Renewables Deal Stalls Over Price Dispute*, Oct. 5, 2009, available at Public Library of US Diplomacy, Wikileaks, [https://wikileaks.org/plusd/cables/09MONROVIA725\\_a.html](https://wikileaks.org/plusd/cables/09MONROVIA725_a.html) (last visited July 20, 2020).
- <sup>6</sup> See Accountability Counsel & Green Advocates International, *supra* note 4, at 52.
- <sup>7</sup> County Gov. of Lamu, Lamu County Spatial Plan (2016-2026) Abridged Version Vol. II, at 19 (May 2017), [http://www.kpda.or.ke/documents/County\\_Spatial\\_Plans/Lamu%20County%20Spatial%20Plan%20ARBRIDGED%20VERSION%20Vol%20II.pdf](http://www.kpda.or.ke/documents/County_Spatial_Plans/Lamu%20County%20Spatial%20Plan%20ARBRIDGED%20VERSION%20Vol%20II.pdf).
- <sup>8</sup> *Lamu Old Town*, UNESCO World Heritage Centre, <http://whc.unesco.org/en/list/1055> (last visited July 15, 2020).
- <sup>9</sup> See David Schlissel, Institute for Energy Economics and Financial Analysis, *The Proposed Lamu Coal Plant: The Wrong Choice for Kenya* (June 2019), [https://ieefa.org/wp-content/uploads/2019/05/The-Proposed-Lamu-Coal-Project\\_June-2019.pdf](https://ieefa.org/wp-content/uploads/2019/05/The-Proposed-Lamu-Coal-Project_June-2019.pdf).
- <sup>10</sup> *Kenya: Lamu Coal-Fired Power Plant*, Accountability Counsel, <https://www.accountabilitycounsel.org/client-case/kenya-lamu-coal-fired-power-plant/> (last visited July 15, 2020).
- <sup>11</sup> Statements regarding the amount of land to be acquired, and the type of compensation that will be given, have varied significantly, and the full Resettlement Action Plan is yet to be publicly disclosed.
- <sup>12</sup> See Cheti Praxides, *Critics of Lamu coal-fired plant are corrupt, says state official*, The Star Kenya (Mar. 29, 2017), <https://www.the-star.co.ke/counties/coast/2017-03-28-critics-of-lamu-coal-fired-plant-are-corrupt-says-state-official> see also “*They Just Want to Silence Us*”: Abuses Against Environmental Activists at Kenya’s Coast Region, Human Rights Watch (Dec. 17, 2018), <https://www.hrw.org/report/2018/12/17/they-just-want-silence-us/abuses-against-environmental-activists-kenyas-coast>.
- <sup>13</sup> The Tribunal found that “it is presumptuous for a proponent, like the [Amu Power] did in this case, to proceed with the [Environmental Impact Assessment] study, identify the impacts and then unilaterally provide for mitigation measures in complete disregard of the people of Lamu and their views. We therefore find that public participation...was non-existent and in violation of the law.” *Save Lamu & 5 others v National Environmental Management Authority (NEMA) & another*, Tribunal Appeal Net 196 of 2016, Republic of Kenya in the National Environmental Tribunal at Nairobi, ¶ 50 (June 26, 2019), <http://kenyalaw.org/caselaw/cases/view/176697/>.
- <sup>14</sup> Communities are taking action to raise their concerns to the investors in the coal plant. For example, two community groups, Save Lamu and the Kwasasi Mvunjani Farmers Self-Help Group, filed a complaint to the IFC’s accountability office, the Compliance Advisor Ombudsman, in April 2019. Although that complaint was found ineligible, the community members and activists’ advocacy continues. See Accountability Counsel, *supra* note 10.
- <sup>15</sup> For example, the harm to the communities displaced from their traditional livelihoods and their land inundated by the Gibe III dam on the Omo River. See Tom Gardner, *State projects leave tens of thousands of lives in the balance in Ethiopia – study*, The Guardian (June 13, 2019), <https://www.theguardian.com/global-development/2019/jun/13/state-projects-leave-tens-of-thousands-of-lives-in-the-balance-in-ethiopia-study>; *The Omo Valley Tribes*, Survival International, <https://www.survivalinternational.org/tribes/omovalley>

---

(last visited July 15, 2020); Laura Parker, *See a Massive Dam's Big Impacts on Tribal Communities*, National Geographic (Sept. 26, 2017), <https://www.nationalgeographic.com/photography/proof/2017/08/omo-dam-ethiopia-kenya-photographs/>.

- <sup>16</sup> Because of the barriers to filing an IAM complaint described in Section 4 below, and based on Accountability Counsel's own experience of receiving more requests for support to file a complaint than we can address even when communities are able to reach our team, we are cognizant that there are many grievances that never result in formal, documented complaints.
- <sup>17</sup> *RQ2016/2 (Senegal)*, African Development Bank Group, <https://www.afdb.org/en/independent-review-mechanism/management-of-complaints/registered-requests/rq20162-senegal/> (last visited July 15, 2020).
- <sup>18</sup> This analysis is based on publicly available data on complaints filed to all IAMs through June 2020, aggregated and analyzed by Accountability Counsel. Accountability Console, <https://accountabilityconsole.com/> (last visited July 15, 2020).
- <sup>19</sup> See *Mombasa-Mariakani road project, Kenya*, Bankwatch Network (June 6, 2017), <https://bankwatch.org/project/mombasa-mariakani-road-project-kenya> (last visited July 20, 2020).
- <sup>20</sup> See Sophie Edwards, *World Bank refinancing of Uganda's Bujagali hydropower scheme under the spotlight*, Devex (Feb. 21, 2018), <https://www.devex.com/news/world-bank-refinancing-of-uganda-s-bujagali-hydropower-scheme-under-the-spotlight-92132>.
- <sup>21</sup> The Mombasa road coalition includes: CEE Bankwatch Network, Counter Balance, Amnesty International Kenya, Polish Green Network, and project affected persons. For more project information, see *Development in Reverse: Episode 2--the Mombasa Road*, Counter Balance (Feb. 2, 2019), <http://www.counter-balance.org/development-in-reverse-episode-2-the-mombasa-road/>. The Bujagali coalition includes: Bank Information Center (BIC), International Rivers (IR), National Association of Professional Environmentalists of Kampala (NAPE), Uganda Save Bujagali Crusade (SBC), CLAI, Counter Balance, Association Sherpa, CSO Coalition on the AfDB, an informal association of former Bujagali construction workers, and project affected persons. See *generally Bujagali Energy Ltd Complaints*, Accountability Console, <https://www.accountabilityconsole.com/projects/bujagali-energy-ltd/> (last visited July 15, 2020).
- <sup>22</sup> Interview by Meetali Jain with John Mwebe, Program Coordinator, International Accountability Project (May 11, 2017).
- <sup>23</sup> Examples of transition minerals and countries that will likely see an intensification of their extraction include: cobalt mining in the Democratic Republic of Congo, bauxite and alumina in Guinea, manganese in Ghana, lithium in Zimbabwe. For case studies about anticipated and actual impacts in each of these countries, see Clare Church & Alec Crawford, *Green Conflict Minerals: The fuels of conflict in the transition to a low-carbon economy*, International Institute For Sustainable Development (Aug. 2018), <https://www.iisd.org/story/green-conflict-minerals/>.
- <sup>24</sup> Siddharth Kara, *Is your phone tainted by the misery of the 35,000 children in Congo's mines?*, The Guardian (Oct. 12, 2018), <https://www.theguardian.com/global-development/2018/oct/12/phone-misery-children-congo-cobalt-mines-drc>.
- <sup>25</sup> For example, the World Bank predicts that demand for the minerals needed for electric battery production will grow by over 1,000 percent in order to meet the Paris Agreement goal of curbing global temperature increase at 2 degrees Celsius. See J. R. Drexhage, D. La Porta Arrobas, K. L. Hund, M. S. McCormick & J. Ningthoujam, World Bank Group, *The Growing Role of Minerals and Metals for a Low Carbon Future*, at 58 (June 2017), <http://documents1.worldbank.org/curated/en/207371500386458722/pdf/117581-WP-P159838-PUBLIC-ClimateSmartMiningJuly.pdf>.

## ENDNOTES CONTINUED

- <sup>26</sup> Business and Human Rights Resource Centre is tracking the human rights impacts of transition minerals globally, with a focus on Southern Africa. See *Transition Minerals Tracker*, Business & Human Rights Resource Centre, <https://trackers.business-humanrights.org/transition-minerals/> (last visited July 15, 2020).
- <sup>27</sup> See Coalition for Human Rights in Development, *supra* note 3.
- <sup>28</sup> Frédéric Mousseau, The Oakland Institute, *The Highest Bidder Takes It All: The World Bank's Scheme to Privatize the Commons*, at 6 (2019), <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/highest-bidder-eng-high-res.pdf>.
- <sup>29</sup> AfDB's *High 5s: A game changer in Africa's development discourse*, African Development Bank Group, <https://www.afdb.org/en/the-high-5/> (last visited July 15, 2020).
- <sup>30</sup> C. Daniel, K. Genovese, M. van Huijstee & S. Singh (Eds.), *Glass Half Full? The State of Accountability in Development Finance* (Jan. 2016), <https://www.somo.nl/wp-content/uploads/2016/03/Glass-half-full.pdf>.
- <sup>31</sup> Katie J.M. Baker & Tom Warren, *A Leaked Report Shows WWF Was Warned Years Ago Of "Frightening" Abuses*, BuzzFeed News (Mar. 5, 2019), <https://www.buzzfeednews.com/article/katiejmbaker/wwf-report-human-rights-abuses-rangers>.
- <sup>32</sup> Interview by Accountability Counsel with Florence Kaswera Sitwaminy, Coordinator, CREDDHO (Feb. 11, 2019).
- <sup>33</sup> For example, in the context of the major iron ore investments that have taken place in Sierra Leone, Fanthorpe and Gabelle point out that companies are "not required to secure local landowners' consent in order to obtain large-scale mining licences; they merely have to supply licensing authorities with evidence that they have consulted with 'interested and affected parties.'" Richard Fanthorpe & Christopher Gabelle, World Bank, *Political Economy of Extractives Governance in Sierra Leone*, at 73 (2013), <https://openknowledge.worldbank.org/handle/10986/16726>.
- <sup>34</sup> Commission for Human Rights and Administrative Justice, *The State of Human Rights in Mining Communities in Ghana* (Mar. 2008), <https://chraj.gov.gh/wp-content/uploads/2018/11/2008-MINING-REPORT.pdf>.
- <sup>35</sup> South African Human Rights Commission, *Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo* (2008), <https://www.business-humanrights.org/sites/default/files/reports-and-materials/SAHRC-report-on-Anglo-Platinum-Nov-2008.pdf>.
- <sup>36</sup> Clayton Masekesa, *Displaced Marange villagers in quandary*, The Standard (Apr. 28, 2013), <https://www.thestandard.co.zw/2013/04/28/displaced-marange-villagers-in-quandary/>.
- <sup>37</sup> See *Baleke & 4 Others v Attorney General & 2 Others*, Suit No. 179 of 2002, High Court of Uganda (concerning forced eviction in the Mubende Districts of Uganda).
- <sup>38</sup> Amnesty International, *Claiming rights and resources: Injustice, oil and violence in Nigeria* (2005), <https://www.amnesty.org/download/Documents/80000/afr440202005en.pdf>.
- <sup>39</sup> M. Watts & S. I. Ibaba, *Turbulent Oil: Conflict and Insecurity in the Niger Delta*, 4 *African Security*, at 1 (2011).
- <sup>40</sup> United Nations for UN Climate Change Conference Nairobi 2006, *UN Fact Sheet on Climate Change* (2006), [http://unfccc.int/files/press/backgrounders/application/pdf/factsheet\\_africa.pdf](http://unfccc.int/files/press/backgrounders/application/pdf/factsheet_africa.pdf).
- <sup>41</sup> Rachel Baird, Minority Rights Group International, *The Impact of Climate Change on Minorities and Indigenous Peoples* (Apr. 2008), <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-524-The-Impact-of-Climate-Change-on-Minorities-and-Indigenous-Peoples.pdf>.
- <sup>42</sup> Lindlyn Tamufor, TWN Africa, *Human rights violations in Africa's mining sector*, at 7-8, [http://twnafrica.org/twnaf\\_humanrights-compilation.pdf](http://twnafrica.org/twnaf_humanrights-compilation.pdf) (last visited July 22, 2020).

- 
- <sup>43</sup> African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, *Indigenous Peoples in Africa: The Forgotten Peoples?* (2006), [https://www.iwgja.org/images/publications/0112\\_AfricanCommissionSummaryversionENG\\_eb.pdf](https://www.iwgja.org/images/publications/0112_AfricanCommissionSummaryversionENG_eb.pdf).
- <sup>44</sup> The right of Indigenous communities to free, prior, and informed consent ("FPIC") when a project seeks their land is enshrined in domestic venues and international standards. See Legal Resources Centre, Oxfam, *Free, Prior and Informed Consent in the extractive industries in Southern Africa* (2018), [http://lrc.org.za/art\\_external/pdf/2018%20Free%20Prior%20and%20Informed%20Consent%20XFAM.pdf](http://lrc.org.za/art_external/pdf/2018%20Free%20Prior%20and%20Informed%20Consent%20XFAM.pdf).
- <sup>45</sup> For example, In Botswana, the San were forced to leave their ancestral homes in the Central Kalahari Game Reserve to make way for a diamond mine. See *Botswana: Diamond mining continues to cause suffering for Bushmen*, Survival International (Nov. 27, 2015), <https://www.survivalinternational.org/news/11028>. In Ethiopia, the government forcefully displaced the people of Gambella from their ancestral home to pave the way for corporate and industrial farming, a move that has resulted in gross violations of human rights. See *Ethiopia: Army Commits Torture, Rape*, Human Rights Watch (Aug. 28, 2012), <http://www.hrw.org/news/2012/08/28/ethiopia-army-commits-torture-rape>.
- <sup>46</sup> Elana Berger, Bank Information Center, *How a Community-Led Response to Sexual Exploitation in Uganda Led to Systemic World Bank Reform*, at 7 (June 2018), [https://bankinformationcenter.cdn.prismic.io/bankinformationcenter%2Fce8a9d3e-4bf1-4b07-9259-fcee487077e6\\_an3\\_june18-v4-jun-18+%281%29.pdf](https://bankinformationcenter.cdn.prismic.io/bankinformationcenter%2Fce8a9d3e-4bf1-4b07-9259-fcee487077e6_an3_june18-v4-jun-18+%281%29.pdf).
- <sup>47</sup> See *Uganda Transport Sector Development Project: Fact Sheet* (June 7, 2017), <http://www.worldbank.org/en/country/uganda/brief/uganda-transport-sector-development-project-fact-sheet>.
- <sup>48</sup> See Coalition For Human Rights In Development, *Uncalculated Risks: Threats and Attacks Against Human Rights Defenders and the Role of Development Financiers* (May 2019), <https://rightsindevelopment.org/uncalculatedrisks/>.
- <sup>49</sup> Karen McVeigh, *UK development bank launches inquiry after murder of Congolese activist*, The Guardian (Sept. 27, 2019), <https://www.theguardian.com/global-development/2019/sep/27/uk-development-bank-launches-inquiry-after-murder-of-congolese-activist-cdc>.

A roadside sign in Kenya displaying some of the financial actors involved in the power project described in Section 2.

PHOTO: DESIREE KOPPE



# UNDERSTANDING THE ACTORS BEHIND INTERNATIONALLY-FINANCED PROJECTS

## 3 SECTION

**B**ehind a project causing harm to local communities and the environment, there is often a chain of global investors and lenders providing the financial resources that make the project possible, and who therefore may have leverage to stop harmful practices and provide remedy when abuse occurs. Identifying the actors in this investment chain is often the first step to accessing justice, as the avenues available for communities to raise grievances and seek accountability are contingent upon the type of financial institutions and corporations involved in a harmful project. Typical actors involved in financing and implementing a project include:<sup>50</sup>

### PROJECT COMPANIES

manage the day-to-day operations of a project;

### PARENT COMPANIES

own the project company;

### INVESTORS AND SHAREHOLDERS

invest money in a project company and/or parent company in exchange for shares of that company, usually with an expectation of profiting. Examples include: investment banks, funds, and individuals;

### LENDERS

provide financing to a project company, parent company, or government with the expectation that the debt will be repaid, often with interest. Examples include: commercial banks and international financial institutions (“IFIs”).

### GOVERNMENTS

(including local, state, and national-level actors) provide land for a project, award contracts, enable companies to operate in their jurisdiction, set policies that affect project and corporate governance, and can be involved as implementing agencies.

In practice, these investment chains are often complex and non-transparent—particularly where private sector actors are involved. Here, we discuss company structures and high-level trends in international financing for projects in Africa as a starting point to understand the types of actors that may be involved in a project causing harm. We then examine how these actors work together to finance projects, with a case study exploring the investment chain behind the Lamu coal-fired power plant, which is discussed above in Section 2.

# UNDERSTANDING COMPANY STRUCTURES

**T**he structure a company follows and how it operates are crucial to the relationship between community members and a corporation seeking to explore and potentially exploit their land or natural resources. A company can take many forms both on and off the African continent, and the first thing a local community needs to understand is what type of institution they are dealing with when a company representative asks for the use of their land or begins operations nearby.

Companies can be public and/or private and either locally or foreign owned, and can be structured in several ways:

**The vast majority of this lending has been to African governments, which hold approximately three quarters of Sub-Saharan African countries' long-term external debt, while the remaining long-term external debt is held by corporations and other private entities in the region.**

- Fully private and domestically owned by nationals of the state;
- Fully private but partially foreign owned and partially domestically owned by nationals;
- Partially private and partially government owned;
- Partially private and partially publicly owned through shareholders on public stock exchanges;
- Fully public and government owned; and
- Fully publicly and owned through shareholders on public stock exchanges.

Further, companies often establish subsidiaries—the “project companies” described above—to operate a project. Because these project companies are considered distinct legal entities, they can serve to shield the “parent company” from liability for harm.<sup>51</sup>

Understanding and recognizing these structures is important for communities, as they affect the ability of the company to pay compensation or provide remedy in the future. Mining corporations operating in Africa exemplify the complex ways in which companies can be structured, often with the result of limiting communities' ability to access remedy for harm. For example, each minefield is often owned by a separate project company. Therefore, even if a parent company backs three mining sites in a country, each site could potentially have a separate set of directors and shareholders—and separate finances. In addition, some companies may not formally have shared ownership, but rather have an agreement such as joint venture agreements where costs are shared, but company ownership is not. These types of company structures hide the amount of money the company can access to compensate for any wrongs.

# TRENDS IN FINANCIAL FLOWS INTO AFRICA



An advertisement for Buchanan Renewables, the corporation who committed abuses in Liberia, discussed in Section 2. Shortly after its investors Vattenfall and Swedfund backed out in May 2012, BR shut down operations, terminated its contracts with farmers, and left local communities to manage the project's negative impacts on their own.

PHOTO: GREEN ADVOCATES INTERNATIONAL

## 1. INVESTORS AND SHAREHOLDERS

In recent years, foreign companies and individuals have directly invested<sup>52</sup> tens of billions of dollars (US) into projects in Africa annually.<sup>53</sup> Figure 4 shows the top 10 countries whose companies and citizens invested in the most projects in Africa between 2014 and 2018. Notably, while shareholders in the United States and France directly invested in the most projects during this five-year period, parties in China directly invested more capital in African projects than both countries combined.<sup>54</sup>

## TRENDS IN FINANCIAL FLOWS INTO AFRICA

### FOREIGN DIRECT INVESTMENT IN AFRICA, 2014-2019

| COUNTRY              | PROJECTS     | INVESTMENT (US\$ MILLION) |
|----------------------|--------------|---------------------------|
| United States        | 463          | \$30,855                  |
| France               | 329          | \$34,172                  |
| United Kingdom       | 286          | \$17,768                  |
| China                | 259          | \$72,235                  |
| South Africa         | 199          | \$10,185                  |
| United Arab Emirates | 189          | \$25,278                  |
| Germany              | 180          | \$6,887                   |
| Switzerland          | 143          | \$6,432                   |
| India                | 134          | \$5,403                   |
| Spain                | 119          | \$4,389                   |
| <b>TOTAL</b>         | <b>2,301</b> | <b>\$213,604</b>          |

**Figure 4:**

Source: EY, Africa Attractiveness Report 2019

## 2. LENDERS

In 2018, Sub-Saharan Africa held over \$580 billion in debt to external lenders from both the public and private sector.<sup>55</sup> The vast majority of this lending has been to African governments, which hold approximately three quarters of Sub-Saharan African countries' long-term external debt, while the remaining long-term external debt is held by corporations and other private entities in the region.<sup>56</sup> International financial institutions (IFIs) play an important role in facilitating this external lending by providing loans themselves and guaranteeing private sector loans. IFIs are public institutions that finance activities in developing countries, often with a goal of promoting economic development or international economic cooperation. IFIs can be owned by one state (bilateral), such as the Development Bank of Southern Africa and the China Development Bank, or can be jointly governed by multiple states (multilateral), such as the World Bank and African Development Bank. At the end of 2017, 60 percent of Sub-Saharan African countries' long-term external debt stock was owed to IFIs, including both multilateral and bilateral sources.<sup>57</sup> Recent IFI lending in Africa has focused heavily on infrastructure, energy, natural resources, and agriculture, and has increasingly prioritized the private sector.<sup>58</sup>

While IFIs have long played and continue to play a prominent role in financing projects in Africa, the overall composition of lenders to the continent has shifted in recent years. Historically, multilateral and bilateral institutions in "Paris Club" countries<sup>59</sup> have been the continent's primary source of external lending. Multilateral institutions continue to remain a major source of financing, accounting for about one third of Sub-Saharan African countries' total external debt at the end of 2017. However, over the last decade, African governments have increasingly borrowed from emerging market countries, commercial banks, and other private creditors.<sup>60</sup> Notably, China has become the single largest lender to Africa, with its combined state and commercial loans estimated to account for about 20 percent of lending to the region,<sup>61</sup> although transparency challenges make these figures hard to verify.

# CASE STUDY: INVESTMENT CHAIN FOR THE LAMU COAL-FIRED POWER PLANT



Signs at the LAPSET port construction site in Lamu, Kenya

In 2014, the **Kenyan Government** awarded a tender to Amu Power Company Limited (“Amu Power”) to build and operate a 1,000 megawatt coal-fired power plant on the mainland coast of Lamu County. Amu Power is a special purpose **project company** created by two **shareholding companies**: Centum Investment, a publicly traded Kenyan investment firm, and Gulf Energy, a privately held Kenyan energy company.<sup>62</sup> In 2018, GE Power, a subsidiary of U.S. multinational General Electric (“GE”), announced a “collaboration agreement” to supply GE’s ultra-supercritical coal plant technology to Amu Power (with an opportunity for GE to acquire an equity interest and become a **shareholder** of Amu Power),<sup>63</sup> although few further details of that arrangement have been publicly confirmed or released. Reporting on the project reveals that financing for the \$2 billion project is expected to be met by:

- 75% debt financing in the form of syndicated loans: The Industrial and Commercial Bank of China (ICBC) reported it would arrange \$900 million in export credit financing as the lead bank in 2015.<sup>64</sup> Other sources report ICBC financing of up to a \$1.5 billion loan.<sup>65</sup> ICBC has not publicly commented on the extent of its involvement since its initial announcement, despite repeated requests that it respond to community concerns about the project’s impacts.<sup>66</sup> A second \$300 million loan was linked at one stage to the Standard Bank of South Africa (who subsequently decided against participation);<sup>67</sup> and

- 25% equity financing from Amu Power’s shareholders.<sup>68</sup>

## CASE STUDY: INVESTMENT CHAIN FOR THE LAMU COAL-FIRED POWER PLANT

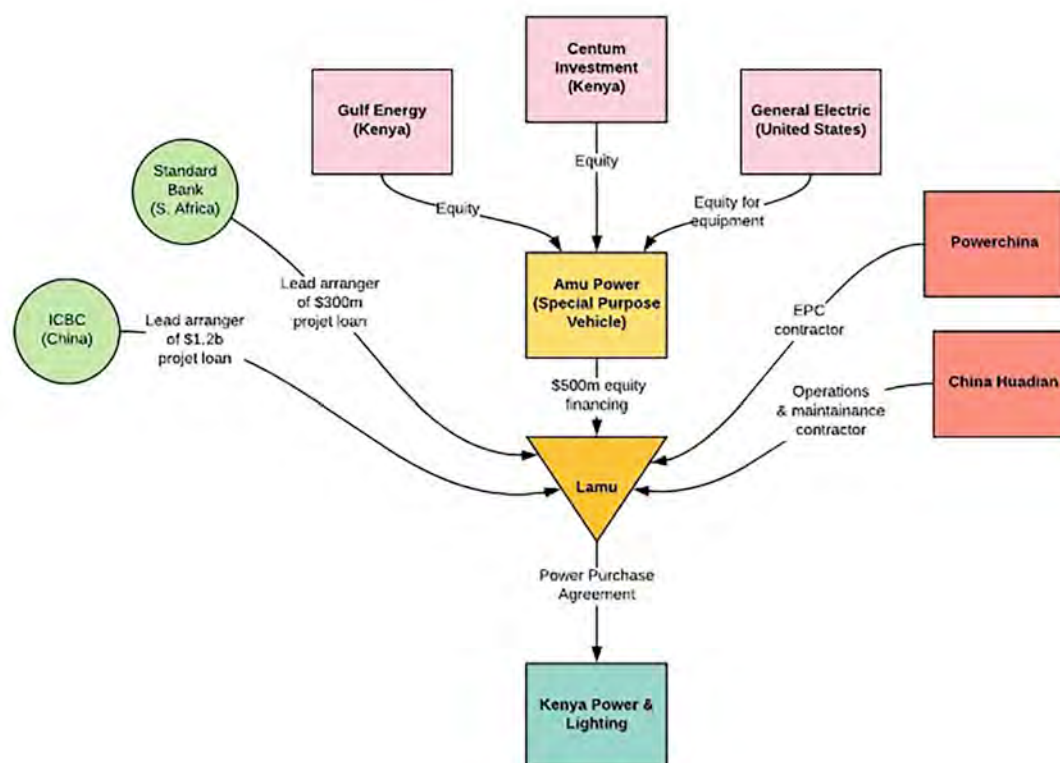


Figure 5: Lamu coal plant investment chain, uncovered by IDI

**These IFIs, as well as other international investors exposed to the coal plant's shareholders, open up a number of strategies and potential forums for communities to advocate for projects to respect their rights.**

In addition to this direct chain of financiers and companies behind the Lamu coal-fired power plant, a number of other lenders and investors have been linked to the project and provide potential pressure points to influence its development. For example, multiple IFIs have been linked at various points in time to the Lamu plant. The African Development Bank ("AfDB") considered providing a partial risk guarantee covering Kenya Power and Lighting Company's obligations under a 25-year Power Purchase Agreement related to the coal plant, although after intense advocacy from communities and their advocates, they are no longer considering this support.<sup>69</sup> The World Bank Group's IFC has also been linked to the coal plant project through various banks that provided support to the project and/or its investors after receiving IFC funds. Over the past six years, five IFC financial sector clients have supported Amu Power or Centum Investment in some form, after receiving IFC funds—reflecting a pattern of investment by IFC clients in the companies developing the coal plant.<sup>70</sup> These IFIs, as well as other international investors exposed to the coal plant's shareholders, open up a number of strategies and potential forums for communities to advocate for projects to respect their rights. The next section explores these avenues for accessing justice. ●

---

## ENDNOTES

- <sup>50</sup> These categories are adapted from the “Follow the Money” resources created by international CSO Inclusive Development International (“IDI”). See *Follow the Money*, IDI, <https://www.followingthemoney.org/> (last visited July 15, 2020). Other stakeholders involved in investment chains include brokers, contractors, and buyers.
- <sup>51</sup> See Amnesty International & Business & Human Rights Resource Centre, *Creating a paradigm shift: Legal solutions to improve access to remedy for corporate human rights abuse*, at 5 (Sept. 4, 2017), [https://www.business-humanrights.org/sites/default/files/documents/AI\\_BHRRRC\\_Elaborating\\_Solutions\\_Report\\_Template\\_1%20Sep%202017.pdf](https://www.business-humanrights.org/sites/default/files/documents/AI_BHRRRC_Elaborating_Solutions_Report_Template_1%20Sep%202017.pdf).
- <sup>52</sup> “Directly invested” refers to foreign direct investment (FDI), or investment from a party in one country into a company in another country with the intention of establishing a lasting interest and control. See UNCTAD, *Definitions and Sources* (2007), [https://unctad.org/en/Docs/wir2007p4\\_en.pdf](https://unctad.org/en/Docs/wir2007p4_en.pdf).
- <sup>53</sup> In 2018, FDI in Africa totaled US\$ 46 billion. See *Foreign direct investment to Africa defies global slump, rises 11%*, UNCTAD (June 12, 2019), <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2109>.
- <sup>54</sup> Dhruv Gandhi & Payce Madden, *The Africa Growth Initiative's top 5 figures of 2019*, Brookings Institute (Dec. 18, 2019), <https://www.brookings.edu/blog/africa-in-focus/2019/12/18/the-africa-growth-initiatives-top-5-figures-of-2019/>.
- <sup>55</sup> Sub-Saharan Africa Country Table, *International Debt Statistics*, World Bank, <https://datatopics.worldbank.org/debt/ids/region/SSA> (last visited May 26, 2020). This value is likely an underestimate as it does not account for hidden debt, including potentially significant lending from China. See Dhruv Gandhi, *Figure of the week: China's 'hidden' lending in Africa*, Brookings Institute (July 10, 2019), <https://www.brookings.edu/blog/africa-in-focus/2019/07/10/figure-of-the-week-chinas-hidden-lending-in-africa/>.
- <sup>56</sup> *Sub-Saharan Africa Country Table*, *supra* note 55. These percentages are based on available data. However, debt flows to the private sector are less reliable than those to the public sector or private sector debt that is publicly guaranteed. See *Private Sector Non-Guaranteed Debt*, External Debt Statistics Quarterly Bulletin: Third Edition, World Bank (Sept. 2016), <https://datatopics.worldbank.org/debt/QuarterlyBulletin-September2016>.
- <sup>57</sup> World Bank Group, *International Debt Statistics 2019*, at 11 (2018), <http://datatopics.worldbank.org/debt/pdf/ids-2019.pdf>.
- <sup>58</sup> See Coalition for Human Rights in Development, *supra* note 3.
- <sup>59</sup> The Paris Club is “an informal group of official creditors whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor countries.” Permanent members *include*: Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Ireland, Israel, Italy, Japan, Korea, Netherlands, Norway, Russia, Spain, Sweden, Switzerland, United Kingdom, and the United States. See Paris Club, <http://www.clubdeparis.org> (last visited July 15, 2020).
- <sup>60</sup> *International Debt Statistics 2019*, *supra* note 57.
- <sup>61</sup> Reality Check Team, *Reality Check: Is China burdening Africa with debt?*, BBC News (Nov. 5, 2018), <https://www.bbc.com/news/world-africa-45916060>.
- <sup>62</sup> Kenya's Amu Power Signs Clean Coal Technology Agreement with GE, General Electric (May 16, 2018), <https://ge.africa-newsroom.com/press/kenyas-amu-power-signs-clean-coal-technology-agreement-with-ge>; Gideon Keter, *Centum's coal deal is still on - CS Keter*, The Star Kenya (Nov. 22, 2018), <https://www.the-star.co.ke/counties/2018-11-22-centums-coal-deal-is-still-on-cs-keter/>.
- <sup>63</sup> *General Electric*, *supra* note 62.

---

## ENDNOTES CONTINUED

- <sup>64</sup> *ICBC Arranges Financing for the Largest Power Plant Project in Eastern Africa*, ICBC (July 3, 2015), <https://www.icbc.com.cn/icbc/en/newsupdates/icbc%20news/ICBC%20Arranges%20Financing%20for%20the%20Largest%20Power%20Plant%20Project%20in%20Eastern%20Africa.htm>
- <sup>65</sup> BankTrack, *Lamu Coal Power Plant*, [https://www.banktrack.org/project/lamu\\_coal\\_power\\_project/pdf](https://www.banktrack.org/project/lamu_coal_power_project/pdf) (last updated June 30, 2020).
- <sup>66</sup> China's role in Lamu coal plant, *Coal in Kenya*, Medium (Dec. 8, 2019), <https://medium.com/@deCOALonize/chinas-role-in-lamu-coal-plant-advocacy-efforts-3be03222d289>; see also Letter to Minister Zhong Shan, Ministry of Commerce of the People's Republic of China, and others from 265 CSOs (Apr. 29, 2020), [https://www.inclusivedevelopment.net/wp-content/uploads/2020/04/CSO-Statement\\_April-2020\\_Final\\_English-STATEMENTAPPENDIX-1.pdf](https://www.inclusivedevelopment.net/wp-content/uploads/2020/04/CSO-Statement_April-2020_Final_English-STATEMENTAPPENDIX-1.pdf).
- <sup>67</sup> *Standard Bank Sets The Record Straight on Financing Lamu*, 350 Africa (Oct. 17, 2017), <https://350africa.org/standard-bank-sets-the-record-straight-on-financing-lamu/>.
- <sup>68</sup> See BankTrack, *supra* note 65.
- <sup>69</sup> See Alexander Winning, *African Development Bank decides not to fund Kenya coal project*, Reuters (Nov. 13, 2019), <https://www.reuters.com/article/us-africa-investment-coal/african-development-bank-decides-not-to-fund-kenya-coal-project-idUSKBN1XN1A8>.
- <sup>70</sup> In 2016, Save Lamu wrote to the IFC to alert it to the fact that two of its clients, Kenya's Equity Bank Limited and Standard Bank of South Africa Limited, appeared to be contributing to the Lamu coal plant. See Letter to Marcos Brujis, Global Director, Financial Institutions Group, International Finance Corporation (Apr. 8, 2016), <https://www.accountabilitycounsel.org/wp-content/uploads/2019/07/9-4-8-16-save-lamu-to-ifc.pdf>. In 2018 and 2019, advocates found that three further IFC clients, the Co-Operative Bank of Kenya, Kenya Commercial Bank, and FirstRand Bank of South Africa, each provided financing to Centum Investment after receiving IFC funds. Co-Operative Bank also provided a bid support bond – a form of guarantee – in direct support of Amu Power's bid to construct the project. See Letters to Osvaldo Gratacós, Vice President, Compliance Advisor Ombudsman (Apr. 26, 2019 & May 3, 2019), <https://www.accountabilitycounsel.org/wp-content/uploads/2018/04/merged-cao-letters-regarding-fi-connections.pdf>.

# 4

SECTION

## VENUES AVAILABLE TO ACCESS REMEDY

---



A fisherman in Lamu  
expertly maneuvers his boat

# 4

## SECTION

### The BUILDING BLOCKS of the RIGHT TO REMEDY

The right to an effective remedy is enshrined in the third pillar of the United Nations Guiding Principles on Business and Human Rights (“UNGPs”). At the “core of ensuring access to remedy”<sup>71</sup> is that it be adequate, effective, and prompt, and the compensation paid be proportional to the gravity of the violations and the harm suffered. Effective remedy is not limited to financial compensation, but can potentially take a number of other substantive forms, such as apologies, restitution, rehabilitation, and punitive sanctions, as well as measures to prevent future harm such as injunctions and guarantees of non-repetition.<sup>72</sup> Remedies negotiated as a result of non-judicial accountability offices can also include a wide range of additional and creative responses to address and prevent harm, including creation of collaborative local development programs or employment opportunities.<sup>73</sup>

In theory, communities facing harm from international investment in Africa have a wide range of options when exploring how and where to lodge a grievance, be heard, and achieve prevention or remedy. Venues to address grievances include courts and commissions that follow judicial process arising from state duties to protect rights, non-judicial accountability offices, as well as traditional methods of dispute resolution. Figure 6 illustrates the spectrum of potential avenues, spanning from local to international and including both judicial and non-judicial mechanisms. This section focuses on three of these options—national courts, regional courts and commissions, and a variety of non-judicial accountability offices—with discussion of the relative opportunities each venue provides, as well as barriers specific to each venue and strategies to overcome them.

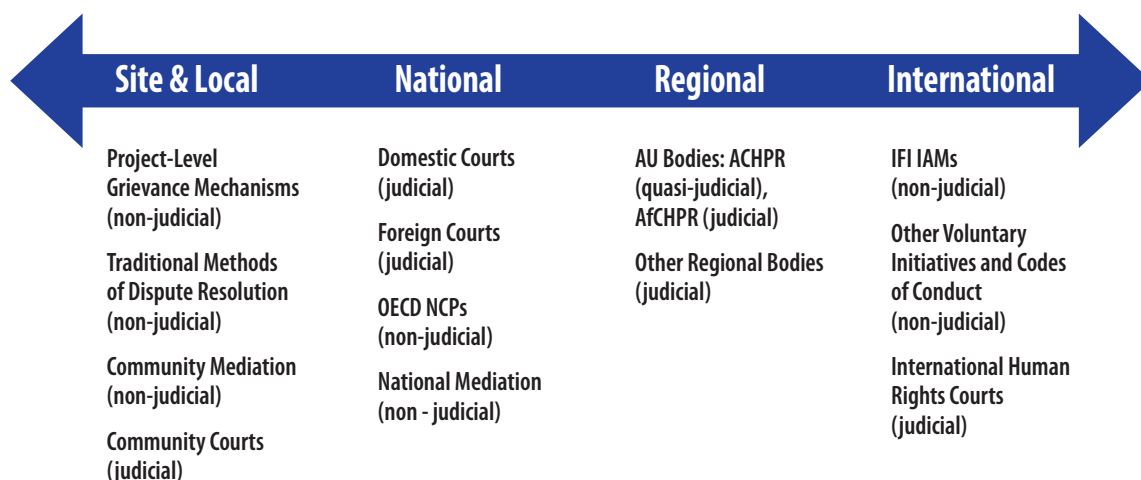


Figure 6: Spectrum of Access to Remedy

## CASE STUDY: DIAMOND MINING IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Communities in the Miabi/Kasai Oriental province in the Democratic Republic of the Congo report environmental damage and pollution caused by diamond mining. The operating company, the Anhui-Congo Mining Investment Corporation (“Société Anhui-Congo d’Investissement Minier” or SACIM), is a 50/50 joint venture between the Congolese government and the AFECC Group, a Chinese investment company.<sup>i</sup> In April 2020, National MP Eric Ngalula called for an audit of AFECC’s shares and accused the company of failing to carry out the socio-economic projects it had agreed to finance.<sup>ii</sup> Ngalula also referred the case to the Court of Cassation, the main court of last resort in the DRC, to denounce the massive tax fraud and mistreatment of Congolese communities by SACIM.<sup>iii</sup>



SACIM built a water pump for a community in Boya Miabi, located in the Kasai Oriental Province, but the pump does not work. The community views this as an act of bad faith



SACIM’s practice of dumping chemicals has polluted the environment around the mine. Here, the nearby population wades through the chemical waste in search of overlooked diamonds.

PHOTOS: DIEUDONNE TSHIMPIDIMBUA OF CONSEIL RÉGIONAL DES ORGANISATIONS NON GOUVERNEMENTALE DE DÉVELOPPEMENT, DRC

<sup>i</sup> Felicia Omari Ochelle, *Stargems and the Anhui-congo Mining Investment Company Successfully Tender 641,962 Carats of Rough Diamonds*, Ventures Africa (Feb. 8, 2018), <http://venturesafrica.com/stargems-and-the-anhui-congo-mining-investment-company-successfully-tender-641962-carats-of-rough-diamonds/>.

<sup>ii</sup> Arnbethnic, *MP Eric Ngalula Calls For Investigations on a Chinese Company Mining in Kasai*, Copperbelt Katanga Mining (Apr. 30, 2020), <https://copperbeltkatangamining.com/mp-eric-ngalula-calls-for-investigations-on-a-chinese-company-mining-in-kasai/>.

<sup>iii</sup> Id.

# NATIONAL COURTS

**N**ational courts may be available to African communities seeking remedy, including both those in African states where harm occurred and those in foreign countries where corporate actors causing harm are based. These courts offer the potential to achieve legally enforceable judgments that may result in remediation and can be powerful in setting precedent and norms to prevent future abuses. However, due to the steep barriers to litigation discussed below, courts may be unavailable or inaccessible in many cases.

## 1. HOST COUNTRY DOMESTIC LITIGATION

When local people face harm, domestic courts have a duty to provide access to remedy in the ‘host’ country of the project—the country into which the investment flowed and where the harm occurred.<sup>74</sup> Human rights and environmental impacts caused by internationally financed projects often give rise to the ability to file a lawsuit, yet community claims often fail to proceed to a court judgment that delivers remedy. In the cases where a remedy is obtained, it frequently does not meet the international standard of “adequate, effective and prompt reparation for harm suffered.”<sup>75</sup>

Lack of resources to hire a lawyer and too few lawyers are both impediments to judicial remedy in domestic courts. Many African countries have a low number of lawyers per capita, with most African law firms and solo practices concentrated in urban centers. This inevitably creates a geographic and linguistic barrier to legal services, especially for rural communities. The cost of legal services can also impede access to justice, where victims of abuse are unable to afford a lawyer.<sup>76</sup> Even where legal aid programs exist, they are often overburdened.

To exacerbate this, many court systems are understaffed and under-resourced, faced with capacity challenges that cause massive case backlogs.<sup>77</sup> Such challenges open the door to—or create the perception of—corruption of judicial processes in the form of bribes and patronage.<sup>78</sup> This can debilitate the efficiency and independence of the judiciary. Such problems have all contributed to a system of domestic law remedies that are “patchy, unpredictable, often ineffective and fragile.”<sup>79</sup>

Domestic courts may also be politicized, thus undermining their ability to provide a legitimate avenue to access justice given the role that states often play in enabling projects causing harm.<sup>80</sup> Additionally, some communities seeking to use domestic courts to address harm may be surprised to learn that their government has traded away their right to challenge the project in court in exchange for foreign investment, opting instead to require affected communities to participate in binding, often costly, arbitration that cannot be appealed to a court.<sup>81</sup>

Despite these barriers specific to domestic litigation, advocates have successfully brought cases on behalf of communities about the harmful impacts of internationally financed projects in domestic courts (in the host countries of projects), with two notable recent examples in Sierra Leone and South Africa:

- Three communities in Sierra Leone, with legal assistance from the legal empowerment organization Namati, brought a case in Sierra Leone that resulted in a November 2018 high court win after the court ordered an oil palm company owned by Singapore-based SIVA Group, to return land and rent they owed.<sup>82</sup> The company did not challenge the lawsuit, thus resulting in

a court judgment that returned possession of the land to the landowners. Some of this land contains potentially income-generating assets, but also comes with enormous maintenance costs due to the period of corporate neglect.<sup>83</sup>

- In a November 2018 victory for the Xolobeni community in Pondoland, South Africa, the high court ruled that the community has the right to FPIC regarding proposed titanium mining on their land by the Australian company Transworld Energy and Mineral Resources.<sup>84</sup> That ruling is being appealed, and the community leaders are under threat.<sup>85</sup> This follows the murder of a Xolobeni mining activist in 2016, a crime the authorities have so far refused to investigate, despite two colleagues reporting that the victim told them the “mining lobby was ‘planning to kill us’” just hours before his murder.<sup>86</sup> In January 2019, community advocates from the Amadiba Crisis Committee called on the South African Mineral Resources Minister to respect the court’s decision on FPIC after he announced he would visit Xolobeni to “engage the community on mining and economic development prospects in the area.”<sup>87</sup> The struggle continues today, with the Minister still insisting on surveying the area for consent.<sup>88</sup>

In a creative example of home country litigation that pertains to host country litigation, EarthRights International is pioneering cases in United States courts under the Foreign Legal Assistance (“FLA”) statute that allows “discovery” of documents to support foreign litigation. In other words, communities suing in domestic courts can potentially obtain documents under United States laws to help support their litigation outside the United States. Three of EarthRights International’s public FLA cases pertain to Africa (two related to domestic cases in Africa and the third in support of a Dutch case regarding abuses in Nigeria).<sup>89</sup>

## 2. HOME COUNTRY FOREIGN LITIGATION

Where domestic litigation in an African host country is not an option due to the barriers described above, communities may seek remedy in the home country of multinational corporations, banks, and/or investors that caused the harm. The home countries of investors and operators with the largest direct investment flows into African countries, as discussed in Section III above, are the United States, France, United Kingdom, China, South Africa, United Arab Emirates, Germany, Switzerland, India, and Spain.

Litigation in these countries regarding harm from their corporate investments in African communities presents yet additional barriers, including the language of a local community versus the language of the foreign court system, the cost and risk associated with foreign litigation due to the large number of procedural and legal hurdles in these complex cases,<sup>90</sup> the gaps in home country laws covering harm by corporations acting abroad,<sup>91</sup> immunity of public institutions financing abuses,<sup>92</sup> and the extraordinary length of time these cases take. In addition, there are very few lawyers who will take a case for an African community to a foreign court where the entity that caused the harm is located.<sup>93</sup> These cases often cost millions of dollars to bring and can take over a decade to litigate, often with uncertain results even where harm is clear, but evidence is hard to collect, preserve, and endure to a substantive case stage.

Cases from Royal Dutch Shell’s operations in Nigeria, a case regarding African Minerals’ conduct in Sierra Leone, and a case from Vedanta’s conduct in Zambia, provide examples of the challenges of foreign litigation for African communities. These cases include examples of losses, settlements, and partial wins:

**Where domestic litigation in an African host country is not an option due to the barriers described above, communities may seek remedy in the home country of multinational corporations, banks, and/or investors that caused the harm.**

- In the case stemming from Royal Dutch Petroleum's complicity in the murder of Ogoni rights defenders in Nigeria, the widow of one of the victims, Esther Kiobel, litigated the case in U.S. for eleven years before her case was dismissed by the United States Supreme Court in 2013. She then brought her case in the Netherlands in 2017, and the court issued an interim ruling in 2019 that it had jurisdiction to hear the case. She is still awaiting a decision.<sup>94</sup> Another one of the Ogoni victims' cases, *Wiwa v. Royal Dutch Petroleum*, settled on the eve of trial in 2009 (also after a decade of litigation) in a rare result leading to compensation for an African litigant in a foreign human rights case.<sup>95</sup>
- In 2012, 15,000 Bodo villagers in the Niger Delta sued Shell in the United Kingdom over devastating impacts of two oil spills. Three years later, Shell accepted responsibility in an out-of-court settlement, agreeing to pay £55 million to clean up the spills. However, these communities are having to argue for the court's continuing jurisdiction to oversee Shell's cleanup.<sup>96</sup> Nonetheless, this case represents a victory in that Shell was found liable through a judicial proceeding and that the cleanup had begun at all.
- In 2015, law firm Leigh Day filed suit in the United Kingdom High Court on behalf of 142 villagers in Sierra Leone who were attacked while protesting conditions at a mine run by Tonkolili Iron Ore Ltd, whose parent company was United Kingdom-based African Minerals. 101 of the cases were settled outside of court. The remaining 41 proceeded to court, and African Minerals was found not liable in December 2018.<sup>97</sup>
- In 2015, 1,826 Zambian villagers brought a negligence case in the United Kingdom against Konkola Copper Mines plc ("KCM") (a Zambian company) and Vedanta (its United Kingdom parent company) for harm including damage to property and loss of income and amenity as a result of environmental pollution from KCM's operations at its Zambian copper mine.<sup>98</sup> Both Vedanta and KCM challenged the jurisdiction of the English court and lost. Though it was not determinative of the issues, the court recognized that there were considerable barriers to accessing justice in Zambia, including the lack of resources to fund the community's litigation (e.g. by way of conditional fee arrangements which are prohibited in Zambia). On April 10, 2019, the Supreme Court ruled that the Zambian villagers' case can be heard in English courts.

In the context of these barriers and the small number of cases that reach an enforceable judgment that leads to remedy through judicial avenues in national courts, non-judicial accountability mechanisms are a critical and complementary tool.



Community members in Lamu work to identify the actors involved in the nearby LAPSET project as part of their complaint strategy

PHOTO: DESIREE KOPPE

# REGIONAL COMMISSIONS, TRIBUNALS, AND COURTS IN AFRICA

For the past three decades, communities and their advocates have relied on the African human rights system to seek redress for violations of civil and political; economic, social and cultural; and peoples' or group rights, which are safeguarded in the African Charter on Human and Peoples' Rights ("African Charter" or "Banjul Protocol").<sup>99</sup> Two complementary bodies are available to access justice for violations of these rights:

- The **African Commission on Human and Peoples' Rights ("ACHPR" or "the African Commission")**<sup>100</sup>: a quasi-judicial body inaugurated in 1987 that serves as a complaints and reporting mechanism for alleging violations of the African Charter; and
- The **African Court on Human and Peoples' Rights ("AfCHPR" or "the African Court")**<sup>101</sup>: a judicial body established in 2004 that delivers binding judgments on member states' compliance with the African Charter.<sup>102</sup>

There are a few notable distinctions between these two bodies. First, who can bring a complaint; individuals, NGOs, and states may file a communication to the African Commission, whereas applications to the African Court must be brought by African intergovernmental organizations—including referrals from the African Commission—or by states, with a few exceptions.<sup>103</sup> Second, the nature of potential remediation; recommendations<sup>104</sup> from the African Commission are not legally binding, in contrast to the judgments made by the African Court. However, as discussed below, enforcement of these binding judgments remains a challenge.

While both the African Commission and African Court can be influential in setting precedent, establishing norms, and raising awareness of human rights issues, redress itself has remained elusive for many communities that are unable to access these mechanisms due to lack of knowledge that they exist, as well as financial, linguistic, geographic, and time constraints. Additionally, and possibly also due to lack of enforcement power, it is difficult to find examples from the African Commission<sup>105</sup> or Court that have resulted in redress, as evidenced by the case of the Ogiek, an Indigenous, forest-dwelling community in Kenya. In 2009, the African Commission received a communication filed on behalf of the Ogiek alleging that the government of Kenya violated the Ogiek peoples' rights. After considering the complaint, the African Commission referred the Ogiek's case to the African Court in 2012, making it one of the Court's first ever cases. In 2017, the African Court reached a landmark decision vindicating the Ogiek peoples' rights, finding that the Kenyan Government violated seven articles of the African Charter.<sup>106</sup> However, as of two years after the decision was reached, the government of Kenya has made little progress in implementing the Court's judgment and the Ogiek have yet to receive the redress they are owed.<sup>107</sup> It will be important to continue tracking implementation of judgments as the African Court's caseload grows to more fully understand its potential to result in meaningful remediation.

Political pressures also threaten the independence and legitimacy of the African Court. Judges are nominated by member states—the very parties that are the subject of complaints.<sup>108</sup> Additionally, three states have backtracked on their commitment to allow individuals and NGOs to raise complaints to the African Court, undermining the credibility of the institution and marking a setback for the African human rights system as a whole.<sup>109</sup>

In addition to the continental African human rights system, there are a number of regional courts tied to economic integration agreements that may provide potential avenues to access justice, including the Economic Community of West African States ("ECOWAS") Court of Justice, Southern African

**Political pressures also threaten the independence and legitimacy of the African Court. Judges are nominated by member states—the very parties that are the subject of complaints.**

Development Community (“SADC”) Tribunal, East African Court of Justice (“EACJ”), and Common Market for Eastern and Southern Africa (“COMESA”) Court of Justice.<sup>110</sup> Of these, only the ECOWAS Court of Justice currently has jurisdiction over individual cases alleging human rights violations, although the Court’s 2016 ruling in *Molmou v. Guinea* in favor of the state and its corporate co-defendant, the palm oil company Société Guinéenne de Palmier Huile et d’Hévéas (SOGUIPAH), marks a worrying backtracking from this role.<sup>111</sup> Previously, the SADC Tribunal also had human rights jurisdiction, but political pressures against this competence ultimately resulted in the Tribunal’s disbandment. The Tribunal’s strong decision in the *Mike Campbell v. Zimbabwe* case challenging land grabs was seen as an overreach in Zimbabwe, leading to the Tribunal’s suspension in 2011.<sup>112</sup> The lack of the Tribunal’s independence exposed through this case exemplifies the barriers to accessing justice through regional courts.

## NON-JUDICIAL ACCOUNTABILITY OFFICES

**C**ommunities in Africa seeking to prevent harm or obtain remedy may have access to non-judicial accountability offices in certain circumstances. We cover accountability offices tied to (1) IFIs; (2) OECD states; (3) projects; and (4) other voluntary initiatives and codes of conduct. Each of these opportunities for redress, and their limitations, are discussed below.<sup>113</sup> This report explicitly recognizes, but is not attempting to cover, the wide variety of non-judicial, often local and traditional dispute resolution and peacebuilding mechanisms in use throughout Africa.<sup>114</sup>

These accountability offices have in common relatively low barriers to entry (lawyers are not required and they are typically low cost) and the ability of communities themselves to drive strategy and remedy sought in creative and responsive ways. By virtue of being “non-judicial,” outcomes from these offices are not backed by the enforcement power of a judiciary. Instead, remediation achieved through non-judicial accountability offices is typically the outcome of voluntary actions taken as a result of good faith, negotiated agreements that the parties find incentive to implement, or voluntary responses to fact-finding and compliance investigations, often taken because of political and/or reputational pressure. Nonetheless, accountability offices can be powerful, and relatively quick and inexpensive tools for communities if they are supported to use them as part of larger strategies that put pressure on the stakeholders to use the process to remedy harm.

A group of businessmen, fishermen, and farmers in Lamu's old town.  
The accounts they shared with community organizers helped shape a complaint strategy.



### 3. INDEPENDENT ACCOUNTABILITY MECHANISMS OF IFIS

Many multilateral development banks and bilateral agencies have their own systems of accountability tied to the internal social and environmental standards that govern their investments. As described in Section II, these are called Independent Accountability Mechanisms (“IAMs”). IAMs are a forum through which individuals, communities, or other stakeholders can raise concerns when they face actual or potential harm from projects supported by financial institutions that have IAMs. These mechanisms are not truly “independent,” but are more aptly described as quasi-independent: they are independent of an institution’s staff, but report to the institution’s leadership<sup>115</sup> and rely on the institution for funding.

IAMs are relatively new tools for communities—the first IAM, the World Bank Inspection Panel, was established in 1993, and new IAMs are being established on an ongoing basis. Around the world, more than 20 IFIs now have IAMs available to receive and address community complaints.<sup>116</sup> IAMs across institutions have the authority to review complaints for initial eligibility, and then address eligible complaints through two primary functions: dispute resolution and/or compliance review. These features are described below in greater detail.

Communities and their advocates seeking to prevent or remedy harm from international investment often find IAMs an effective and strategic option. But to date, IAMs have only been effective in achieving a desired result for communities in a small number of cases.<sup>117</sup> There are a number of factors that hinder a meaningful outcome for communities, from those that are specific to each case to broader flaws in the complaint process. One factor is lack of support from civil society organizations (“CSOs”) to communities raising a complaint. Accountability Counsel’s data show that complaints in Africa supported by CSOs reached an outcome three times as often as those filed without any CSO involvement.<sup>118</sup> There is a dire need to grow the capacity, resources, and advocacy support for African communities to bridge this gap and ensure that more communities are able to reach an outcome through an IAM. The next subsections include examples of communities who successfully used IAM complaints, with support from CSOs, to address harm from internationally financed projects.

**Communities and their advocates seeking to prevent or remedy harm from international investment often find IAMs an effective and strategic option.**

---

#### DISPUTE RESOLUTION

Dispute resolution is a voluntary process designed to address community concerns about a project that was the subject of a complaint. Dispute resolution brings together affected people and the company or government in charge of the project, and may also involve other local stakeholders and/or the IFIs that supported the project. The parties work together to try to reach a solution to the issues raised in the complaint. Typically, after finding a complaint eligible, an IAM will hire a neutral mediator or facilitator to work at the local level to assist the parties to voluntarily reach agreements. Dispute resolution frequently involves information sharing, engagement of independent experts to conduct studies to help the parties understand the harm and possible solutions, and negotiation between the parties. The process may take months or even several years. If agreements are reached through dispute resolution, the IAM typically monitors the implementation of agreement commitments and reports on progress.

A hallmark of dispute resolution in the IAM context is the challenging imbalance of resources between the community and the company or government operating the project at issue.<sup>119</sup> Communities often need effective advocates to support their ability to successfully engage in dispute resolution, with the IAM and its mediator or facilitator frequently also playing a key role. However, even with advo-

**Accountability  
Counsel's data  
show that  
complaints in Africa  
supported by CSOs  
reached an outcome  
three times as  
often as those filed  
without any CSO  
involvement.**

cacy support, dispute resolution often involves compromise and power imbalances that may disadvantage communities. As a result, outcomes reached through dispute resolution often fall far short of fully remediating harm, or providing “effective remedy” as the UN Guiding Principles on Business and Human Rights require. With any dispute resolution process that results in an agreement between parties, strong advocacy continues to be important during the implementation phase of agreements.

The potential of dispute resolution to address seemingly intractable disputes, albeit in a way that fails to provide effective remedy for the extent of the abuses suffered, is seen in the cases of communities in the Mubende<sup>120</sup> and Kiboga<sup>121</sup> districts of central Uganda, where thousands of people were forcibly displaced for a commercial forestry project. The company's abuses are alleged to include burning of villages, which led to the death of an 8-year-old child when security officers set his home on fire.<sup>122</sup> Because the International Finance Corporation (“IFC”) was invested in the project through a financial intermediary—an agribusiness-focused private equity fund—the communities were able to raise their grievances to the IFC's IAM, called the Compliance Advisor Ombudsman (“CAO”). These complaints to the CAO initiated dialogue processes between the IFC, the forestry company, and communities in each district, who were supported by the Uganda Land Alliance and Oxfam. Through these processes, the parties reached agreements to achieve some partial remedy for economic harm experienced by communities in each district. The agreements provided for replacement land, financial support to address specific needs of the communities, and committed the parties to work together on joint projects aimed at longer-term sustainable development. In 2018, the CAO closed both cases, stating that all aspects of the agreements were implemented, although that claim is not verified by the affected communities.<sup>123</sup> Though the communities had requested both mediation and investigation in their original complaint, the complaint never went through an audit, so the responsibility of the IFC for the harm that communities suffered was never explored.

---

## COMPLIANCE REVIEW

Compliance review (also called compliance investigation) is the process of an IAM reviewing whether or not the project that is the subject of a complaint violates the financial institution's own social or environmental policies or procedures. Compliance review focuses on the compliance of the institution itself, rather than the actions of the company or government that received its funds or assistance. Typically, after finding a complaint eligible, an investigation team conducts a review of all project-related documents, interviews all of the relevant players at the institution, and travels to the project site and/or the site of the harm raised in the complaint (i.e. the village where farmers lost their land or where water was contaminated). There, they inspect the site, interview the community members that submitted the complaint and other stakeholders, and learn about the local context.

At the end of the investigation, the investigation team produces a draft compliance review report, which is typically shared with the institution's staff and the community members that filed the complaint for feedback on the report's accuracy. The institution's staff often also prepares a formal response or action plan to address any findings of non-compliance. The final compliance report is sent to the institution's leadership and made public, often with recommendations. The institution's leadership then determines next steps, including any remedial measures.<sup>124</sup> Compliance reports do not automatically result in an institution remediating or preventing harm, even if the compliance report finds non-compliance. Institutions can cancel a project, work to change it, order remedy, or opt to do nothing. Some institutions may direct their IAMs to monitor implementation of recommendations, action plans, or remedial measures. For example, the CAO has the power to monitor implementation of remedial measures required to address non-compliance until its compliance team



Community members gather in Didewaride, a small village impacted by the port construction in Kenya.

PHOTO: DESIREE KOPPE

determines compliance with the bank's policies has been achieved. Because of this wide discretion, communities seeking remedy or changes to a project after a report finding non-compliance must often use those findings as a platform for further advocacy with the institution or other actors.

The case of the Bigodi community in Western Uganda, which was affected by the World Bank-financed Uganda Transport Sector Development Project, provides an example of the outcomes possible through an IAM compliance review. The influx of workers in the small Bigodi community due to this project led to sexual exploitation of teenage girls, resulting in significantly increased rates of HIV/AIDS, teenage pregnancy, and girls dropping out of school.<sup>125</sup> The community and their advocates, including local organization Joy for Children, Uganda and international civil society organization Bank Information Center, launched a major campaign to seek redress for harm.<sup>126</sup> After their concerns were initially dismissed by Ugandan government and World Bank officials, communities filed a complaint with the World Bank's IAM, the Inspection Panel (Panel), in 2015 and requested a compliance review. In response to the formal complaint—and in contrast to their initial dismissal of community concerns—the World Bank took the unusual step of acting to address harm before the investigation was complete. A few months after the complaint was filed, the Bank made the rare decision to cancel the project and began providing emergency support to affected children and young women.<sup>127</sup> After the Panel's investigation was complete, the Bank took action to provide remedy to the affected community. Additionally, this case led to the creation of a Bank-wide Global Gender-Based Violence Task Force intended to learn from the failures in this project and prevent future abuses.<sup>128</sup> The Bank has successfully implemented many of the recommendations of the task force.

While the remediation and institutional learning that resulted from the Bigodi community's complaint are emblematic of the outcomes that are possible through an IAM compliance review, the results in this case are not the norm. In particular, the Bank's action to address harm before the Panel's investigation was complete is rare. A number of factors influenced the Bank's response in addition to the Panel's strong compliance report, including a sustained community campaign supported by a coalition of advocates, high-profile media coverage, pressure on Bank management from the Board of Directors as a result of Board and government advocacy, and commitment from

high-level officials in the Bank for an institutional response.<sup>129</sup> This type of multifaceted campaign strategy is often needed for an IAM process, and particularly a compliance review, to result in meaningful change for affected communities.

## 4. OECD NATIONAL CONTACT POINTS

Many countries provide avenues for non-judicial accountability for corporate abuse through a state-based system tied to the Organization for Economic Co-operation Development (“OECD”). The OECD is an intergovernmental organization of countries that commit to abide by a wide range of agreements related to good governance and investment. With a few exceptions (notably China, India, and Russia), OECD members and partners represent the world’s wealthiest nations measured by gross domestic product and represent about 80% of world trade and investment.<sup>130</sup>

Part of a country’s commitment when they adhere to the OECD is agreement to the OECD Guidelines for Multinational Enterprises (“Guidelines”). The Guidelines provide non-binding recommendations for the “responsible business conduct” of multinational corporations operating in or from adhering countries. They cover a wide variety of issues, including corporate conduct relating to human rights, the environment, consumer protection, taxation and bribery.<sup>131</sup> Companies’ implementation of the Guidelines is promoted through a system of state-based offices known as National Contact Points (“NCPs”). In 2000, these offices were given the power to accept complaints from people harmed by companies’ noncompliance with the Guidelines. There are now 49 NCPs, and they are mandated to be available in each OECD adhering country.<sup>132</sup>

**The Guidelines provide non-binding recommendations for the “responsible business conduct” of multinational corporations operating in or from adhering countries.**

Ideally, African communities harmed by international investment can use NCPs to get free, neutral mediation services to come to voluntary agreements with a multinational corporation to resolve issues pertaining to the Guidelines. If, for example, a French company invests in a palm oil plantation in Cameroon that violates the human rights of local people as covered in the Guidelines, the Cameroonian community may file a complaint with the grievance system tied to the OECD Guidelines in France. The mandate of NCPs is to help resolve issues relating to implementation of the Guidelines in “specific instances” of corporate misconduct.<sup>133</sup> NCPs offer their “good offices,” or help, to bring parties together to resolve a dispute through a range of options, including conciliation or mediation, facilitated dialogue, joint fact finding, or other methods. Where a multinational enterprise refuses to enter a mediation or similar process in good faith, NCPs may choose to investigate the corporation’s adherence to the Guidelines and issue findings.

However, despite the promise of NCPs as tools for communities in Africa to raise grievances and receive remedy regarding corporate abuse, NCPs have a number of limitations and produce very few victories for communities.<sup>134</sup> NCPs vary widely in their rules, practices, and effectiveness. A study of the first 15 years of NCP cases worldwide, called *Remedy Remains Rare*, found that only 14 percent of cases led to “beneficial results that may have provided some measure of remedy,” and only one percent led to remedy that directly improved conditions for communities.<sup>135</sup> Common critiques of the NCP system are lack of independence from corporate promotion agencies within national governments, draconian confidentiality rules (the U.S. National Contact Point prohibits community complainants from publishing their complaints or discussing complaints in the media once filed), the low number of NCPs willing to investigate and issue findings, and other procedural problems.<sup>136</sup>

The example above from Cameroon is real and is illustrative of the limitations of NCPs. In 2010, four civil society organizations filed a complaint with the French NCP about Société Camerounaise de Palmeraie (“SOCAPALM”), a Cameroonian producer of palm oil linked to French conglomerate

Bolloré Group. The complaint alleged that SOCAPALM harmed traditional livelihoods of local communities, contributed to human rights abuses, and participated in labor violations against plantation workers.<sup>137</sup> In 2013, the French NCP issued a final statement finding that SOCAPALM violated the Guidelines and invited the parties to develop an action plan to address the violations of the Guidelines.<sup>138</sup> After a several-month mediation process, the parties agreed to an action plan that would improve conditions. The French NCP stayed involved to monitor the action plan.<sup>139</sup>

From a process perspective, a complaint leading to an official validation of the community's grievances and an agreed action plan represents a critical victory. However, such achievements on paper require implementation to translate to meaningful remediation. In this case, that change has yet to be realized; the company has not fully implemented the agreed upon action plan, despite additional efforts through the Belgian NCP.<sup>140</sup> After both the French and Belgian NCPs' efforts failed to result in remedy, Sherpa and several other organizations sued Bolloré Group in a French court in May 2019.<sup>141</sup> Sherpa summed up the weakness of the OECD NCP process, noting that "[t]he French and Belgian NCPs have asked the companies to respect their commitments, without success. These non-binding OECD mechanisms have therefore reached the limits of their power in this case."<sup>142</sup>

In this complex case, the communities in Cameroon and their advocates have experienced many of the challenges so commonly reported in *Remedy Remains Rare*, where even with procedural victories and intensive investment in sophisticated organizing and advocacy, there are few results on the ground.

## 5. PROJECT-LEVEL GRIEVANCE MECHANISMS

Many international standards meant to protect communities and the environment from harm require companies and financial institutions to create project-level grievance mechanisms at project sites.<sup>143</sup> As the name implies, project-level mechanisms address grievances at the level of the company's engagement in a community or at the project site.<sup>144</sup> Such mechanisms should typically be established at the outset of a project, and as the United Nations Guiding Principles on Business and Human Rights reflect, they should be created in consultation with stakeholders.<sup>145</sup> Because companies are in control of project-level grievance mechanisms, there may be problems of perceived or actual conflicts of interest and lack of fairness, independence, and transparency. Project-level grievance mechanisms vary greatly from one project to another. In Accountability Counsel's experience, many of the cases that escalate to independent accountability mechanisms do so because of failure of a project operator to offer a legitimate project-level grievance mechanism. The following example from Siguiri, Guinea about AngloGold Ashanti—a South African-based gold mining company operating in South Africa, Congo, Mali, Guinea, and Ghana—highlights a number of deficiencies in such mechanisms.

In 2015 and 2016, approximately 380 households in Kintinian commune were forcibly evicted with paltry compensation to make way for a gold mine operated by the Guinean branch of AngloGold, Société AngloGold Ashanti de Guinée ("SAG").<sup>146</sup> In line with the Guiding Principles, AngloGold requires that "each site implements a locally and culturally appropriate grievance mechanism, which supports AngloGold Ashanti's values to 'uphold and promote fundamental human rights where we do business.'"<sup>147</sup> SAG claimed to have such an operational level grievance mechanism in place at the Siguiri mine in 2016 available to address grievances about resettlement.<sup>148</sup> However, a fact-finding mission by two Guinean NGOs found that "[n]early 76% of interviewees stated that they did not know that SAG had a complaint mechanism and only four answered that they had already filed complaints with SAG."<sup>149</sup> The deficiency of SAG's mechanism posed a particular barrier to accessing remedy because the resettlement agreements required the use of that very mechanism to resolve

disputes. According to the fact-finding report, “SAG therefore failed to put in place a grievance mechanism that would meet the international standard or its own internal human rights policy.”<sup>150</sup>

Without a functional project-level venue to seek remedy, in 2017, communities filed a complaint to the IFC’s accountability office, the CAO, that is now in mediation.<sup>151</sup> The Guinean NGOs that led the fact-finding mission described above, Centre de Commerce International pour le Développement (“CECIDE”) and Les Mêmes Droits Pour Tous (“MDT”), and international CSO Inclusive Development International (“IDI”) are supporting the complaint.

While, in theory, project-level grievance mechanisms should provide the fewest barriers to access, in reality, corporate incentive structures may not set up mandates for such mechanisms to work in practice.

## 6. OTHER VOLUNTARY INITIATIVES AND CODES OF CONDUCT

Finally, when the above avenues are inaccessible, communities in Africa seeking remedy may benefit from exploring other options, including multi-stakeholder or company initiatives. These initiatives may help inform engagement with corporations and provide complaint mechanisms for communities to pursue remedy, although, due to their voluntary nature, they are typically much less effective in producing results than the avenues described above.

Multi-stakeholder initiatives (“MSIs”) bring together corporations, civil society, and other stakeholders in order to set voluntary corporate or government codes of conduct and facilitate dialogue and collaboration between stakeholders. There are 40 recognized MSIs that set global standards of conduct in sectors ranging from agriculture, forestry, fishing, mining and energy, industrials, and consumer goods.<sup>152</sup> Examples of MSIs active in Africa include the Alliance for Responsible Mining, the Ethical Trading Initiative, the Extractive Industries Transparency Initiative, the Forest Stewardship Council, the Roundtable on Sustainable Palm Oil, and the Voluntary Principles on Security and Human Rights.

The legitimacy and effectiveness of MSI standards vary greatly, and analysis of the MSI field has found that, collectively, they fail to provide meaningful remedy to communities who are harmed by MSI members. Only about one third of MSIs have grievance mechanisms available for people to raise concerns about harm caused by their members’ activities and access remedy. For MSIs that do have grievance mechanisms, their policies and procedures often fall short of the international standard for effective access to remedy.<sup>153</sup> For example, the Roundtable on Sustainable Palm Oil (“RSPO”) has a grievance mechanism, the Complaint Panel, with the power to provide remedy and sanction members. However, the Complaint Panel has been criticized by both civil society and investors for its lack of transparency, responsiveness, credibility, and effectiveness.<sup>154</sup>

Despite the serious limitations of the RSPO Complaint Panel, Liberian communities have used it effectively in their fight to protect their forests and human rights from two massive palm oil operations: Sime Darby’s 543,600 acre plantation in Western Liberia, and Golden Veroleum Liberia’s (“GVL”) 543,600 acre plantation in Southeastern Liberia. In 2011, Liberian CSO Green Advocates filed a complaint to the RSPO Complaint Panel about violations at Sime Darby’s plantation. In response, the RSPO initiated an independent investigation, found that the complaint had merit, and issued a stop order requiring the company to cease operations until it obtained consent from local communities to operate on their land.<sup>155</sup> In negotiations with the communities, it became clear that operating on the land the company wanted to use was untenable. As of May 2019, Sime Darby has cleared only 25,946 acres of its concession,<sup>156</sup> and the company sold the concession to a Liberian manufacturer in December 2019.<sup>157</sup>

**Multi-stakeholder initiatives (“MSIs”) bring together corporations, civil society, and other stakeholders in order to set voluntary corporate or government codes of conduct and facilitate dialogue and collaboration between stakeholders.**



Workers in Liberia attend a meeting of community advocates to discuss the harmful impacts of the Buchanan Renewables biomass project.

In 2012, communities affected by GVL's operations adopted a similar strategy and filed a complaint against GVL to the RSPO Complaint Panel, with support from Green Advocates. In response, according to Green Advocates Founder Alfred Brownell, "the first mission from the RSPO tried to greenwash what was happening. We challenged them. We built partnerships with international NGOs, we encouraged media to come. The RSPO was then forced to hire an independent firm for a second verification mission."<sup>158</sup> After six years of investigation, during which five other NGOs filed complaints against GVL,<sup>159</sup> the RSPO found that GVL had violated the RSPO Principles and Criteria and called for GVL to obtain the free, prior, and informed consent of affected communities.<sup>160</sup> Throughout the complaint process leading to this result, local communities and Green Advocates staff faced retaliation for speaking out, including criminalization, police brutality, and assassination attempts. In reaction to the RSPO's stop order, GVL suspended its membership in the RSPO in 2018.<sup>161</sup> GVL continues to operate in the country and has cleared 123,552 acres of its concession as of May 2019.<sup>162</sup>

GVL's response of suspending its membership in the RSPO in reaction to the Complaint Panel's findings illustrates the primary weakness of voluntary initiatives, including those with complaint mechanisms—companies may go back on their human rights and environmental pledges at any moment, without consequence. However, despite this limitation, communities' use of the RSPO complaint process has protected hundreds of thousands of acres of forest in Liberia. A key factor in these achievements was that the RSPO complaints were part of a broader strategy that included raising awareness of abuses through the media and building a strong coalition of advocates working at the local, national, and international levels who had the technical expertise and capacity to support affected communities through multi-year campaigns.

Often, this type of multi-pronged, coordinated approach is the most effective way for communities to have their voices heard and seek remedy, regardless of the avenue used, due to the many barriers to accessing justice. Complementary strategies that put pressure on stakeholders to remedy harm through any of these forums include media, shareholder activism, political advocacy, and civil disobedience. In addition to the limitations of each individual venue discussed here, there are significant barriers that impede virtually all efforts to access remedy, and that often require substantial outside pressure to overcome. These barriers, and some strategies that communities and their advocates are using to overcome them, are discussed in the next section. ●

---

## ENDNOTES

- <sup>71</sup> See U.N. Human Rights Office of the High Commissioner, *supra* note 2.
- <sup>72</sup> See Jennifer Zerk, *Corporate liability for gross human rights abuses: A Report prepared for the Office of the UN High Commissioner for Human Rights*, at 61 (2013), <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.
- <sup>73</sup> Read about remedies negotiated with these elements in Accountability Counsel's cases in Haiti and Mongolia. See *Community Cases*, Accountability Counsel, <https://www.accountabilitycounsel.org/community-cases/> (last visited July 22, 2020).
- <sup>74</sup> See U.N. Human Rights Office of the High Commissioner, *supra* note 2, at 27, Principle 25 ("As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.").
- <sup>75</sup> See General Assembly Resolution 60/147 on Dec. 16, 2005, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147 (Mar. 21, 2006), at arts. I.2(b) & VII, <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx>.
- <sup>76</sup> See Socio-Economic Rights Institute of South Africa, *Public Interest Legal Services in South Africa: Project Report*, at 25-26 (July 2015), [http://www.seri-sa.org/images/Seri\\_Pils\\_report\\_Final.pdf](http://www.seri-sa.org/images/Seri_Pils_report_Final.pdf) (discussing costs and corruption as barriers to public interest litigation in South Africa).
- <sup>77</sup> *Why justice in Africa is slow and unfair*, The Economist (July 1, 2017), <https://www.economist.com/middle-east-and-africa/2017/07/01/why-justice-in-africa-is-slow-and-unfair> ("across much of Africa you find courtrooms that are dilapidated and judges who take an age to resolve disputes or sort the innocent from the guilty").
- <sup>78</sup> Kamil Omoteso & Hakeem Ishola Mobolaji, *Corruption, Governance and Economic Growth in sub-Saharan Africa: a Need for the Prioritisation of Reform Policies*, 10 Social Responsibility Journal (2014).
- <sup>79</sup> See Zerk, *supra* note 72, at 7.
- <sup>80</sup> For example, the people of Saoro in Guinea determined that Guinean courts were not an option given the government's role in expropriating community land and transferring it to a palm oil company, SOGU-IPAH. See Frédéric Foromo Loua & Jonathan Kaufman, *Molmou v. Guinea: The ECOWAS Court of Justice at the Service of Its Member States*, 2 Business and Human Rights Journal (2017).
- <sup>81</sup> An example is the corporate-state agreement to use binding arbitration to address disputes in Paragraph 18.1c of Newmont Mining Corporation's December 2003 Investment Agreement with the Government of Ghana.
- <sup>82</sup> *Court Orders Oil Palm Company to Return Land and Pay Arrears of Rent to Landowners in Sierra Leone*, Namati (Nov. 6, 2018), <https://namati.org/news/court-orders-oil-palm-company-to-return-land-pay-arrears-sierra-leone/>.
- <sup>83</sup> Interview by Accountability Counsel with Eleanor Thompson and Daniel Sesay, Namati Sierra Leone (Feb. 12, 2019). A number of the environmental and social issues (including plants brought in as weed killers by the company that took over neighboring farms) were not addressed in the court case pertaining to rent and possession of land. The Namati lawyers had not considered use of a non-judicial accountability office to address these issues.
- <sup>84</sup> Jonathan Watts, *South African community wins court battle over mining rights*, The Guardian (Nov. 22, 2018), <https://www.theguardian.com/environment/2018/nov/22/south-african-community-wins-court-battle-over-mining-rights>.
- <sup>85</sup> Shenilla Mohamed, *Mantashe Appeal: We'll fight you all the way, vows Xolobeni community*, Daily Maverick (Dec. 14, 2018), <https://www.dailymaverick.co.za/article/2018-12-14-mantashe-appeal-well-fight-you-all-the-way-vows-xolobeni-community/>.

- 
- <sup>86</sup> *Family of murdered Xolobeni activist appeal to NPA to “unblock” investigation*, Mail & Guardian (Mar. 28, 2018), <https://mg.co.za/article/2018-03-28-family-of-murdered-xolobeni-activist-appeal-to-npa-to-unblock-investigation>.
- <sup>87</sup> See Siphelele Dlodla, *More support for Xolobeni’s resistance to mining exploration*, IOL (Jan. 15, 2019), <https://www.iol.co.za/news/south-africa/eastern-cape/more-support-for-xolobenis-resistance-to-mining-exploration-18826404>.
- <sup>88</sup> Lucas Ledwaba, *‘We will not give up’: Tension rises as Xolobeni community vows to fight mining*, City Press (Apr. 9, 2019), <https://citypress.news24.com/News/we-will-not-give-up-tension-rises-as-xolobeni-community-vows-to-fight-mining-20190409>.
- <sup>89</sup> See *Our Cases*, EarthRights International, <https://earthrights.org/how-we-work/litigation-and-legal-advocacy/our-cases/> (last visited July 15, 2020).
- <sup>90</sup> See *Complete list of cases profiled*, Business & Human Rights Resource Centre, <https://www.business-humanrights.org/en/corporate-legal-accountability/case-profiles/complete-list-of-cases-profiled> (last visited July 15, 2020) (listing a number of cases where the ability to sue the corporation(s) has been at issue).
- <sup>91</sup> In the United States, for example, survivors of human rights abuses have used the Alien Tort Statute (ATS) to sue multinational corporations for violations of international human rights law in US courts since the 1990s. However, the US Supreme Court has limited corporate liability under the ATS in recent years in *Kiobel* (2013) and *Jesner* (2018). Corporate liability under the ATS is again under consideration in *Nestle/Cargill* (decision expected in 2021). See William Dodge, *Trump Administration Reverses Position on Corporate Liability Under Alien Tort Statute*, Just Security (June 1, 2020), <https://www.justsecurity.org/70512/trump-administration-reverses-position-on-corporate-liability-under-alien-tort-statute/>; see also *Kiobel v. Shell*, Center for Justice and Accountability, <https://cja.org/what-we-do/litigation/amicus-briefs/kiobel-v-shell/> (last visited July 6, 2020).
- <sup>92</sup> The absolute immunity of the World Bank Group in US courts was removed in the landmark US Supreme Court case *Jam v. IFC* in February 2019. However, the implications of this decision on whether judicial accountability will be feasible and accessible for communities harmed by international institutions remain to be seen. EarthRights International, the lawyers for the plaintiffs in *Jam v. IFC*, discusses some of these questions. See Marco Simons, *Jam v. IFC – some questions and answers after the Supreme Court’s ruling*, EarthRights International (Mar. 4, 2019), <https://earthrights.org/blog/which-international-organizations-will-be-affected-most-by-the-supreme-courts-ruling/>.
- <sup>93</sup> Some of the most prominent entities that take on such high-risk and challenging cases include Center for Justice and Accountability, EarthRights International, Schonbrun Seplow Harris Hoffman & Zeldes in the United States, Prakken d’Oliveira in the Netherlands, and Leigh Day in the United Kingdom. Often, major United States law firms work *pro bono* on such cases, but are not the initial points of contact given the amount of organizing and fact-gathering that is often required by a civil society organization or public interest firm before a case can be filed.
- <sup>94</sup> *Shell lawsuit (re Nigeria - Kiobel & Wiwa)*, Business & Human Rights Resource Centre, <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa> (last visited July 15, 2020); see also Rod Austin, *Ogoni widows testify at The Hague over Shell’s alleged complicity in killings*, The Guardian (Feb. 12, 2019), <https://www.theguardian.com/global-development/2019/feb/12/ogoni-widows-testify-the-hague-shell-alleged-complicity-killings>.
- <sup>95</sup> *Wiwa v. Royal Dutch Shell*, EarthRights International, <https://earthrights.org/case/wiwa-v-royal-dutch-shell/> (last visited July 15, 2020).
- <sup>96</sup> *Shell lawsuit (re oil spills & Bodo community in Nigeria)*, Business & Human Rights Resource Centre, <https://www.business-humanrights.org/en/shell-lawsuit-re-oil-spills-bodo-community-in-nigeria> (last visited July 15, 2020).

## ENDNOTES CONTINUED

- <sup>97</sup> *Tonkolili Iron Ore lawsuit (re complicity in violence against villagers in Sierra Leone)*, Business & Human Rights Resource Centre, <https://www.business-humanrights.org/en/tonkolili-iron-ore-lawsuit-re-complicity-in-violence-against-villagers-in-sierra-leone> (last visited July 15, 2020).
- <sup>98</sup> *Vedanta Resources lawsuit (re water contamination, Zambia)*, Business & Human Rights Resource Centre, <https://www.business-humanrights.org/en/vedanta-resources-lawsuit-re-water-contamination-zambia> (last visited July 15, 2020).
- <sup>99</sup> African Banjul Charter on Human and Peoples' Rights (adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986), <https://www.achpr.org/legalinstruments/detail?id=49>.
- <sup>100</sup> African Commission on Human and Peoples' Rights (ACHPR), <http://www.achpr.org/> (last visited July 16, 2020). Note that Commission opinions are not binding. *Impact of the African Charter on domestic human rights in Africa*, ACHPR, <https://www.achpr.org/iotacodhria> (last visited July 21, 2020). For a guide to filing a complaint to the African Commission, see *The African Commission on Human and Peoples' Rights*, SOMO & Natural Justice (July 2018), <https://www.somo.nl/wp-content/uploads/2018/07/ACHPR-brochure-final.pdf>.
- <sup>101</sup> See African Court on Human and Peoples' Rights, <https://www.achpr.org/afchpr/> (last visited July 15, 2020). For a guide to filing a complaint to the African Court, see International Federation for Human Rights, *Practical Guide: The African Court on Human and Peoples' Rights* (Apr. 2010), [https://www.fidh.org/IMG/pdf/african\\_court\\_guide.pdf](https://www.fidh.org/IMG/pdf/african_court_guide.pdf); see also International Justice Resource Center, *Advocacy before the African Human Rights System: A Manual for Attorneys and Advocates* (Nov. 2016), <https://ijrcenter.org/wp-content/uploads/2016/11/Advocacy-before-the-African-Human-Rights-System.pdf>.
- <sup>102</sup> Of the 55 member states of the African Union (AU), 30 have ratified the Protocol establishing the AfCHPR. For a list, see *African Court on Human and Peoples' Rights*, International Justice Resource Center (2017), <https://ijrcenter.org/wp-content/uploads/2017/11/4.-AfCHPR-one-pager.pdf>.
- <sup>103</sup> States may authorize the African Court to hear complaints presented by individuals and NGOs with observer status before the African Commission. As of 2020, only eight states currently authorize the Court to hear these complaints: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Tanzania, and Tunisia. *Id.*
- <sup>104</sup> The Commission has the power to make any recommendations it deems "useful" in a particular case. For more information on the wide-ranging recommendations, see Open Society Justice Initiative, *Fact Sheet: African Commission on Human and Peoples' Rights* (June 2013), <https://www.justiceinitiative.org/uploads/a6396ca7-b03f-40f7-8fe8-ed6e51ebd15/fact-sheet-african-commission-human-peoples-rights-20130627.pdf>.
- <sup>105</sup> See Rebecca Marlin, "*The Endorois decision*"—Four years on, the Endorois still await action by the Government of Kenya, Minority Rights Group International (Sept. 23, 2014), <https://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/> (describing the lack of resulting remedy from the *Endorois* case—one the Commission has highlighted as being particularly impactful).
- <sup>106</sup> *Kenya: Guaranteeing Ogiek rights*, Minority Rights Group International (Nov. 14, 2016), <https://minorityrights.org/law-and-legal-cases/the-ogiek-case/>.
- <sup>107</sup> *Two years on, Kenya has yet to implement judgment in Ogiek case – MRG Statement*, Minority Rights Group International (June 5, 2019), <https://minorityrights.org/2019/06/05/two-years-on-kenya-has-yet-to-implement-judgment-in-ogiek-case-mrg-statement/>.
- <sup>108</sup> See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted June 9, 1998, entered into force Jan. 25, 2004), OAU/LEG/EXP/AFCHPR/PROT (III), at arts. 12, 13.
- <sup>109</sup> *Benin: Withdrawal of individuals right to refer cases to the African Court a dangerous setback in the protection of human rights*, Amnesty International (Apr. 24, 2020), <https://www.amnesty.org/en/latest/news/2020/04/benin-le-retrait-aux-individus-du-droit-de-saisir-la-cour-africaine-est-un-recul-dangereux/>.

- 
- <sup>110</sup> For more information, see International Justice Resource Center, *supra* note 101, at 30.
- <sup>111</sup> In its decision in the *Molmou* case, the ECOWAS Court rejected the applicability of international law to corporations, rejected national-law based claims, employed a restrictive definition of “people,” and failed to respect customary land rights. For more information on the case and its implications, see Loua & Kaufman, *supra* note 80.
- <sup>112</sup> Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 Human Rights Quarterly (2013), [https://www.researchgate.net/publication/265724911\\_The\\_Disbanding\\_of\\_the\\_SADC\\_Tribunal\\_A\\_Cautionary\\_Tale](https://www.researchgate.net/publication/265724911_The_Disbanding_of_the_SADC_Tribunal_A_Cautionary_Tale).
- <sup>113</sup> For a detailed Accountability Resource Guide covering how to file complaints at accountability offices, see Accountability Counsel, *Accountability Resource Guide* (Aug. 2015), <https://www.accountabilitycounsel.org/accountability-resources/guides/>.
- <sup>114</sup> See Dejo Olowu, *Indigenous Approaches to Conflict Resolution in Africa: A Study of the Barolong People of the North-West Province, South Africa*, 1 Journal of Law and Judicial System, at 10 (2018), <https://www.sryahwapublications.com/journal-of-law-and-judicial-system/pdf/v1-i1/3.pdf>.
- <sup>115</sup> The board of directors or president of the institution.
- <sup>116</sup> A majority of these institutions with IAMs finance and support projects in Africa. For a list of IAMs, see *Independent Accountability Mechanisms*, Accountability Console, <https://accountabilityconsole.com/iams/> (last visited July 22, 2020).
- <sup>117</sup> See Daniel et al, *supra* note 30.
- <sup>118</sup> Accountability Counsel, *Mapping Accountability: A Regional Look at Complaints in Development Finance*, at 21 (2017), [https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/MappingAccountability\\_HighRes-1.pdf](https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/MappingAccountability_HighRes-1.pdf).
- <sup>119</sup> Daniel et al, *supra* note 30.
- <sup>120</sup> See *Uganda / Agri-Vie Fund-02 / Mubende*, Compliance Advisor Ombudsman, [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=181](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=181) (last visited July 15, 2020).
- <sup>121</sup> See *Uganda / Agri-Vie Fund-01/Kiboga*, Compliance Advisor Ombudsman, [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=180](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=180) (last visited July 15, 2020).
- <sup>122</sup> Josh Kron, *In Scramble for Land, Group Says, Company Pushed Ugandans Out*, The New York Times (Sept. 21, 2011), <https://www.nytimes.com/2011/09/22/world/africa/in-scramble-for-land-oxfam-says-ugandans-were-pushed-out.html>.
- <sup>123</sup> Compliance Advisor Ombudsman, *Dispute Resolution Conclusion Report:Agri-Vie Fund-02 / Mubende, Uganda* (Feb. 2018), [http://www.cao-ombudsman.org/cases/document-links/documents/CAO.MubendeConclusionReport\\_February2018\\_English.pdf](http://www.cao-ombudsman.org/cases/document-links/documents/CAO.MubendeConclusionReport_February2018_English.pdf); Compliance Advisor Ombudsman, *Dispute Resolution Conclusion Report:Agri-Vie Fund-01/Kiboga, Uganda* (Oct. 2018), <http://www.cao-ombudsman.org/cases/document-links/documents/ConclusionReportAgriVie-Fund-01-Kiboga.pdf>.
- <sup>124</sup> *Accountability Office FAQs*, Accountability Counsel, <https://www.accountabilitycounsel.org/accountability-resources/accountability-office-faqs/> (last visited July 15, 2020).
- <sup>125</sup> Bank Information Center & Joy for Children, *Uganda, The Impact Of The World Bank Funded Kamwenge – Kabarole Road Construction Project On Children*, [https://prismic-io.s3.amazonaws.com/bankinformationcenter%2F32e83626-92a6-4a58-ae6f-f3dc644bc9cf\\_kamwenge-road-final.pdf](https://prismic-io.s3.amazonaws.com/bankinformationcenter%2F32e83626-92a6-4a58-ae6f-f3dc644bc9cf_kamwenge-road-final.pdf) (last visited July 22, 2020).
- <sup>126</sup> Berger, *supra* note 46, at 7.
- <sup>127</sup> *Id.* at 8.
- <sup>128</sup> *World Bank Board Approves Action Plan for Uganda Inspection Panel Case*, World Bank (Nov. 22, 2016), <http://www.worldbank.org/en/news/press-release/2016/11/22/world-bank-board-approves-action-plan-for-uganda-inspection-panel-case>.
- <sup>129</sup> Berger, *supra* note 46, at 5.

---

## ENDNOTES CONTINUED

- <sup>130</sup> A number of non-member countries have also agreed or “adhered” to the governing documents of the OECD. For a list of OECD members and adhering countries, see *Members and Partners*, OECD, <https://www.oecd.org/about/members-and-partners/> (last visited July 15, 2020).
- <sup>131</sup> OECD, *OECD Guidelines for Multinational Enterprises* (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.
- <sup>132</sup> See *National Contact Points*, OECD, <http://mneguidelines.oecd.org/ncps/> (last visited July 15, 2020).
- <sup>133</sup> *Id.*
- <sup>134</sup> See OECD Watch, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct* (June 2015), [https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/OECDWATCH\\_RRR\\_04-1.pdf](https://www.accountabilitycounsel.org/wp-content/uploads/2017/08/OECDWATCH_RRR_04-1.pdf).
- <sup>135</sup> *Id.* at 19.
- <sup>136</sup> *Id.* at 5.
- <sup>137</sup> The “Specific Instance” was filed with the French NCP by Association Sherpa (France), Centre pour l’Environnement et le Développement - CED (Cameroon), Fondation Camerounaise d’Actions Rationalisées et Formation sur l’Environnement - FOCARFE (Cameroon) and MISEREOR (Germany). See *Sherpa et al vs SOCAPALM/SOCFIN/SOCFINAF*, OECD Watch, [https://complaints.oecdwatch.org/cases/Case\\_202](https://complaints.oecdwatch.org/cases/Case_202) (last visited July 22, 2020).
- <sup>138</sup> OECD Watch, *supra* note 137, provides a download link to the French NCP’s final statement.
- <sup>139</sup> OECD Watch, *supra* note 137, provides a download link to the French NCP’s “statement announcing that an independent body to monitor the action plan has been selected by the parties.”
- <sup>140</sup> In 2014, “the Bollore group suddenly announced that it would not implement the action plan and offloaded its responsibilities on SOCFIN, another SOCAPALM shareholder.” *Palm oil in Cameroon: the Bollore group sued by NGOs in an unprecedented legal action*, Sherpa (May 27, 2019), <https://www.asso-sherpa.org/palm-oil-in-cameroon-the-bollore-group-sued-by-ngos-in-an-unprecedented-legal-action>. The French NCP then called on the Belgian and Luxembourg NCPs to take forward this case, and the Belgian NCP offered its good offices. In June 2017, “the Belgian NCP concluded the case and issued a Final Statement because SOCFIN was not willing to adhere to the NCP’s requests and will only partially implement the agreement that had been made in 2013.” OECD Watch, *supra* note 137.
- <sup>141</sup> Harriet Agnew, *Lawsuit filed against Bollore Group over Cameroon plantations*, Financial Times (May 27, 2019), <https://www.ft.com/content/f6364426-8061-11e9-9935-ad75bb96c849>.
- <sup>142</sup> Sherpa, *supra* note 140.
- <sup>143</sup> For example, financial institutions that have adopted the Equator Principles or follow the IFC Performance Standards (or similar corporate standards) require project-level grievance mechanisms at the operational point of their investment chains.
- <sup>144</sup> International Finance Corporation, *Addressing Grievances from Project-Affected Communities*, at 4 (2009), [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/publications\\_gpn\\_grievances](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_gpn_grievances).
- <sup>145</sup> This is set out in Principle 31(h). See U.N. Human Rights Office of the High Commissioner, *supra* note 2, at 34.
- <sup>146</sup> *Guinea: Anglogold Ashanti Gold Mine*, Inclusive Development International, <https://www.inclusivedevelopment.net/campaign/guinea-anglogold-ashanti-mine-forced-evictions/> (last visited June 2, 2020).
- <sup>147</sup> See AngloGold Ashanti, *DMA: Grievance mechanisms for impacts on society*, <http://www.aga-reports.com/14/download/dma-grievance-mechanisms-impacts-society.pdf> (last visited July 22, 2020).

- 
- <sup>148</sup> CECIDE & MDT, *Involuntary Resettlement for the Extension of a Gold Mine in Kintinian: Kintinian, Guinea – Fact-Finding Mission Report*, at 31 (Jan. 2017), <https://communitiesfirst.net/wp-content/uploads/2017/01/CECIDE-MDT-Report-%E2%80%93-Kintinian-Resettlement-AngloGold-Ashanti-Jan-2017.pdf>.
- <sup>149</sup> *Id.* at 30.
- <sup>150</sup> *Id.* at 7.
- <sup>151</sup> See *Guinea / Nedbank-01/Kintinian*, Compliance Advisor Ombudsman, [http://www.cao-ombudsman.org/cases/case\\_detail.aspx?id=1259](http://www.cao-ombudsman.org/cases/case_detail.aspx?id=1259) (last visited July 16, 2020). A criminal complaint is also pending in local courts. See *Criminal complaint lodged against Guinean security forces for crackdown on electricity protests against AngloGold Ashanti*, Inclusive Development International (Feb. 28, 2019), <https://www.inclusivedevelopment.net/criminal-complaint-lodged-against-guinean-security-forces-for-crackdown-on-electricity-protests-against-anglogold-ashanti/>.
- <sup>152</sup> *The Multi-Stakeholder Initiative Database*, MSI Integrity & The Duke Human Rights Center at the Kenyan Institute for Ethics (June 2017), <https://msi-database.org/database>.
- <sup>153</sup> MSI Integrity, *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance* (July 2020), <https://www.msi-integrity.org/not-fit-for-purpose/>.
- <sup>154</sup> See Letter from Adam Kanzer, Managing Director of Corporate Engagement, Domini Impact Investments LLC, and Leslie Samuelrich, President, Green Century Capital Management, to members of the RSPO Secretariat and the RSPO Complaints Panel, RSPO Secretariat Sdn Bhd (Mar. 12, 2018), [https://www.domini.com/sites/default/files/\\_files/RSPO\\_Investor\\_Letter\\_March\\_2018.pdf](https://www.domini.com/sites/default/files/_files/RSPO_Investor_Letter_March_2018.pdf); Gaurav Madan, *Certified weaknesses: The RSPO's Liberian fiasco (commentary)*, Mongabay (Apr. 13, 2018), <https://news.mongabay.com/2018/04/certified-weaknesses-the-rspos-liberian-fiasco-commentary/>.
- <sup>155</sup> Marlena Chertock, *Goldman Prize Winner Alfred Brownell Stopped Palm Oil Companies from Destroying Liberian Forests*, World Resources Institute (May 1, 2019), <https://www.wri.org/blog/2019/05/goldman-prize-winner-alfred-brownell-stopped-palm-oil-companies-destroying-liberian>.
- <sup>156</sup> *Id.*
- <sup>157</sup> Alphonso Toweh & Cooper Inveen, *Sime Darby to sell Liberia plantation to local manufacturer*, Reuters (Dec. 5, 2019), <https://www.reuters.com/article/us-sime-darby-liberia/sime-darby-to-sell-liberia-plantation-to-local-manufacturer-idUSKBN1YA00P>.
- <sup>158</sup> Jocelyn C. Zuckerman, *To Stop Destruction of Liberia's Rainforest, He Put His Life on the Line*, Yale Environment 360 (June 18, 2019), <https://e360.yale.edu/features/to-stop-destruction-of-liberias-rainforest-he-put-his-life-on-the-line-alfred-brownell>.
- <sup>159</sup> Letter from Ravin Krishnan, Complaints Coordinator, Complaints Panel of the Roundtable on Sustainable Palm Oil, to Green Advocates, Save My Future Foundation, Sustainable Development Institute, Forest Peoples Programme, Social Entrepreneurs for Sustainable Development, Kulu United Development Association, Complainants (Apr. 22, 2015), [https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PYOt/ryQo7PgaBCM\\_VMBEkaBK5zlwRwg.hFuWUxzqaRLV61w](https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PYOt/ryQo7PgaBCM_VMBEkaBK5zlwRwg.hFuWUxzqaRLV61w).
- <sup>160</sup> Letter from Dato' Henry Barlow, Chairperson, RSPO Complaints Panel, to Alwi Hafiz, Golden Veroleum (Liberia) Inc. (Feb. 13, 2018), <https://ap8.salesforce.com/sfc/p/#90000000YoJi/a/90000000PYNW/wejicg57MvyUJnh3.Ck3a6iBwZvBweRbWlrKflqf2LM>.
- <sup>161</sup> Tim Cocks, *Liberia's Biggest Palm Oil Project Quits Eco-Certification Scheme*, Reuters (July 21, 2018), <https://www.reuters.com/article/liberia-palmoil/liberias-biggest-palm-oil-project-quits-eco-certification-scheme-idUSL8N1UH09X>.
- <sup>162</sup> Marlena Chertock, *supra* note 155; *Alfred Brownell*, The Goldman Environmental Prize (2019), <https://www.goldmanprize.org/recipient/alfred-brownell/>.



When BR began chopping down rubber trees in 2007, vulnerable charcoalers who depended on those trees were left without livelihoods, and the process to access justice has not been easy. Today, hundreds of people remain worse off than they were prior to OPIC's investment in BR.

# BARRIERS TO ACCESS TO REMEDY IN AFRICA AND CIVIL SOCIETY RESPONSES

## 5 SECTION

**W**hile there are strategies that communities are effectively using to access remedy through a wide range of judicial and non-judicial venues, and that can be further developed, the reality shows a host of barriers that exist regardless of what venue is pursued. As a result of these barriers, the range of options for remedy is often woefully inadequate to address the scale and frequency of harm. This section discusses these barriers and examples of civil society groups in Africa working to address them. Some of these barriers are greater obstacles in judicial venues than they are in non-judicial venues, as discussed in the previous section.

## ATTACKS ON RIGHTS DEFENDERS AND RETALIATION

**F**or communities speaking up about human rights and environmental abuses from international investment in African communities, threats of retaliation and efforts to silence dissent are common. “Those who stand up and protect the rights of Indigenous people are facing the wrath of the clients of development finance institutions,” said Alfred Brownell, Founder and Lead Campaigner of Green Advocates International. “They are using the criminal justice system to suppress defenders and bring up frivolous charges. There are threats of intimidation and violence, but also murder...I myself am a victim, I was forced to flee the country [Liberia].”<sup>163</sup> This is a global crisis for affected communities and the civil society organizations supporting them. In 2018 alone, 321 defenders across the globe were murdered for protecting their human and environmental rights.<sup>164</sup> A full “77% of the total number of activists killed were defending land, environmental, or Indigenous Peoples’ rights, often in the context of extractive industries and state-aligned mega-projects.”<sup>165</sup>

**“Those who stand up and protect the rights of Indigenous people are facing the wrath of the clients of development finance institutions,”**

**—Alfred Brownel**

At the same time, there is a proliferation of legislation restricting civil society operations, the media, and freedom of assembly in many African countries, and around the world.<sup>166</sup> While these restrictions are neither new nor unique to Africa, there is an urgent need to reverse the trend of closing civic space as defenders are increasingly under threat. As an example of progress towards rebuilding space for human rights and environmental activists in the continent, recent legislation in Ethiopia has eliminated some of the most draconian restrictions on civil society in the country.<sup>167</sup> While an important step, much work remains to ensure that Ethiopian communities and their advocates can safely and effectively defend their rights.

Attacks on rights defenders are a barrier to access to remedy in all venues, from use of local courts to non-judicial accountability offices. More broadly, threats against local people can prevent even basic local communication, organizing, and sharing of local information—all precursors to steps to be heard anywhere.

Some of the civil society organizations working on this issue in Africa include AfricanDefenders (the Pan-African Human Rights Defenders Network), DefendDefenders (East and Horn of Africa Human Rights Defenders Project), Frontline Defenders, the West African Human Rights Defenders Network (WAHRDN), the Ivorian Coalition of Human Rights Defenders (CIDDH), the Coalition for Human Rights in Development, and Global Witness.

## **FORMAL LEGAL STRUCTURES THAT FAIL TO PROTECT COMMUNITY RIGHTS**

**F**ormal legal structures that facilitate investment but conflict with traditional practices and social and environmental protections can impede access to justice at every level, in both judicial and non-judicial settings.<sup>168</sup> This is a complex issue tied to many interrelated challenges, including the alarming rise of ‘corporate capture’ of state decision making<sup>169</sup> and weak rule of law that persists in many African countries.<sup>170</sup> Here, we focus on one particular legal structure that often benefits corporate and state interests over communities’ rights: land tenure.

In particular, the way in which land is held presents an array of obstacles for communities seeking access to remedy when land is taken or harmed as a result of international investment. The land regime in Africa is not uniform; it is diverse and varies widely from state to state. There are some traditions in which families acquire and retain inter-generational rights to community land by clearing and planting it. Under other African traditions, land is held in trust for future generations under a communal system, and land is not to be destroyed but only used by each generation.<sup>171</sup> In some areas of Kenya, for example, land is granted by a chief to an individual, and is understood by the local community to be for life or for a fixed period, or only while being used. This tradition presumes that the land will be respected and that access to resources, such as water, are not curtailed or limited. Notably, communities often have no formal legal title or documentation of their land claims in a setting of communal or traditional land use.<sup>172</sup>

At the same time, the majority of traditional and communally used and occupied land in African nations is formally owned by the state.<sup>173</sup> Corporate land use, granted by the state, stands in direct contrast to the understanding that traditional local communities have surrounding use of land and resources.<sup>174</sup> It also presents complex barriers for communities mounting legal challenges to land uses and ownership that the state has granted to corporations.<sup>175</sup>

Presenting a similar barrier, minerals, even if found on private property, are often state property.<sup>176</sup> Disagreements concerning surface versus subsoil ownership are especially prone to igniting conflict when different claims on valuable minerals or hydrocarbons are at stake. Indeed, land acquisition associated with extractive industry investments can further obscure land rights claims, particularly when they are insecure or contested,<sup>177</sup> and decisions by the state to allow extraction of these minerals can result in displacement of peoples through both legal (compulsory acquisition) and illegal (arbitrary evictions) means. A third common type of displacement occurs where a company may arrive with a mining permit, but not land title, because the state lacks the resources or fails to go through compulsory acquisition.<sup>178</sup> Seeking remedy under these circumstances may present a barrier, because securing land rights may be a precursor to steps to access remedy related to harm the locally affected communities experience.

Some of the civil society organizations working to support communities through these types of conflicts over land and resources include Rights and Resources Initiative,<sup>179</sup> with its affiliated partners, networks, and collaborators; Natural Justice, which has developed community protocols;<sup>180</sup> and Namati, which has a community land protection program.<sup>181</sup>



The Maasai community, who also calls itself the Suswa Kitet group, has lived in the Kedong Valley of Kenya for hundreds of years. The Maasai, a pastoralist community, faced appropriation of their lands and eviction by British settlers in the early 1900s (under the guise of contested “treaties” in 1904 and 1911), and later through government policies that led to massive subdivision and individualization of their land.<sup>182</sup> Despite the community’s continuous, ancestral ownership, the legal title to the 75,000 acres of land is owned by Kedong Ranch Ltd.<sup>183</sup>

For over a century, the Maasai community has had to continuously defend itself from land grabbing, and it has been fighting for its land rights in the court system for over 40 years.<sup>184</sup> Domestic courts in Kenya have failed in several instances to protect the community’s land rights.<sup>185</sup> Now, the Kenyan government’s construction of a dry port and Standard Gauge Railway line, involving the Kenya Railways Corporation and China Communications Construction Company, could potentially displace more than 30,000 members of the Maasai community without adequate compensation or consultation.<sup>186</sup> In October 2019, members of the community filed suit against Kedong Ranch Ltd, the Kenya Railways Corporation, the National Land Commission, and the Attorney-General to stop the evictions.<sup>187</sup>

## LACK OF ACCESS TO INFORMATION

**A**s described in Section II, while insufficient access to information is a type of harm in and of itself when communities lack culturally appropriate information about international investment causing abuses, it also presents a barrier to accessing remedy. It is a threshold issue; without information provided in a culturally appropriate manner about a project that is causing harm or potential harm—and who the involved corporate, government agency, or international financial players are—it can be impossible for communities to pursue access to justice in any venue.

Communities experiencing harm from international investment often receive no information about who has funded a project that is impacting them. While some level of transparency is mandated for many public sector investments, the links in investment chains—where that financing flows to private actors or where it originates from private actors—are often invisible at the point where they reach communities. This makes understanding the investment chain

exceedingly difficult for affected people, just as it makes it hard for investors to understand the harmful impacts they cause.

Even when project and investment details are publicly disclosed, communities still face steep barriers to accessing that information in a way that is accessible and actionable. Information may not be provided in local languages, illiteracy may limit people's ability to engage with information that is shared, and lack of connectivity may prevent access altogether. These barriers often particularly affect marginalized groups. For example, there is a gender gap in digital access, and internet penetration was 33 percent lower for African females than males in 2019.<sup>188</sup>

Efforts to provide information by groups like International Accountability Project ("IAP") with their Early Warning System<sup>189</sup> show that bridging these barriers requires proactive research, use of technology, and translation into local languages. Importantly, it also requires the critical step of working *in person* in communities where there are barriers to using new communication platforms,<sup>190</sup> and to paying particular attention to ensuring accessibility for marginalized groups. Lumière Synergie pour le Développement ("LSD") in Senegal, Green Advocates in Liberia, and Save Lamu in Kenya are examples among the many groups working at national or subnational levels to bring project-specific information to local communities in a culturally appropriate way so that it can be useful and actionable. Accountability Counsel and many members of the International Advocates Working Group regularly support local communities and their advocates to understand and engage with complex project documents. This work involves time reviewing what are almost exclusively English-language documents, evaluating, and then communicating them through live conversations and/or workshops with local communities and their advocates. But for

**Community organizers at Save Lamu share contact information with residents of Pate Island who were impacted by the LAPSET project in Kenya.**

PHOTO: DESIREE KOPPEES



this level of work translating and facilitating the flow of information, directly affected communities may have no way to know that information exists, how to understand it, and meaningfully engage to seek remedy or prevent harm. While civil society has a positive role to play in bridging information barriers, it is often a role needed only due to a failure by a state, international agency, or private party to provide the information.

In addition to LSD, Green Advocates, and Save Lamu mentioned above, some of the civil society organizations working in Africa to promote access to information in communities include members of the African Coalition for Corporate Accountability (“ACCA”), including the Centre de Recherche sur l’Environnement, la Démocratie et les Droits de l’Homme (“CREDDHO”) in the Democratic Republic of Congo, Buliisa Initiative for Rural Development Organisation (“BIRUDO”) in Uganda, and Réseau Camerounais des Organisations des Droits de l’Homme (“RECODH”) in Cameroon.

In addition to IAP and Accountability Counsel mentioned above, global organizations partnering with civil society groups and communities in Africa to support access to information include Advocates for Community Alternatives, Bank Information Center, Both ENDS, Business and Human Rights Resource Centre, Friends of the Earth, Inclusive Development International, Natural Justice, Rights and Resources Initiative, Rights and Accountability in International Development (“RAID”), The Centre for Research on Multinational Corporations (“SOMO”), and Urgewald.

## INSUFFICIENT ADVOCACY SUPPORT

**O**ften the communities that are most remote, and that have the greatest language and cultural differences from project operators and investors, are those most harmed and most in need of support to be heard. Although civil society organizations and legal aid services exist to bridge some of these barriers to access to remedy, many organizations are under-resourced and/or do not have adequate capacity or training to take on community and environmental rights cases that often go on for many years.<sup>191</sup>

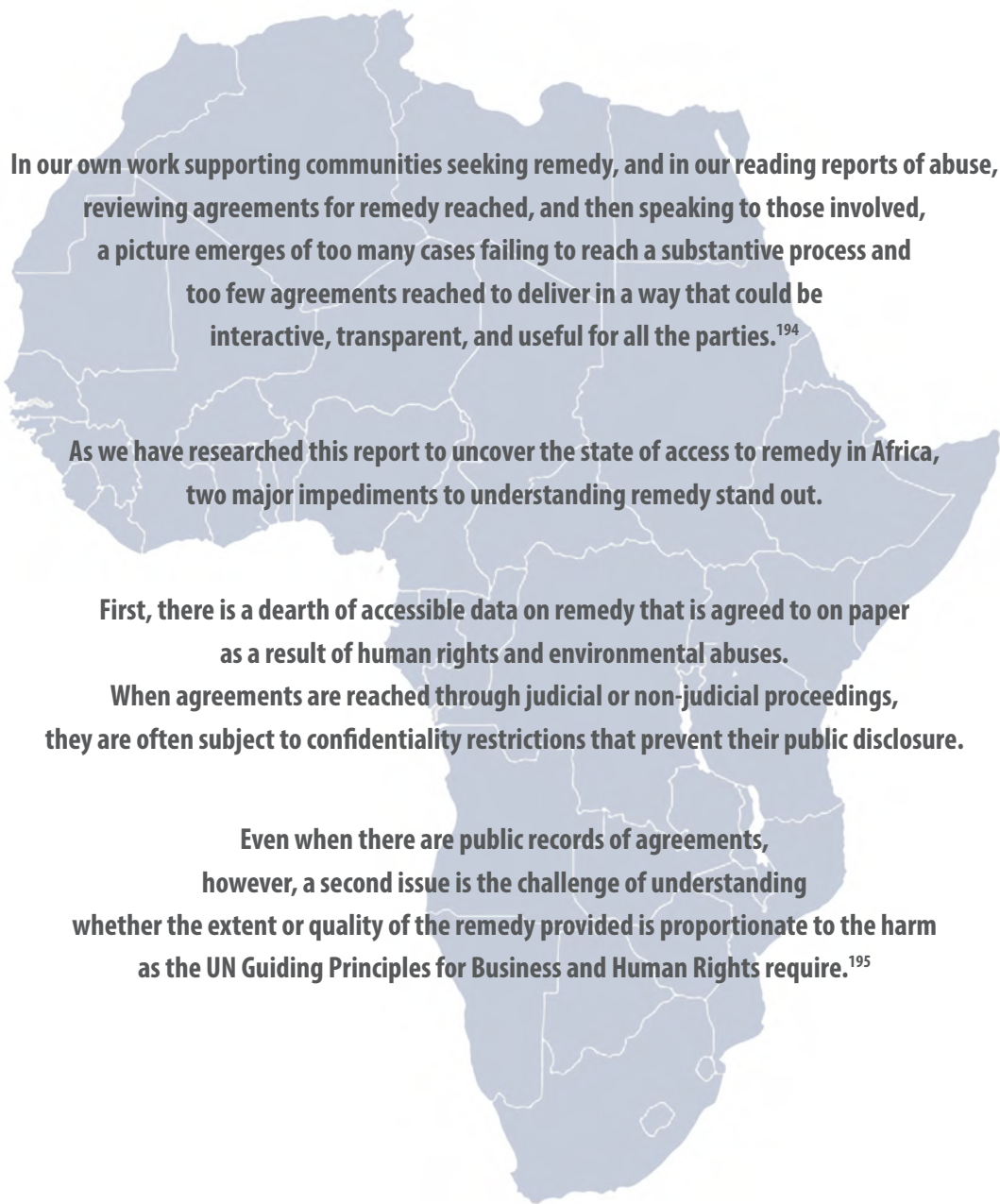
These barriers are significant; it is often only because of sustained support to communities from civil society actors that cases move forward.<sup>192</sup> Both rural and urban communities in Africa, across all regions, need strong advocates as partners to ensure access to remedy. Even in forums in which communities can file grievances without a lawyer, such as the non-judicial accountability offices, non-lawyer advocates are often imperative to helping communities overcome the barriers described above.

There is a well-established history of low or no cost paralegal and pro bono support in a number of African regions, including for example, a number of entities in South Africa;<sup>193</sup> paralegals working throughout Chad trained by the Chadian Association for the Promotion and Defense of Human Rights; and through Namati in Sierra Leone. Community-led campaigners have been a growing force, including WoMin: African Women Unite Against Destructive Resource Extraction. WoMin has a commitment to movement building and organizing, including grassroots campaigning, partnering with a wide group of local and regional organizations throughout Africa.

In addition, there is a diverse group of civil society organizations (with lawyers and non-lawyers) that work at all levels, from local to global, to support African communities with access to remedy. Examples of networks with members that support local communities in this type of work include ACCA, the Coalition on Human Rights in Development, and the International Advocates Working Group. ●

**Both rural and urban communities in Africa, across all regions, need strong advocates as partners to ensure access to remedy.**

## THE PARTIAL PICTURE ON PROVISION OF REMEDY



In our own work supporting communities seeking remedy, and in our reading reports of abuse, reviewing agreements for remedy reached, and then speaking to those involved, a picture emerges of too many cases failing to reach a substantive process and too few agreements reached to deliver in a way that could be interactive, transparent, and useful for all the parties.<sup>194</sup>

As we have researched this report to uncover the state of access to remedy in Africa, two major impediments to understanding remedy stand out.

First, there is a dearth of accessible data on remedy that is agreed to on paper as a result of human rights and environmental abuses.

When agreements are reached through judicial or non-judicial proceedings, they are often subject to confidentiality restrictions that prevent their public disclosure.

Even when there are public records of agreements, however, a second issue is the challenge of understanding whether the extent or quality of the remedy provided is proportionate to the harm as the UN Guiding Principles for Business and Human Rights require.<sup>195</sup>

---

## ENDNOTES

- <sup>163</sup> Interview by Accountability Counsel with Alfred Brownell, Founder and Lead Campaigner, Green Advocates International (Feb. 7, 2019).
- <sup>164</sup> Front Line Defenders, *Front Line Defenders Global Analysis 2018* (Jan. 7, 2019), <https://www.frontline-defenders.org/en/resource-publication/global-analysis-2018>.
- <sup>165</sup> *Id.*
- <sup>166</sup> See, e.g., David Kode & Lizet Vlamings, Civicus, *Addressing Civic Space Restrictions in Uganda: What Role for the Universal Periodic Review* (Feb. 2017), [http://www.civicus.org/images/Addressing\\_Civic\\_Space\\_Restrictions\\_in\\_Uganda\\_PolicyBrief\\_Feb2017rf.pdf](http://www.civicus.org/images/Addressing_Civic_Space_Restrictions_in_Uganda_PolicyBrief_Feb2017rf.pdf).
- <sup>167</sup> Amy Braunschweiger & Felix Horne, *Interview: Ethiopia Lets in Human Rights Watch for First Time in 8 Years*, Human Rights Watch (Feb. 22, 2019), <https://www.hrw.org/news/2019/02/22/interview-ethiopia-lets-human-rights-watch-after-8-year-ban>.
- <sup>168</sup> See, e.g., Jędrzej George Frynas, *Social and Environmental Litigation against Transnational Firms in Africa*, 42 *The Journal of Modern African Studies*, at 366 (2004), <https://www.jstor.org/stable/3876337> (describing how the World Bank and other institutions have “done little to strengthen [national] environmental or labour rights regimes; indeed [they] have undermined the rights of nation-states to impose environmental or labour rights provisions”); see also Shenilla Mohamed, *supra* note 85 (describing the argument of the Mineral Resources Minister in South Africa that community rights violate the principle of equality - with corporations - in the South African Constitution); Hakeem O. Yusuf & Kamil Omoteso, *Combating environmental irresponsibility of transnational corporations in Africa: an empirical analysis*, 21 *Local Environment*, at 1381 (2016), DOI: 10.1080/13549839.2015.1119812.
- <sup>169</sup> ‘Corporate capture’ is the “means by which an economic elite undermine the realization of human rights and the environment by exerting undue influence over domestic and international decision makers and public institutions.” According to ESCR-Net, elements of corporate capture include: community manipulation, economic diplomacy, judicial interference, legislative and policy interference, privatizing public security services, ‘revolving door’ employment, shaping narratives, and capture of academic institutions. See *Corporate Capture Project*, ESCR-Net, <https://www.escr-net.org/corporateaccountability/corporatecapture> (last visited July 14, 2020). As an example, even the billions of dollars in loans from the World Bank and International Monetary Fund to help countries, including Kenya, to respond to the ongoing COVID-19 pandemic appear conditioned on their adoption of favorable policies to the private sector. Frederic Mousseau & Andy Currier, *World Bank’s COVID-19 Assistance to Kenya Benefits Multinational Agribusiness and Agrochemical Firms*, Oakland Institute (July 2, 2020), <https://www.oaklandinstitute.org/blog/world-bank-covid-19-assistance-kenya-benefits-multinational-agribusiness-agrochemical>.
- <sup>170</sup> Many African countries have low rankings on the World Justice Project’s Rule of Law Index. See *WJP Rule of Law Index 2020*, World Justice Project (2020), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>.
- <sup>171</sup> Okoth Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991).
- <sup>172</sup> Téodyl Nkuintchua, African Community Rights Network, *The State of Community Land Rights in Africa* (Dec. 2016), <http://www.cedcameroun.org/wp-content/uploads/2016/12/the-state-of-Community-EN.pdf>.
- <sup>173</sup> An exception is Ghana, where very little land is state owned and approximately 80 percent is considered to be subject to traditional ownership. See *Ghana*, LandLinks, <https://www.land-links.org/country-profile/ghana/> (last visited July 15, 2020); Eric Yeboah & David Shaw, *Customary land tenure practices in Ghana: Examining the relationship with land-use planning delivery*, 35 *International Development Planning Review*, at 21 (2013),

---

## ENDNOTES CONTINUED

[https://www.researchgate.net/publication/270079500\\_Customary\\_land\\_tenure\\_practices\\_in\\_Ghana\\_Examining\\_the\\_relationship\\_with\\_land-use\\_planning\\_delivery](https://www.researchgate.net/publication/270079500_Customary_land_tenure_practices_in_Ghana_Examining_the_relationship_with_land-use_planning_delivery). Another exception is Mozambique, where the 1997 *Lei de Terras* establishes that anyone living or working on land for ten years in good faith has an automatic de jure “right of use and benefit” over that land, and allows for community lands to be registered as a whole, thus formalizing communal customary rights. Communities may continue to administer and manage their lands according to custom, with the caveat that such practices should not contravene the national constitution. Similarly, in Tanzania’s Village Land Act of 1999, the village is both the primary land-holding unit and the center of local land administration, management, record-keeping, and land dispute resolution. It also makes customarily-held land rights equal to formally-granted land rights, and explicitly protects the land rights of vulnerable groups. In doing so, it creates a hybrid of customary and codified law—allowing (at least in theory) the village to dictate how things are done, but holding it to strictly-defined legal mandates.

<sup>174</sup> Nkuintchua, *supra* note 172.

<sup>175</sup> In the case of Liberia, for example, a report for the Government Land Commission suggests that the government has issued concessions to commercial entrepreneurs, communities (commonly just a front for more commercial exploitation), and for conservation programs, which exceed 50 percent of the country’s land area, much of which is used by rural populations. See Paul De Wit, *Land Rights, Private Use Permits and Forest Communities*, Land Commission of Liberia Report (2012), <https://landwise.resourceequity.org/records/1860>.

<sup>176</sup> For example, in South Africa, the Mineral and Petroleum Resources Development Act (MPRDA) states “Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.”

<sup>177</sup> See Lorenzo Cotula, *Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries*, International Institute for Environment and Development (2ed. 2016), <https://pubs.iied.org/12587IIED/>.

<sup>178</sup> *Id.*

<sup>179</sup> *The Coalition*, Rights and Resources, <https://rightsandresources.org/en/the-coalition/#.XMICl-tKjo0> (last visited July 15, 2020).

<sup>180</sup> *Community Protocols*, Natural Justice, <https://naturaljustice.org/community-protocols/> (last visited July 15, 2020).

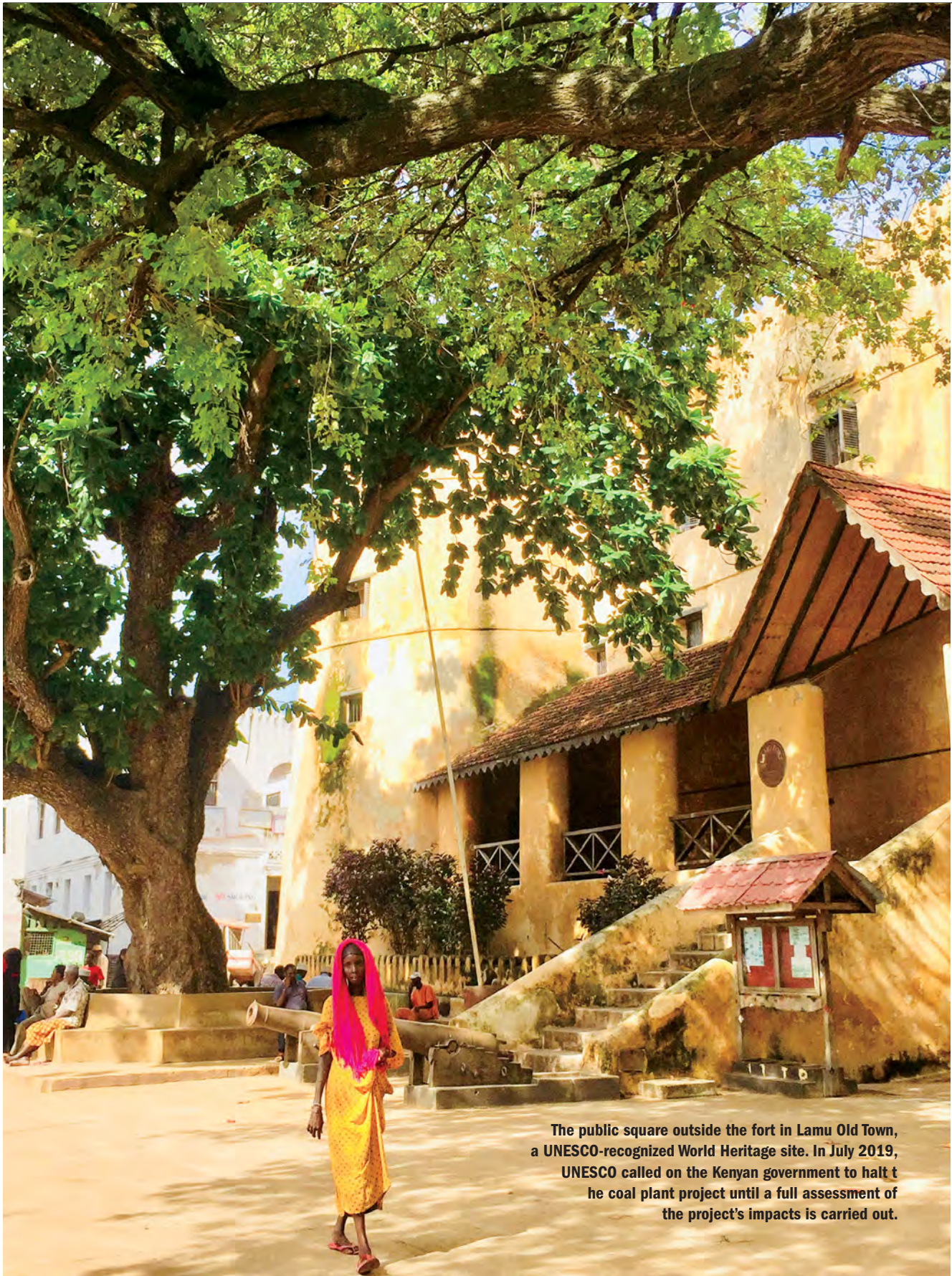
<sup>181</sup> *Protecting Community Land*, Namati, <https://namati.org/ourwork/communityland/> (last visited July 15, 2020).

<sup>182</sup> Ben Koissaba, *Elusive Justice: The Maasai Contestation of Land Appropriation in Kenya: A Historical and Contemporary Perspective*, Kenya After 50. African Histories and Modernities (Dec. 2015).

<sup>183</sup> Kanyinke Sena, International Work Group for Indigenous Affairs & Indigenous Peoples National Steering Committee on Climate Change, *Renewable Energy Projects and the Rights of Marginalised/Indigenous Communities in Kenya*, at 14 (Nov. 2015), [https://www.iwgia.org/images/publications/0725\\_REPORT21.pdf](https://www.iwgia.org/images/publications/0725_REPORT21.pdf).

<sup>184</sup> Kurgat Marindany, *Maasai community rejects Kedong land offer*, The Star Kenya (Feb. 16, 2020), <https://www.the-star.co.ke/counties/rift-valley/2020-02-16-maasai-community-rejects-kedong-land-offer/>.

- 
- <sup>185</sup> See B.R. Ole Koissaba, *Kenyan Government Manipulates Courts to Dispossess the Maasai of their Lands*, Cultural Survival (Feb. 17, 2015), <https://www.culturalsurvival.org/news/kenyan-government-manipulates-courts-dispossess-maasai-their-lands>.
- <sup>186</sup> George Murage, *Maasai claim dry port will displace them*, The Star (June 21, 2019), <https://www.the-star.co.ke/news/2019-06-21-maasai-claim-dry-port-will-displace-them/>.
- <sup>187</sup> Joseph Openda, *Locals move to court to stop eviction from Kedong ranch*, Daily Nation (Nov. 12, 2019), <https://www.nation.co.ke/kenya/counties/nakuru/locals-move-to-court-to-stop-eviction-from-kedong-ranch-222464>.
- <sup>188</sup> International Telecommunications Union, *Measuring Digital Development: Facts and Figures 2019*, at 3 (2019), <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/FactsFigures2019.pdf>.
- <sup>189</sup> Early Warning System, <https://ews.rightsindevelopment.org/> (last visited July 22, 2020).
- <sup>190</sup> See Natalie Bridgeman Fields, *What Partnering with Communities Teaches Us About Civic Tech: The World Bank Group's "Barriers and Accountability" Opportunity*, Accountability Counsel (Oct. 18, 2017), <https://www.accountabilitycounsel.org/2017/10/what-partnering-with-communities-teaches-us-about-civic-tech/>. In situations where in-person engagement is not possible, such as during the COVID-19 pandemic, remote communications tools can provide a useful supplement, as long as good practice principles are followed. See Sydney Speizman & Samer Araabi, *Reenvisioning Community Engagement in the Coronavirus Response*, Accountability Counsel (Apr. 6, 2020), <https://www.accountabilitycounsel.org/2020/04/reenvisioning-community-engagement-in-the-coronavirus-response>.
- <sup>191</sup> Accountability Counsel conducted interviews throughout 2017 to 2019 with over a dozen civil society organizations working throughout Sub-Saharan Africa. Interviewees defined capacity as the need for trained staff who can do this work, and the funding to support staff with those skills. They also identified the need for capacity in terms of bandwidth of existing staff to better liaise with global allies in campaigns. Improvement of national-level advocacy to accompany and strengthen international campaigns was also a repeated call.
- <sup>192</sup> Hakeem O. Yusuf & Kamil Omoteso, *Combating environmental irresponsibility of transnational corporations in Africa: an empirical analysis*, 21 *Local Environment*, at 1372 (2016), DOI: 10.1080/13549839.2015.1119812.
- <sup>193</sup> Socio-Economic Rights Institute of South Africa, *supra* note 76, at 70 (discussing community advice offices and paralegals in South Africa); D. Holness, *Recent developments in the Provision of Pro Bono Legal Services by Attorneys in South Africa*, 16 *Potchefstroomse Elektroniese Regsblad* (2013), <http://dx.doi.org/10.4314/pelj.v16i1.5> (discussing pro bono support in South Africa).
- <sup>194</sup> The Paper to Progress microsite that Accountability Counsel developed is an example that allows the fuller picture of the impact of remedy for affected communities. *From Paper to Progress: Tracking Agreements between Nomadic Herders and Mongolia's Largest Copper Mine*, Accountability Counsel, <https://tpcprogress.com/> (last visited Jul. 17, 2020).
- <sup>195</sup> See U.N. Human Rights Office of the High Commissioner, *supra* note 2.



The public square outside the fort in Lamu Old Town, a UNESCO-recognized World Heritage site. In July 2019, UNESCO called on the Kenyan government to halt the coal plant project until a full assessment of the project's impacts is carried out.

**M**aking progress toward access to remedy in Africa requires action on the part of all stakeholders involved in international financial flows. These stakeholders include governments in both host states in Africa and home states of multinational corporations and investors; companies and investors; asset owners; and communities and their advocates. We have identified four goals and key recommendations for steps that each of these stakeholders can take, based on both ongoing experience and the learning from the research for this report by Accountability Counsel and ACCA, and from the grassroots members of ACCA who provided their recommendations at workshops.

## **1 STRENGTHEN RULES AND REGULATIONS THAT PROTECT COMMUNITY RIGHTS, PROMOTE ACCESS TO INFORMATION, AND GUARANTEE ACCOUNTABILITY**

**L**aws and regulations that prioritize corporate and state interests over human rights and the environment are at the root of many of the barriers communities face in accessing remedy. Governments in both host states in Africa and home states of multinational corporations play perhaps the most important role of all in changing these structures.

Companies and investors must strengthen their policies and practices to promote access to remedy and prevent harm in the first place, regardless of whether or not sufficient state-based protections are in place. Communities and their advocates, as well as the media, need to continue applying pressure to drive these changes, through campaigns to raise awareness of issues and build reputational costs of inaction, civic participation, and targeted advocacy with decision makers. Finally, philanthropic organizations—particularly those with large endowments—should ask questions of their investment managers to pressure meaningful adoption of policies and practices that guarantee accountability. The recommendations below provide more specific steps key stakeholders can take to improve the rules and regulations governing the relationship between states, communities, corporations, and institutions.

# ACTION NEEDED

---

## AFRICAN HOST STATES

- Legislate for greater transparency and access to information around international investments, enacting freedom of information laws and national corporate transparency and accountability laws, and requiring disclosure of beneficial owners. Negotiate for treaties that comply with these laws.
- Change national investment laws to mirror best practice with international level social, human rights, and environmental standards and ensure that communities have a voice in development decisions affecting them.
- Establish land tenure security by vesting ultimate land rights in communities, supporting Indigenous and traditional community land tenure systems, and creating an enforceable fiduciary duty between local land management bodies and community members.
- Support the rule of law in national and regional institutions, and unite the parallel and multi-layered complex legal systems in African countries.
- Establish laws protecting communities and their advocates from abuse, threats, or retaliation for speaking up to defend rights and the environment.

---

## CORPORATE AND INSTITUTIONAL HOME STATES

- Promote access to information by ensuring that all government-corporate contracts are public and that the community is made aware of these contracts before negotiations commence.
- Improve regulation and oversight of institutions, agencies, and of multinational corporations operating in African communities, regardless of where headquartered.
- Increase the formal judicial avenues for redress by eliminating numerous existing barriers, including gaps in liability for abuse abroad. Removing national and multilateral immunity for state action that constitutes environmental and human rights abuse should result in sanctions and injunctions that hold actors accountable, with remedy to victims and incentives to prevent future harm.
- Negotiate community protections and accountability for harm into bilateral investment treaties.
- Sanction bad actors, such as eliminating export credits or other state benefits to corporate actors that abuse local people and the environment.

---

## COMPANIES AND INVESTORS

- Implement free, prior and informed consent (FPIC) through operations that are transparent and ensure project-specific information is accessible to affected communities, including by translating documents into local languages and sharing information in a gender sensitive and culturally appropriate manner. This must include in-person information sharing, especially where literacy and/or Internet access are barriers. Meaningful implementation of FPIC requires a corporate and investor acceptance that communities have the right to withhold consent.

- Establish and work within effective accountability frameworks, including adoption of social and environmental policies that require meaningful due diligence, effective project-level grievance mechanisms, and institutional-level accountability offices that meet best practice.
- Incentivize policy compliance, best practice, and well-functioning grievance and accountability mechanisms throughout corporate culture.

## 2 GROW ADVOCACY SUPPORT FOR AFRICAN COMMUNITIES SEEKING REMEDY



Workers in Liberia attend a training led by Accountability Counsel.

Due to both the steep barriers to accessing remedy and the power imbalances communities face, successful efforts almost always require substantial time and resources, and require a range of skills and abilities.

In order to follow through on judicial and non-judicial complaints seeking remedy, communities tend to find success with a combination of strong local organizing; participatory fact-finding and documentation of harm; advocates with the ability to facilitate multi-faceted, international campaigns; and the financial resources to sustain these campaigns for a multi-year period. While there is a rich ecosystem of civil society organizations supporting communities to access remedy and hold corporations accountable for abuse, the need for support outweighs existing capacity, which is uneven among countries and communities, and under-resourced. The state and non-state actors financing harm must resource access to advocacy support through a shared fund. Community advocates and their civil society allies—including lawyers, paralegals, researchers, organizers, and activists— could use this fund to build capacity through information sharing, trainings, outreach, and advocacy support.

## ACTION NEEDED

---

### COMMUNITIES, ADVOCATES, AND CIVIL SOCIETY

- Offer “know your rights” trainings that cover relevant protections, including national and international legal protections; the importance of documenting negotiations, land agreements, compensation, and evidence of harm in writing; business and human rights training; as well as the basic structure of the investment rules meant to safeguard human rights and the environment.
- Build the capacity of grassroots, national, and regional groups to conduct these trainings and support efforts to access remedy through training and outreach. Together, these groups can continue to grow the knowledge base around access to remedy and share lessons about moving from access to remedy to provision of remedy.
- Continue to grow civil society coalitions such as ACCA to be more robust, including through creation of national-level ACCA coalitions, and deepen linkages with aligned networks and movements, such as corporate transparency and tax justice networks.

---

### PHILANTHROPIC FUNDERS

- Provide communities and their advocates with funding that is flexible and can respond to ability to work in a changing campaign environment.
- Take bold and transformative steps to fund core support to hyper-local movements and regional advocates, noting that this will shift OECD-based philanthropy more toward funding African civil society groups directly.
- Develop funds for free legal and advocacy services for communities affected by human rights and environmental violations of corporations and development actors. The structure of these funds should be developed in collaboration with civil society, as well as bilateral and multilateral institutions.

## 3 FOCUS ATTENTION ON PROVISION OF ACTUAL REMEDY, IN ADDITION TO ACCESS TO REMEDY

While the analysis in this report focuses largely on barriers to accessing remedy, there is another glaring gap that prevents communities from receiving meaningful compensation or other remedial support for harm: state, company and investor failure to deliver effective remedy.

One barrier to delivery of remedy is funding. For non-judicial processes in particular, after reaching an agreement for remedy through a long campaign, communities may need to initiate yet another campaign to move a commitment on paper to a remedy that is supported and implemented. Remedial funds available for this purpose would help to remove this barrier. States and institutions can also play a role in monitoring provision of remedy to add accountability to the state of the process that matters most to communities seeking remedy.

## ACTION NEEDED

---

### CORPORATE AND INSTITUTIONAL HOME STATES

- Require corporations, agencies, or institutions to ensure funds are available for remedy of harm due to public or private financial flows.
- Develop monitoring mechanisms and administrative systems to report on and assess provision of remedy.
- Ensure consequences through removal of export promotion benefits or other state action to ensure accountability where provision of required remedy falls short.

---

### COMPANIES AND INVESTORS

- Ensure that corporate- or investor-level policy requires provision of remedy when harm occurs, or when remedial actions are needed to prevent harm. Make funds available to immediately address, prevent, and remedy harm when it occurs.
- Make compensation agreements public and accessible, including translating compensation agreements into languages that affected communities understand.
- Disclose progress toward delivery of remedy with such disclosures including community perspectives and third party verification.

---

### COMMUNITIES, ADVOCATES, AND CIVIL SOCIETY

- Aggregate and publicize data on compensation agreements between communities and corporate and state actors to establish precedent, promote transparency, and improve compliance. This would limit the possibility of corporations colluding with government officials to assess remedy in favor of corporations rather than the communities affected.
- Research and share in-depth, first person narratives about the delivery and impact of any remedy achieved through judicial and non-judicial processes. Where that information surfaces that remedy agreements are not resulting in delivery of effective remedy, advocate for full implementation.

## 4 PREVENT HARM THROUGH COMMUNITY-LED DECISION MAKING ABOUT RIGHTS AND RESOURCES



Mohammad Shee – a fisherman, farmer, and respected member of the Kwasasi Mvunjani Farmers Self-Help Group in Lamu County, Kenya

Conflicts arise when communities are left out of decisions impacting their rights and resources. Currently, priority setting regarding international financial flows is done by government officials, industry lobbyists, bankers, and leaders of multinational corporations in national capitals and places like Washington, D.C. and Beijing. Projects are being designed far from the reach of local voices, perspectives, and feedback. If financial flows are dictated by community needs and priorities, there will be fewer abuses that give rise to the need for remedy in the first place. This shifting of financial flows to a community-centered model requires an acknowledgement of the power communities already have to articulate their needs and protect their rights and resources.

### ACTION NEEDED

#### COMMUNITIES, ADVOCATES, AND CIVIL SOCIETY

- Proactively offer a vision of what sustainable, responsible investment looks like locally, nationally, and throughout the African continent. Increasingly, there is an appetite for responsible investment opportunities, and communities can partner with investors to resource local needs. Civil society can facilitate non-extractive and non-exploitive partnerships with new models for community-led international financial flows.
- Engage in the earliest stages of decision making about investments that impact rights and resources, including by providing input into national action plans, national investment priorities, and development plans. Advocates and civil society can help facilitate local participation through organizing around local and national government representation.
- Support community participation in FPIC processes. Because of language, resource, and cultural barriers to community engagement, communities and their advocates can be effective when they work in coalitions with allies who can offer support and amplify—not substitute for—local voices.

---

## PHILANTHROPIC FUNDERS

- Seek out and listen to the investment ideas of communities themselves when making endowment investments. Making room for locally-led solutions will lead to better impact investment and development projects aimed at poverty alleviation.
- Partner with local cooperatives and grassroots civil society organisations working to achieve community-led investment and development.

---

## STATES, COMPANIES, AND INVESTORS

- States and their institutions should ensure opportunities for information sharing in gender sensitive and culturally appropriate ways that enable community-based input into national action, development, and investment plans.
- Initiate finance and investment decisions through direct partnerships with communities. Direct cash transfers are increasingly being used as a way to fund community-led development initiatives. Invest in community cooperatives, benefit sharing, and joint ownership models. For example, developing a mining regime that provides local communities a role in the management and ownership of mineral resources.



---

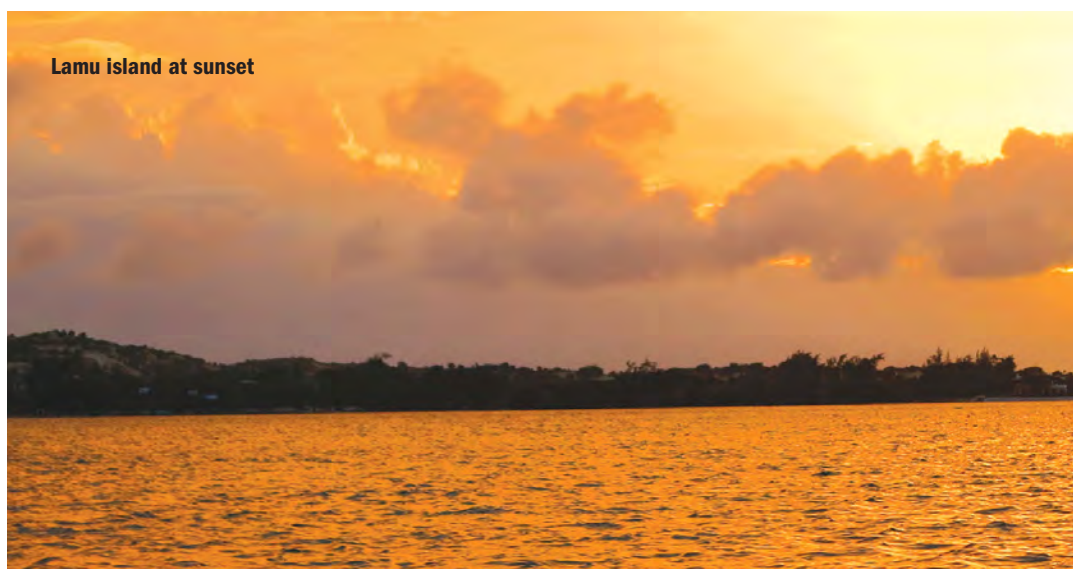
# CONCLUSION

---

**A**s international financial flows continue to reach the African continent, wholesale shifts are required to protect community rights and abandon the extractive and exploitative patterns of finance and investment still predominant today. While access to remedy is an important goal for African communities harmed by abuse from these financial flows, this report describes a pattern of abuses that are often predictable and never should have occurred. Many of these abuses remain unremediated even where the responsibility of a state or corporation to provide remedy has been agreed upon through a formal process.

This report describes the judicial and non-judicial options for communities seeking remedy. In each venue, there are victories that have come from strong local fact-finding, organizing, legal work, and advocacy. These provide both a beacon of hope, and a model that can and should be replicated by communities and their advocates. However, the reality is that achievements resulting in effective remedy remain few and far between, with replication of successes a challenge due to a host of barriers that impede justice and enable companies and investors to continue exploitative practices with little recourse. Addressing these barriers—from glaring gaps in liability for abuse, to violence and intimidation of rights defenders, to the lack of resources available for communities and their advocates—must be a priority for all stakeholders involved in financial flows. While reforms are vital to protecting African communities’ rights and the environment, they alone are not enough.

A deeper change is required to acknowledge the inadequacy of simply talking about access to remedy for African communities who have, like Sarah Monopoloh, a charcoaler in Liberia, lost everything when uninvited foreign investment devastates livelihoods and leaves communities without a way to recover. This report urges a reconsideration of how decisions are made that gives rise to the need for remedy in the first place. In place of top-down, extractive decisions that ignore community voices and prioritize corporate and state interests, decision making must be shifted to recognize the knowledge and power that already exists at local levels, and that requires state-based and institutional support. ●







**ACCOUNTABILITY COUNSEL**

[www.accountabilitycounsel.org](http://www.accountabilitycounsel.org)