Investor Responsibility towards Local Communities in Extractive Industry Projects in African Countries

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In the last decade, African Governments and institutions have adopted several extractive industry initiatives. From the African Commission on Human and Peoples' Rights' (African Commission) adoption of a resolution establishing the Working Group on Extractive Industries, Environment and Human Rights Violations in 2009, the same year that the Africa Mining Vision was adopted; the African Union's (AU) adoption of the Statute of the African Minerals Development Centre in 2016 to *inter alia* coordinate, oversee and implement the Africa Mining Vision; to adoption of multiple regional instruments such as the Economic Community of West African States (ECOWAS) Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector; and adoption of regional investment treaties and bilateral investment treaties (BITs), there is a clear concerted effort to adopt mechanisms for developing

extractive industry projects in African countries. Yet, there remains an absence of clear and definite direction regarding responsibility of project proponents/investors, in international law, for extractive industry activities in African countries and, indeed, in the rest of the world.

Extractive industry projects, including oil, gas and mining projects, have been at the fore of the discussion regarding the responsibility of actors for human rights violations and environmental degradation in African countries and other jurisdictions. Closely related to these issues are impacts on the socio-economic wellbeing of people and communities that host these projects. While most of the projects are located within specific countries and are mostly regulated by the domestic laws of these countries as well as the international law relating to foreign investment, there has been a turn to transnationalization of some of these projects. For some projects, there is significant involvement of multiple African states; foreign investors; local communities, including Indigenous peoples, in multiple countries; as well as development institutions such as the African Development Bank, the World Bank and the International Finance Corporation (IFC). Some of the projects such as the Chad Cameroon Petroleum Development and Pipeline Project (CCPDPP) and the West African Gas Pipeline Project (WAGP) are well known and others such as the East African Crude Oil Pipeline are more recent. With most extractive projects, the rights of foreign investors and state responsibility are internationalized.

It is trite that responsibility in international law is located in states. However, it is no longer new to state that international law is not as state-centric as it used to be. The extent of the responsibility of non-state actors such as foreign investors for investment-related misconduct is a subject of debate. Of particular relevance is the responsibility of these investors towards local communities that host extractive projects. Given that host and impacted communities are important actors in extractive industry projects and given these projects' propensity to impact human rights and the natural environment, extractive industry projects provide an ideal location for exploring investor responsibility in international law. While the debate over business and human rights as soft law and treaty continues, local communities already negotiate their rights in relation to the responsibilities of business actors in international fora.

The AU has commenced work to develop a policy framework on business and human rights. Also, the *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria* (*Morocco/Nigeria BIT*), which is not yet in force, articulates an innovate view. It includes language regarding investors' compliance with environmental and social impact assessment requirements but adopts permissive corporate social responsibility language. Perhaps, most relevant are the provisions regarding investors' civil liability in their home states for damage and harm to people in the host state as well as article 18 investor obligations that require extractive companies to maintain environmental management standards, "uphold human rights" and comply with labour standards. In spite of initiatives of this nature, responsibility for harms done to local communities remains an open question.

The African Commission and the Court of Justice of the Economic Community of West African States (ECOWAS Court) provide important institutional support but work within limited frameworks that are based on the premise that responsibility resides in states. The ECOWAS Court's ruling on preliminary objections in *The Registered Trustee of the Socio-Economic Rights and Accountability Project v. The President of the Federal Republic of Nigeria and Others* (*SERAP v. Nigeria*) is particularly apposite. In that case, SERAP – the Socio-Economic Rights and Accountability Project – filed an application against Nigeria's President, Attorney General, the Nigerian National Petroleum Corporation and several oil companies including Shell Petroleum Development Company, Elf Petroleum Nigeria Ltd, Chevron Oil Nigeria Plc. and ExxonMobil Corporation. It sought several orders, including "an order directing the defendants to ensure full enjoyment of the people of the Niger Delta" to several human rights as well as an order directing the defendants to pay USD 1 billion as compensation for violation of the human rights of Niger Delta peoples as a result of oil pollution and environmental damage. The ECOWAS Court considered what it regarded as "one of the most controversial issues in International Law", that is, "the accountability of companies, especially multinational corporations, for violation or complicity in violation of human rights especially in developing countries." It noted that "one of the paradoxes that characterize international law presently is the fact States and individuals can be held accountable internationally, while companies cannot." This 2010

decision preceded the United Nations Guiding Principles on Business and Human Rights but the Court referenced the Protect, Respect and Remedy Framework outlined in the Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie. The Court nevertheless concluded that "international law has not yet arrived at a point that allows the claim against corporations before international courts".

In the investor responsibility conversation, local communities and people in African countries have been the biggest champions of their own causes and, essentially, they seek to ensure that all actors including extractive companies are held accountable for their actions. From host state domestic court cases such as *Gbemre v. Shell Petroleum Development Company of Nigeria and Others* to extraterritorial decisions such as *Kiobel v. Royal Dutch Petroleum Co.* to disputes before tribunals such as the World Bank's Inspection Panel and the IFC's Compliance Advisor Ombudsman (CAO), local communities seek to hold foreign investors and other actors accountable for harms done in the process of natural resource extraction. Although this contribution focuses on investor responsibility, local communities direct attention to several actors. The African Commission's holding in *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*(*Ogoni Case*) focused on state responsibility, *Kiobel* raised, *inter alia*, investor responsibility questions, cases such as *Gbemre* and *SERAP* were directed at both the state and investors and the CCPDPP and the WAGP communities directed their complaints regarding the projects to the World Bank's Inspection Panel and the CAO. The thread that ties all together is mostly the activities of the investors. Some of the judicial interventions such as *Gbemre* have been more successful than others, at least in terms of decisions in favour of impacted peoples, if not as successful in practical terms that lead to concrete changes regarding wellbeing.

People and communities impacted by the CCPDPP and the WAGP had recourse to the Inspection Panel and the CAO. Neither mechanism provides broad remedies for local communities impacted by World Bank or IFC/Multilateral Investment Guarantee Agency (MIGA) projects. Yet, having recourse to the mechanisms demonstrates communities' interest in avenues for holding actors accountable. Cameroonian communities complained before the CAO about,

inter alia, the destruction of a reef that had a significant impact on fishermen, alleged dumping of toxic waste, displacement of the Indigenous Bagyeli peoples, and payment of inadequate compensation. At the Inspection Panel, some of the Cameroonian communities highlighted challenges attributable to pipeline construction including environmental disturbance, water pollution, impacts on livelihood, inadequate compensation, and violations of labour law. Communities impacted by the West African Gas Pipeline also outlined concerns in their Request for Inspection directed to the Inspection Panel and expressly noted that neither the World Bank nor the project proponents had addressed the communities' "concerns and fears".

Regardless of communities' efforts, the relevant mechanisms that they rely on are based on a model that does not recognize investor responsibility towards the communities under international law. The ECOWAS Court made this point poignantly in *SERAP v. Nigeria* and the African Commission was clearly limited in the *Ogoni Case* by this view. The Inspection Panel and the CAO, for their part, only address the concerns of people who have been affected by projects sponsored by the World Bank and the IFC or MIGA respectively. They provide limited avenues for responding to communities' concerns. Hence, local communities direct questions of responsibility to other actors that the law permits while raising concerns that arise as a result of investors' activities. In spite of this limitation, local communities sometimes directly raise questions of investor responsibility.

The mechanisms discussed above do not provide concrete avenues for investor responsibility in international law because international actors have yet to delineate clearly identifiable, binding and enforceable international obligations for foreign investors. However, some demonstrate the progress that is being made toward investor responsibility. Local communities, for their part, consider investor responsibility a necessary part of the fabric of international law and politics. While the AU works towards framing business and human rights in Africa along with global developments regarding a treaty on business and human rights and treaties such as the *Morocco/Nigeria BIT*, African peoples and communities continue to adopt available mechanisms as avenues for communicating their positions on these important issues and exercising agency on a subject that is of utmost importance to their wellbeing.

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