

# RADE

Revue Africaine de Droit de l'Environnement  
African Journal of Environmental Law

## Climate justice and extractive industries in African law



N° 08 . 2023



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The African Journal of Environmental Law (RADE) aims to encourage the development of environmental law and strengthen its effectiveness in Africa, in particular through the promotion of doctrine, the dissemination of information and the sharing of experience and good practice. Under the aegis of the World Commission on Environmental Law of the International Union for Conservation of Nature (IUCN), RADE receives logistical support from the Faculty of Legal, Political and Social Sciences of Tunis, Université de Carthage, and the Institut de la Francophonie pour le développement durable, as well as financial support from Natural Justice and the Konrad Adenauer Foundation.

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## FOREWORD

While predictions are generally dangerous and open to question because of the uncertainties they entail, there are unfortunately others which, based on scientifically established criteria, are so obvious that they end up becoming "an inconvenient truth"<sup>1</sup>. One of these is climate change.

Climate change is defined as "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods"<sup>2</sup>. Despite its late appearance on the international agenda<sup>3</sup>, the issue of climate change has become a matter of concern because of the serious threat it poses to humanity. Indeed, "global warming is unequivocal and many of the changes observed are unprecedented in decades, if not millennia. The atmosphere and oceans have warmed, snow and ice cover has decreased, sea levels have risen and greenhouse gas concentrations have increased"<sup>4</sup>. The main culprit in this situation is well known: mankind. His "influence [...] on the climate system is clearly established, based on data concerning the increase in greenhouse gas concentrations in the atmosphere [...]"<sup>5</sup>. A number of scientific studies<sup>6</sup> show that before the industrial revolution, the concentration of carbon dioxide in the atmosphere was around 280 parts per million (ppm) and should not exceed 350 ppm today. However, we have already reached 387 ppm and are heading for concentrations of 600 ppm or even more. At this rate, the necessary limitation of warming to +2°C compared with the pre-industrial era (i.e. a maximum concentration of 400 ppm) advocated by scientists is proving to be nothing more than an illusion; hence the urgent need to act to avoid the irreversible situation of climate change of +4°C or more by the end of the century, towards which the continuation of current development patterns would lead us, as the IPCC warns in its 5<sup>ème</sup> report.

Among these targeted development methods, mining activities, for which the African continent has become a preferred location, occupy a significant place.

It is true that the inequality of the contributions to global warming persists and brings to light the delicate issue of climate justice, the definition of which, marked by the North/South divide that characterises this deeply divided world, exposes us to endless jousting.

However, there is no need to give in to the siren calls of climate sceptics and other deniers, and even less need to engage in a "climate war"<sup>7</sup>. Clearly, the

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<sup>1</sup> Title of the film by former US vice-president Al Gore, which was awarded the Nobel Peace Prize in 2007 along with the Intergovernmental Panel on Climate Change (IPCC).

<sup>2</sup> Article 1(2) of the United Nations Framework Convention on Climate Change.

<sup>3</sup> The issue of climate change entered the international agenda in the 1980s.

<sup>4</sup> IPCC, 2013: Summary for Policymakers, Climate Change 2013: The scientific evidence. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Edited by Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S. K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P. M. Midgley], Cambridge University Press, Cambridge, United Kingdom and New York (New York State), United States of America, p. 4.

<sup>5</sup> *Ibid*, p. 15.

<sup>6</sup> See for example the journal *Nature*, vol. 461/24, September 2009.

<sup>7</sup> See the film by Laure Noualhat and Franck Guérin entitled "Climatosceptiques: la guerre du climat".

The "climate war" will not happen and if there were to be a "great global warming scam"<sup>8</sup>, it would undoubtedly be the desperate attempt of these protesters and others to get their way. The "merchants of doubt"<sup>9</sup> want to "delegitimise climate policies at a time when they are only just beginning to be put in place and when the community of states is still hesitating about making a commitment"<sup>10</sup>.

With this in mind, this issue of the African Journal of Environmental Law looks at climate justice in relation to extractive industries in African law.

Since climate justice is, by its very nature, a connotative concept, the search for a definition of which inevitably leads to a free-for-all, we have opted for a cautious approach that understands it to mean the search for equality and fairness in the face of the consequences of climate disruption.

This raises the question of whether the mining regulations in force on the continent take account of the concerns associated with the climate justice that is so much in demand. This question is all the more important given that Africa is witnessing the emergence of a 'fourth generation' of mining codes drawn from a variety of sources and characterised by openness to new initiatives aimed at ensuring better governance of natural resources<sup>11</sup>.

The studies in this volume illustrate the timid appropriation of the concept of climate justice by African mining regulations, which is still struggling to be translated into practice, particularly in terms of litigation.

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<sup>8</sup> French subtitles for a March 2007 film entitled *The Great Global Warming Swindle*. This film, in which the opinions of a number of leading figures, including at least 18 researchers, are gathered, seems to play down the role played by human activity in climate change.

<sup>9</sup> This fine expression is used by Naomi Oreske to describe climate sceptics: "Les marchands du doute aux États-Unis. Comment et pourquoi une poignée de scientifiques se sont mis en obstacle de la vérité sur le changement climatique", in E. Zaccai, F. Gemenne and J.-M. Decroly (eds.), *Controverses climatiques, science et politique*, Paris, Presses de Sciences Po, 2012, p. 106.

<sup>10</sup> J.-L. Fellous *et al*, "Un étonnant effet collatéral du changement climatique", *Le Monde*, 6 April 2010.

<sup>11</sup> H. Besada and Ph. Martin, "Mining codes in Africa: the rise of a "fourth" generation?", Research report, North-South Institute, May 2013, 31 p.

*IN SEARCH OF CLIMATE JUSTICE IN AFRICAN MINING  
LAW*



# REFLECTION ON THE EFFECTIVENESS AND EFFICIENCY OF IMPLEMENTING CLIMATE JUSTICE IN AFRICA

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## **Summary**

Concepts are the product and reflection of a society and an era. The concept of "climate justice" emerged in the wake of climate change and takes on different meanings, depending on whether we consider it in an international or national context. Both in its individual and collective or inter-state aspects, this concept is clearly included in international texts such as the United Nations Framework Convention on Climate Change and the Paris Agreement, through the recognition of the principle of equity and the principle of common but differentiated responsibilities. But given the weakness of the texts and the lack of enthusiasm and commitment on the part of States, we need to ask ourselves about the chances of success in implementing climate justice in Africa, a continent marked by its acute climato-vulnerability.

**Key words:** climate justice; human rights; environment; Green Climate Fund; sustainable development.

## **Abstract**

*Concepts are the fruit and reflection of a society and an era. The concept of "climate justice" emerged in the wake of climate change, and takes on different meanings, depending on whether the context is international or national. In both its individual and its collective or inter-state dimensions, this concept clearly features in international texts such as the United Nations Framework Convention on Climate Change and the Paris Agreement, through the recognition of the principle of equity and the principle of common but differentiated responsibilities. But given the weakness of the texts and the lack of enthusiasm and commitment from States, it is worth questioning the chances of success in implementing climate justice in Africa, a continent marked by its acute climate vulnerability.*

**Keywords:** Climate Justice; Human Rights; Environment; Green Climate Fund; Sustainable Development.

## Introduction

Humanity is currently facing a global environmental crisis of such magnitude that it is threatening the very life of the human species and of ecosystems, proof that humanity has indeed entered the era of the Anthropocene<sup>1</sup>. By making the fight against climate change and its repercussions a priority, Sustainable Development Goal (SDG) 13 recommends that urgent measures be taken to deal with it. This has given rise to the concept of "climate justice", which appears to be the most equitable solution for countering environmental inequalities<sup>2</sup> and the injustices linked to global warming.

Climate justice has a number of meanings, depending on whether the context is national or international. In the national context, it consists of recognising that climate change is caused by greenhouse gases, emitted by someone who is "guilty". In the international context, marked by a strong North/South polarity, developing countries attribute responsibility for these emissions to the developed countries, whose emissions from the 19th century onwards and throughout the industrial revolution were suffered by the "victims", the majority of whom were developing countries. In such a context, it seems obvious that the guilty parties owe a "climate debt"<sup>3</sup> to the victims. Some authors speak of both the retrospective and prospective responsibility of Western countries for their significant contribution to global warming.

The inequality of contributions to global warming is an enduring historical legacy. We know, for example, that the ecological footprint of an American is 3.5 times higher than the global average; that a British citizen generates as much greenhouse gas in two months as an inhabitant of a poor country does in a year, etc.<sup>4</sup>.

With 3-4% of GHG emissions, Africa is the continent least responsible for climate change, but paradoxically one of the most sensitive and vulnerable<sup>5</sup>. This brings us to the very heart of the issue of climate justice - or rather, injustice<sup>6</sup>. This is why the developing countries have called for a rebalancing in favour of adaptation measures and the taking into account of loss and damage mechanisms.

In national contexts, climate change affects territories and social classes differently. Indeed, the consequences of climate change are felt unequally, with the poorest populations being the first victims and the most seriously affected. Here, climate justice takes on the meaning of a duty for public authorities to put in place, as part of national solidarity and the fight against inequality, mechanisms to support the citizens most affected (who are generally the most vulnerable and the most deprived) by those who are most resilient and least affected (who are generally the most affluent).

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<sup>1</sup> On this concept: L. Scotto d'Apollonia, "L'anthropocène: un concept socio scientifique pour une éducation au développement durable?", <https://www.parcs.hypotheses.org>.

<sup>2</sup> C. Larrère, "Environmental inequalities and climate justice", *Annales des Mines - Responsabilité et environnement*, 2015/3, pp. 73-77.

<sup>3</sup> *Ibid*, p. 74, note 3.

<sup>4</sup> *Ibid*, p. 74.

<sup>5</sup> P. Coudurier, "Cop 27: l'Afrique est le continent qui pollue le moins, mais qui trinque le plus", <https://www.slate.fr/story/235745/cop27-egypte-afrique-changement-climatique-inondations-secheresse-developpement-energies-fossiles-vertes>; Ch. Nourissier, "La communauté internationale doit aider l'Afrique à sortir de la double peine-climatique", <https://afrique.latribune.fr/think-tank/tribunes/2021-10-29/la-communaute-internationale-doit-aider-l-afrique-a-sortir-de-la-double-peine-climatique-895412.html>.

<sup>6</sup> C. Larrère, "Inégalités environnementales et justice climatique", *op. cit.* p. 75.



Presented in this way, climate justice has several aspects: individual, collective or inter-state, depending on whether environmental inequalities affect individuals, social groups or countries. These different aspects of climate justice are helping to build up the still very abstract category of "climate victims" in public opinion and, no doubt, gradually before national courts<sup>7</sup>.

On the one hand, the individual aspect of climate justice is based on the human right to live in a healthy environment, which is now materialised by its increasingly real justiciability before the courts. Consideration of the individual aspect of climate justice is clear from the preamble to the decision preceding the Paris Agreement, which states that "...Parties should, when taking measures to address these changes, respect, promote and take into account their respective obligations regarding human rights, the right to health, (...), migrants, children, persons with disabilities and persons in vulnerable situations..."<sup>8</sup>.

A few examples of action for climate justice by vulnerable people have been seen here and there around the world: action by a group of children in the United States<sup>9</sup>, a little girl in India<sup>10</sup>, a farmer in Pakistan<sup>11</sup> and grandmothers in Switzerland<sup>12</sup>. These climate actions by people who are most vulnerable to the consequences of climate change are highly visible in the media because of their compassionate impact, but also legally because of their clear link with human rights obligations<sup>13</sup>.

In reality, these actions aimed at repairing specific damage caused by the effects of climate change are still difficult to bring to a successful conclusion, either because of the lack of a sufficient causal link or because of the sovereign immunity of the State accused of negligence<sup>14</sup>. Domestic court actions against public authorities have often resulted in injunctions, the enforcement of which still *ultimately* depends on the political will<sup>15</sup>.

On the other hand, the collective or inter-state aspect of climate justice is based primarily on the principle of equity and on the principle of common but differentiated responsibilities. The latter principle first appeared in 1992 in Principle 7 of the Rio Declaration, in Article 3 of the United Nations Framework Convention on Climate Change (UNFCCC) and in the Paris Agreement<sup>16</sup>. This principle is based on the observation that countries are at different stages of development, which means that they have contributed, or are contributing, to varying degrees to environmental degradation, and that they do not all have the same rights and responsibilities.

<sup>7</sup> C. Cournil, "Les convergences des actions climatiques contre l'État. Étude comparée du contentieux national", *Revue juridique de l'environnement*, special issue, 2017, p. 251.

<sup>8</sup> Paris Agreement, preamble, § 11; article 7, §§ 5 and 7.

<sup>9</sup> See the NGO website: <https://www.ourchildrenstrust.org/>.

<sup>10</sup> Petition filed in April 2017 by Ridhima Pandey before the National Green Tribunal.

<sup>11</sup> *Leghari v. Federation of Pakistan*, W.P. No. 25501, Lahore High Court, Sept. 4, 2015.

<sup>12</sup> Application by the *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council* in 2016, website of the NGO *Les aînées pour la protection du climat*, <http://ainees-climat.ch/>.

<sup>13</sup> C. Cournil, "Les convergences des actions climatiques contre l'État...", *op. cit.* p. 254.

<sup>14</sup> UNEP, *The Status of Climate Change Litigation, Global Review*, May 2017, Nairobi, UNEP Publication, pp. 19-22.

<sup>15</sup> A.-S. Tabau, "Les circulations entre l'Accord de Paris et les contentieux climatiques nationaux: quel contrôle de l'action climatique des pouvoirs publics d'un point de vue global?", *Revue juridique de l'environnement*, special issue, 2017, p. 242.

<sup>16</sup> Art. 2, para. 2 of the AP of 12 Dec. 2015.

do not have the same technical and financial capacities. At the same time, this principle recognises that only global, coordinated action can protect and restore the health and integrity of the Earth's ecosystem.

The Paris Climate Agreement refers indiscriminately to these different aspects (individual, collective or inter-state) of climate justice in various, sometimes very vague terms. For example, it refers to strengthening equity and combating poverty; recognising the efforts of civil society and encouraging a participatory approach; and recognising the principle of common but differentiated responsibilities; stakeholders "should" respect, promote and take into account their respective obligations regarding human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and persons in vulnerable situations and the right to development, as well as gender equality, the empowerment of women and intergenerational equity<sup>17</sup>, etc.

The present reflection on the "effectiveness" and "efficiency" of implementing climate justice requires clarification of these other two concepts, in order to avoid any sometimes imperceptible slippage towards related notions such as "efficiency", the three forming what Marie-Anne Frison-Roche has called a "Bermuda triangle built on three distinct features"<sup>18</sup>. Indeed, these three concepts are so closely linked that they are considered interchangeable<sup>19</sup>. In classical law, effectiveness and efficacy are simply regarded as identical<sup>20</sup>. Despite this apparent confusion, a clear distinction must be drawn between them.

The term "effectivity" comes from the Latin "*effectivus*" (which produces) and "*effectus*" (effect). According to the Littré dictionary, its first meaning is "which produces effects". A phenomenon is said to be effective when it exists, when it has left behind the simple state of form, power or virtuality<sup>21</sup>. In practical terms, effectiveness makes it possible to measure the gap between the standard laid down and the behaviour followed, to see whether it is actually applied<sup>22</sup>, application being the "dominant paradigm of the notion of the effectiveness of the law". In the same vein, Paul Amselek states that "the analysis of the effectiveness of legal rules concerns the question of their application"<sup>23</sup>, both by members of the public and by various organs of the State apparatus. Thus, the two key terms (effectiveness and ineffectiveness) "refer to the possibility of measuring the existing gaps between the law in force and the social reality it is supposed to regulate"; in this sense, they "fully belong to the sociology of law"<sup>24</sup>. As we can see, effectiveness is an *ex post* concept that allows us to measure empirically the degree to which a legal standard has been achieved<sup>25</sup>. According to Tatiana Gründler, "to question the effectiveness of a right is to question

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<sup>17</sup> Preamble to the Paris Agreement.

<sup>18</sup> M.-A. Frison-Roche, "L'efficacité des décisions en matière de concurrence : notions, critères, typologie", *Petites affiches*, n°259, pp. 4-5.

<sup>19</sup> L. Heuschling, "Effectivité, 'Efficacité', 'Efficience' et 'Qualité' d'une norme / du droit. Analyse des mots et des concepts", in A. Vidal-Naquet (ed.), *L'efficacité de la norme juridique. Nouveau vecteur de légitimité ?* Brussels, Bruylant, 2012, p. 57.

<sup>20</sup> M.-A. Frison-Roche, "L'efficacité des décisions en matière de concurrence ...", *op. cit.* p. 5.

<sup>21</sup> *Ibid.*

<sup>22</sup> H. Reid, *Dictionnaire de droit québécois et canadien*, 2<sup>e</sup> ed, Montréal, Wilson et Lafleur, 1996, p. 209; G. Cornu (dir.), *Vocabulaire juridique*, 9<sup>e</sup> ed, Quadrige/PUF, Paris, 2012, p. 384.

<sup>23</sup> P. Amselek, *Perspectives critiques d'une réflexion épistémologique sur la théorie du droit*, Paris, LGDJ, 1964, p. 340.

<sup>24</sup> P. Lascombes, "Effectivité", *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2<sup>e</sup> ed, Paris, LGDJ, 1993, p. 217.

<sup>25</sup> L. Heuschling, "Effectiveness', 'Efficiency' and 'Quality'", *op. cit.* p. 32.





on its implementation"<sup>26</sup> . This brings effectiveness closer to efficiency, without confusing the two.

Effectiveness", on the other hand, refers to what "produces the expected effect", what "succeeds"<sup>27</sup> . Thus, what is effective is "that which produces the expected effects", that which is hoped for, desired or desired. As one author has written<sup>28</sup> , effectiveness is "the method of assessing the consequences of legal norms and their suitability for the ends they are intended to achieve". Effectiveness is a term that makes it possible to measure the gap between the rule laid down and the objective pursued, in order to see whether the expected result has been achieved. The concept of effectiveness therefore assumes that the legal scientist focuses on the *raison d'être* of the rule, the *ratio legis*, or, in other words, the aim.

Finally, the last term ("efficiency"), which is an Anglicism (from the English "*efficiency*") - a detail which is not entirely insignificant<sup>29</sup> -, is the least traditional and the least familiar to legal experts. It is a term that is at the heart of the economic analysis of law, and its influence is growing. We speak of efficiency when we seek to achieve the desired result at the lowest cost, i.e. by optimising the resources employed. Efficiency can be quantified by the ratio between the results obtained and the resources consumed or used. Efficiency is therefore the result of a cost-effectiveness analysis, linked to the success of an activity. In the context of globalisation, where countries are competing to attract foreign investors, players are increasingly tempted to look at the law from an economic angle. This is why the climate (both mitigation and adaptation) is now tending to be taken into account in cost-benefit assessments. Chronologically, for a standard to be "effective", it must first be "effective". Effectiveness, which presupposes and goes beyond effectiveness and efficiency, is therefore the most complete state of human action<sup>30</sup>

Given the lack of enthusiasm and commitment to climate justice on the part of many countries, it is worth asking what the chances are of its successful implementation in Africa. In other words, are African demands for climate justice in application of the principle of equity and the principle of common but differentiated responsibilities, clearly enshrined in the UNFCCC and the Paris Agreement, likely to succeed? In other words, can the enshrinement of climate justice in legal texts produce the desired result, or should it not be seen as a mere incantation with mixed repercussions in developing countries, particularly in Africa?

It is appropriate to review the obstacles to the operationalisation of climate justice in Africa (1), before making proposals for better implementation of climate justice in this continent marked by its acute climato-vulnerability<sup>31</sup> (2).

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<sup>26</sup> T. Gründler, "Effectivité, efficacité, efficience. L'exemple du droit à la santé", in V. Champeils-Desplats and D. Lochak (eds.), *À la recherche de l'effectivité des droits de l'homme*, Presses universitaires de Paris Nanterre, 2012, p. 32.

<sup>27</sup> P. Pescatore, *Introduction à la science du droit*, Luxembourg, Office des imprimés de l'État, 1960/78, pp. 399 et seq.

<sup>28</sup> R. Bettini, "Efficacité", *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2<sup>e</sup> ed, Paris, LGDJ, 1993, p. 219.

<sup>29</sup> B. Frydman and G. Haarscher, *Philosophie du droit*, Connaissance du droit, Dalloz, 1998, p. 49 et seq.

<sup>30</sup> M.-A. Frison-Roche, "L'efficacité des décisions en matière de concurrence ...", *op. cit.* p. 5.

<sup>31</sup> M. A. Mekouar, "L'Afrique à l'épreuve de l'Accord de Paris : ambitions et défis", *Revue juridique de l'environnement*, special issue, 2017/HS17, p. 60.

## 1. Obstacles to the operationalisation of climate justice in Africa

The African continent is in the front line when it comes to implementing climate justice, as its vulnerability to the effects of climate change is inversely proportional to its responsibility. This is what Professor Mohamed Ali Mekouar calls "Africa's acute climate vulnerability"<sup>32</sup>. Despite this bitter observation, and notwithstanding the fact that climate justice is enshrined in law, there are still a number of bottlenecks to its implementation in Africa. The obstacles to action, both in terms of reducing emissions and adaptation (understood in the broad sense of transforming lifestyles), are legal (1.1), financial (1.2) and political (1.3).

### 1.1. Legal limits: a relatively vague commitment to climate justice

Given that the international community agrees on the urgency of taking action to reduce the effects of climate change, governments must be forced to make ambitious commitments, which is not yet fully the case.

#### 1.1.1. A hybrid of standards combining legal obligations and directives

Despite the strong words used to hail the Paris Agreement<sup>33</sup>, the fact remains that it is characterised by a varying degree of normative intensity, which has been described by academic writers as a hybrid of norms combining legal obligations and directive prescriptions, or as a mixed normative arrangement resulting from a subtle consensual architecture<sup>34</sup>.

On the one hand, *mandatory standards* consist of legal obligations of result ("shall") or of means ("should"), even if their scope and force are played out in nuances. By way of illustration, the Paris Agreement requires States to establish, communicate and update nationally determined contributions (NDCs) every five years and to take domestic mitigation measures to achieve their targets; subsequent NDCs must, by virtue of the principle of non-regression, represent progress<sup>35</sup> and correspond to the highest possible level of ambition<sup>36</sup>.

On the other hand, the Paris Agreement contains numerous *non-binding provisions*. For example, Article 4 paragraph 1 states that in order to contain the rise in temperature (2°C/1.5°C objectives), a global cap on GHG emissions must be achieved as soon as possible, with a view to achieving a balance between emissions by sources and removals by sinks during the second half of the century. It should be noted that this provision does not specify a date by which States must cap their GHG emissions.

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<sup>32</sup> *Ibid.*

<sup>33</sup> K. Tate et al, *Is the Paris Agreement really legally binding? How will this constraint be applied? What transparency is planned?* Compte rendu des exposés des étudiants, Master droit et politique de l'environnement, Faculté de droit de l'Université de Lomé, 2015-2016, p. 3.

<sup>34</sup> M. A. Mekouar, "Global climate governance between New York, Paris and Marrakech: commitments, expectations and challenges", paper presented at the 2<sup>e</sup> *international symposium on environmental law in Africa*, Rabat (Morocco), 25 July 2016.

<sup>35</sup> The principle of progression is the positive version of the principle of non-regression: M. Prieur and G. Sozzo (eds.), *La non-régression en droit de l'environnement*, Brussels, Bruylant, 2012, 550 p.

<sup>36</sup> Art. 4-2, 4-3, 4-9 of the AP.



Similarly, Article 9 (1) of the same Agreement states that "Developed country Parties shall provide financial resources to assist developing country Parties for both mitigation and adaptation in a manner consistent with their obligations under the Convention". This mobilisation of resources for financing climate action by developed countries should represent an upward trend from 2015<sup>37</sup>, compared with previous efforts<sup>38</sup>. As the doctrine points out, this is a "relatively vague commitment by developed countries to financially support developing countries"<sup>39</sup>.

In the same vein, it should be noted that the "floor figure" of 100 billion per year, which will be used to negotiate a new mobilisation effort for the period after 2025, is not a conventional figure, in that it only appears in the Decision that precedes the Paris Agreement<sup>40</sup>. Given that this Decision is not binding on the States that ratify the Paris Agreement, there are grounds for expressing some reservations about its effectiveness, or even its efficiency in the fight against climate change. What's more, the information provided by developed countries on the public resources they have mobilised to support developing countries is only "indicative"<sup>41</sup>.

All these weaknesses and many others have led to criticism of the Paris Agreement for its non-binding nature<sup>42</sup>, and *ultimately* for its inability to effectively combat the effects of climate change.

### 1.1.2. Timid and variable contributions, voluntarily set by the Member States

The Paris Agreement does not set individual targets for reducing GHG emissions, adapting to the effects of climate change or providing technological and financial support. It leaves it up to the Parties themselves to set their own NDCs<sup>43</sup>. It is clear that these are merely "behavioural obligations"<sup>44</sup> which leave open the possibility that this may not necessarily be the case<sup>45</sup>.

As a result of this freedom granted to the Parties, the States' NDCs are designed with timid targets, freely set by the Parties. This "bottom-up" approach, which respects the will of the Parties, has been criticised for its lack of ambition<sup>46</sup>. According to the doctrine, these notoriously inadequate commitments currently put the planet on a trajectory not of 2°C, but rather of 3 or 3.5°C<sup>47</sup>.

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<sup>37</sup> Dec. 1/CP.21, §§ 53 and 114.

<sup>38</sup> Art. 9-3 *in fine* of the AP.

<sup>39</sup> S. Lavallée, "From COP21 Paris 2015 to COP22 Marrakech 2016: Paris 2015: the COP of "commitment"? Marrakech 2016: the COP of "action"? Washington 2017: A potential legal denunciation?", <https://alfresco.uclouvain.be/>.

<sup>40</sup> Dec. 1/CP.21, §§ 54 and 115.

<sup>41</sup> Art. 9-5 of the AP.

<sup>42</sup> A. Garric, "Is the agreement reached at COP21 really legally binding?", *Le Monde*, 14 February 2015.

<sup>43</sup> Art. 4 § 2 of the AP.

<sup>44</sup> S. Maljean-Dubois, L. Rajamani, "The Paris Agreement on Climate Change of 12 December 2015", *AFDI*, 2015, vol. 61, pp. 615-648.

<sup>45</sup> E. Brosset, "Conclusions", *Revue juridique de l'environnement*, special issue, 2017, p. 271.

<sup>46</sup> A.-S. Tabau, "Les circulations entre l'Accord de Paris et les contentieux climatiques nationaux...", *op. cit.*, p. 235.

<sup>47</sup> A. Dahan, "La gouvernance du climat : entre climatisation du monde et schisme de réalité", *L'Homme et la Société*, n° 199, pp. 79-90, July 2016.

The Paris Agreement also stipulates that NDCs must provide for the cost of implementing adaptation and mitigation measures. Adaptation measures are a particular feature of African NDCs, compared with those of several countries in other regions, where they are totally ignored. Professor Mohamed Ali Mekouar speaks of the "transversal omnipresence of adaptation in the continent's NDCs", although priority is given to agriculture, renewable energy and water<sup>48</sup>.

In terms of mitigation, African NDCs are quite dissimilar and difficult to compare. Overall, they reflect a level of ambition that can be described as "average". In detail, however, their commitments vary widely, ranging from a maximum of -89% (Namibia) to a minimum of -11.6% (Burkina Faso). What's more, as the timeframe for mitigation efforts has not been specified, it is often set at 2030, rarely 2025, 2035 or 2040. It is sometimes double - 2025/2030, 2025/2035, 2030/2050, 2035/2050 - with progressive percentages of emission reductions between the target years<sup>49</sup>.

### **1.1.3. Weakening the compensation mechanism for loss and damage**

The compensation mechanism for loss and damage has been recognised as the third pillar of climate action, alongside GHG reduction and adaptation to climate disruption. This mechanism should be useful when mitigation and adaptation have not prevented the occurrence of loss and damage. It is enshrined in Article 8 of the Paris Agreement. It should be remembered that this "loss and damage" mechanism was called for by the developing countries and obtained at the Warsaw Conference in 2013, with the aim of getting the developed countries to repair the damage that their production and consumption patterns cause to the populations of the developing countries.

Unfortunately, there still seems to be a "red line" that developed countries do not yet want to cross in negotiations with the countries most vulnerable to climate change. The Decision preceding the Paris Agreement clearly states that the "loss and damage" mechanism "shall not give rise to or serve as a basis for liability or compensation"<sup>50</sup>. It was this reduction in the scope of Article 8 of the Paris Agreement that prompted Nicaragua to withdraw from the Agreement. Yet the urgency is clear: UNEP estimates that by 2030, the total loss and damage for Africa alone would amount to 100 billion per year if global warming were to be kept below 2°C<sup>51</sup>.

### **1.1.4. The residual role of renewable energies in the Paris Agreement and damaging omissions**

Another limitation of the Decision and the Paris Agreement is the absence of any reference to the development of renewable energies, with the exception of the following mention in the preamble to the Decision: "Recognising the need to promote universal access to sustainable energy in developing countries, particularly in Africa, by enhancing the deployment of renewable energies". As we can see, the Paris Agreement does not affirm its firm commitment to implementing measures for the transition to a low-carbon economy.

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<sup>48</sup> *Ibid*, p. 65.

<sup>49</sup> M. A. Mekouar, "L'Afrique à l'épreuve de l'accord de paris : ambitions et défis", *op. cit.*, p. 65.

<sup>50</sup> Dec. 1/CP.21, § 52.

<sup>51</sup> F. Petitbon, "Au cœur de la justice climatique : l'enjeu des pertes et dommages", 2017, <https://reseauactionclimat.org/justice-climatique-pertes-dommages/>.



As for the long term, many aspects remain taboo, such as the point at which we will have to do without fossil fuels. One author observes that "the oil-producing countries do not want to contemplate this stage, and the negotiators have found some very convoluted ways of saying that we will have to 'absorb what we emit'. Hence the misleading rhetoric about negative emissions, which is nothing but an intellectual and political deception. The technologies that would enable us to absorb carbon emissions simply do not exist today! So no real stabilisation of the climate is in sight<sup>52</sup>. The author makes a very clear reference to the double game being played by the Middle East oil monarchies, who are blocking any progress in the negotiations, while at the same time demanding funds for adaptation<sup>53</sup>. Some references, even declarative ones, are also missing from the Paris Agreement. This is the case, for example, with transport and the circular economy.

### **1.1.5. The absence of coercive measures to implement climate justice**

From the point of view of international law, the Paris Agreement is not strictly speaking binding insofar as it does not provide for coercive mechanisms or sanctions as the Kyoto Protocol did for countries that do not respect their commitments. The signatory states of the Agreement could therefore drink the chalice of pollution to the dregs by ignoring the obligations of the Paris Treaty<sup>54</sup>.

In the event of non-compliance with its provisions, the Paris Agreement does not intend to use force to compel States to fulfil the commitments they have made in good faith. On the contrary, it is through "facilitation", monitoring and the periodic reports of the group of experts set up that the Agreement hopes to achieve the expected results<sup>55</sup>. As can be seen, the various components of the control mechanism of the Paris Agreement have been bitterly negotiated to exclude any jurisdictional or conflictual coloration.

In the absence of any legal constraint, the only sanction against states can only be reputational, i.e. involving the reputation of countries in the eyes of their peers and public opinion. In reality, it is the "*name and shame*" rule that acts as a punishment and should encourage countries to keep their promises.

## **1.2. Financial limits: the uncertain financing of climate action**

From an economic point of view, the obstacles to implementing climate justice in Africa stem from the gap between needs and resources on the one hand, and the lack of ambition on the part of certain countries in making commitments to finance climate action on the other.

### **1.2.1. Funding gaps between needs and resources**

The main economic difficulty in implementing climate justice lies in the fact that the problems are in the countries of the South while the resources are in the countries of the North. As one author has written<sup>56</sup>, one day resources will have to be brought closer together.

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<sup>52</sup> A. Dahan, "La gouvernance du climat : entre climatisation du monde et schisme de réalité", *L'Homme et la Société*, no. 199, July 2016, pp. 79-90.

<sup>53</sup> *Ibid.*

<sup>54</sup> K. Tate et al, *Is the Paris Agreement really legally binding?...*, Proceedings, p. 5.

<sup>55</sup> Art. 15 of the AP.

<sup>56</sup> M. Kamto, "La mise en œuvre du droit de l'environnement: forces et faiblesses des cadres institutionnels", *Revue africaine de droit de l'environnement*, no. 1, 2014, p. 29 et seq.

problems. From summits to conferences, promises are made about the transfer of financial and technological resources to the countries of the South, but never seriously fulfilled<sup>57</sup>. This is what Amy Dahan and Stefan Aykut call the "reality schism", reflecting the "growing gap" between the ambitions pursued in international negotiations and "the reality of the world, that (...) of states caught up in fierce economic competition and clinging more than ever to their national sovereignty"<sup>58</sup>. It is this

The "glaring gap between, on the one hand, the rhetoric and, on the other, the real facts to the contrary inspires the scholar to examine the ineffectiveness"<sup>59</sup>, or even the ineffectiveness, of climate action. The financing gap between needs and resources is illustrated by the fact that the resources announced in the Decision preceding the Paris Agreement (USD 100 billion between now and 2020 and up to 2025) are clearly insufficient and still largely virtual.

Of the US\$100 billion earmarked per year, less than US\$1 billion has been mobilised annually for the climate, of which only 3.6% benefited Africa in 2014. The promised resources, while clearly insufficient, remain largely virtual. Professor Mohamed Ali Mekouar refers to this as the "random financing of climate action"<sup>60</sup>, since to date there is no clear roadmap for achieving real financing. Although recent improvements have been noted, the gap between identified needs and available funding remains enormous<sup>61</sup>.

### 1.2.2. Less ambitious financial commitments from governments

The issue of climate financing is a crucial dimension of the Paris Agreement, which requires developed countries to provide financial support to developing countries in their mitigation and adaptation efforts<sup>62</sup>.

Overall, the commitments relating to the financing of the fight against climate change are imprecise, being made "as part of a global effort"<sup>63</sup>. There is also a lack of precision in the reference to carbon pricing in paragraph V of the Decision (Non-Parties), which "Recognizes also the importance of providing incentives for emission reduction activities, including tools such as national policies and carbon pricing".

Finally, it is clear that the Paris Agreement includes a relatively vague commitment by developed countries to provide financial support to developing countries<sup>64</sup>. Despite the urgency of the situation, the fight against global warming is going far too slowly: the commitments announced to reduce greenhouse gases and to finance mitigation and adaptation by developing countries to climate disruption are largely inadequate, not to mention assistance for the victims of climate disruption, which is virtually non-existent to date<sup>65</sup>.

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<sup>57</sup> *Ibid.*

<sup>58</sup> A. Dahan and S. C. Aykut, *Gouverner le climat, 20 ans de négociations internationales*, Paris, Presses de Sc. Po, 2015, pp. 399-400; A. Dahan, "La gouvernance du climat : entre climatisation du monde et schisme de réalité", *op. cit.*

<sup>59</sup> L. Heuschiling, "'Effectiveness', 'Efficiency' and 'Quality'", *op. cit.* p. 46.

<sup>60</sup> M. A. Mekouar, "L'Afrique à l'épreuve de l'accord de paris : ambitions et défis", *op. cit.* p. 66.

<sup>61</sup> *Ibid.*, p. 67.

<sup>62</sup> Art. 9-1 of the AP.

<sup>63</sup> Art. 9, § 3 of the AP.

<sup>64</sup> Art. 9 [1] of the AP.

<sup>65</sup> <https://www.cncd.be/justice-climatique->



### 1.3. Political limits linked to the contrasting enthusiasm of the various protagonists

The mixed results achieved at several Conferences of the Parties (COPs) have disappointed many observers and exacerbated criticism of the diplomatic route, which is more than ever criticised for its slowness and shortcomings. On the political front, the bottlenecks to implementing climate justice are to be found at several levels. In Africa, environmental law still faces what Professor Maurice Kamto calls the "extraversion of environmental policies"<sup>66</sup>. According to him, environmental law is not perceived in Africa as the product of a decision by Africans to meet local requirements, nor as the normative translation of an endogenous, conscious and deliberate national policy for the protection of nature and the sustainable management of natural resources and spaces for present and future generations<sup>67</sup>. Environmental requirements are still seen by some as an obstacle to the economic emergence of African countries.

In addition to this negative perception of environmental law, the poor governance of African leaders is also a serious obstacle to the implementation of climate justice in Africa. By way of illustration, while the texts stipulate that the NDCs must specify the expected sources of funding for adaptation and mitigation actions, clearly indicating local sources (unconditional) and external sources (conditional), we find that a consistent proportion of the funding (12.71%) provided for in the NDCs of African states is not clearly divided between mitigation and adaptation needs, indicating uncertainties as to the final use of the amounts not pre-allocated<sup>68</sup>.

Indeed, the compensation system is presented as a climate justice mechanism for Africans. But as half a century of corruption, mismanagement and oppression, fuelled in part by a largely ineffective international aid system, has shown, we can only be very pessimistic about the use of these funds and fear that the benefits of these billions will not reach the average African<sup>69</sup>. Even if, to our knowledge, there have been no cases brought before domestic courts concerning the inadequacy or misuse of climate finance<sup>70</sup>, the increase in climate action funding by developed countries could fuel such lawsuits in Africa. To this end, *accountability* mechanisms must be put in place as part of the transparency of climate finance, otherwise the granting of financial assistance will only be relevant for some and could have a counter-productive effect.

At European level, the "old continent" is still facing what the Anglo-Saxons call *Eurobashing* or euroscepticism on the part of the United States and emerging countries. This denigration is reflected in the European Union's inability to deal with the problems associated with climate change. For example, a comparison of the levels of ambition of the EU's NDCs and those of four African countries shows that the latter are more ambitious than the former<sup>71</sup>.

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<sup>66</sup> M. Kamto, "La mise en œuvre du droit de l'environnement...", *op. cit.* p. 29 et seq.

<sup>67</sup> *Ibid.*

<sup>68</sup> M. A. Mekouar, "L'Afrique à l'épreuve de l'Accord de Paris : ambitions et défis", *op. cit.*, p. 67.

<sup>69</sup> [http://www.librefrique.org/Martin\\_Afrique\\_Climat\\_061212](http://www.librefrique.org/Martin_Afrique_Climat_061212).

<sup>70</sup> A.-S. Tabau, "Les circulations entre l'Accord de Paris et les contentieux climatiques nationaux...", *op. cit.*, p. 238.

<sup>71</sup> According to *Climate Action Tracker*, the EU's NDC ambition is only "medium", while it is "sufficient" for Ethiopia, Gambia and Morocco, and "inadequate" only for South Africa.

In the United States, the withdrawal and subsequent re-entry of the United States into the Paris Agreement is regrettable. Although the United States officially rejoined the Paris Agreement on 19 February 2021, the fact remains that this procrastination has had a counter-productive effect on the Parties' willingness to make a greater commitment to climate action.

Global climate governance, of which Amy Dahan claims her obesity and paralysis have gone hand in hand<sup>72</sup>, is also a brake on the implementation of climate justice. *Climategate* in 2009, on the eve of the Copenhagen summit, which revealed the manipulation of data on global warming and pressure to prevent the publication of work sceptical of anthropogenic warming, speaks volumes about the anti-scientific nature of certain specialists working on a subject that is in fact highly politicised. In such a context, the commitment of States to direct resources towards the fight against global warming could result in more reluctance<sup>73</sup>, or even crystallise the blatant unwillingness of certain Parties to contribute to the response to climate change.

All these bottlenecks and many others lead us to propose a number of possible solutions for better implementation of climate justice in Africa.

## **2. Proposals for better implementation of climate justice in Africa**

For the concept of climate justice to be appropriated and implemented effectively in Africa, action must be taken on both the substantive and procedural aspects of this law. With regard to the substantive aspect, governments in both the North and South must strengthen their climate commitments (2.1). As financing is a crucial aspect of the Paris Agreement, they must also, and above all, strengthen climate financing mechanisms (2.2). On the procedural side, judges also have a crucial role to play in implementing climate justice in Africa (2.3).

### **2.1. Strengthening governments' commitment to climate justice**

Strengthening governments' commitment to climate justice means reinforcing their duty of vigilance in the face of global warming and the need to respect their international commitments.

#### **2.1.1. The need to strengthen governments' duty of vigilance in the face of global warming**

The duty of due diligence imposed on the State in climate matters was recognised for the first time by a Dutch judge in the case of *Urgenda foundation v. Kingdom of the Netherlands*<sup>74</sup>. In this case, the Urgenda foundation had written to the Dutch Prime Minister in 2012 requesting that the State undertake to reduce its CO<sub>2</sub> emissions by 40% by 2020 compared to the emissions measured in 1990. Unsatisfied with the response, the foundation decided to take the case to the Court of First Instance in The Hague on 24 June 2015, which handed down a landmark decision invoking the principles of international law.

<sup>72</sup> A. Dahan, "La gouvernance du climat : entre climatisation du monde et schisme de réalité", *op. cit.*

<sup>73</sup> E. Martin, "Climate justice: billions for Africa", [www.contrepoints.org/2012/12/07/107103-justice-climatique-des-milliards-pour-lafrique](http://www.contrepoints.org/2012/12/07/107103-justice-climatique-des-milliards-pour-lafrique).

<sup>74</sup> District Court, The Hague, 24 June 2015, Case C/09/456689/HA ZA 13-1396.



The judge used both scientific arguments (the IPCC report) and legal arguments (he referred to the texts binding the State, in particular the principle of common but differentiated responsibilities) to conclude that the Netherlands' ambition was too low. This led it to impose a duty of care on the Dutch government by setting a standard for reducing its greenhouse gas emissions by at least 25% by 2020. It follows from this decision that what the national court needs to determine what corresponds to a valid climate objective is a long-term trajectory based on scientific knowledge, which is now set by the Paris Agreement through the objective of 2°C, or even 1.5°C, but also a translation of this objective in terms of GHG reductions<sup>75</sup>.

The State's duty of vigilance in climate matters, as in other areas, takes the form of both substantive and procedural obligations. In terms of substantive obligations, States can be expected to devote particular attention to :

- the fundamental right to a climate system capable of sustaining human life for both present and future generations. The claim to this right is clear from the 2016 case of *Kelsey Cascade Rose Juliana v. the United States of America*<sup>76</sup> ;
- the obligation to protect vulnerable people most affected by the negative effects of climate change.

In procedural terms, the State should be responsible for :

- a procedural obligation to carry out a climate assessment of acts by public authorities that could undermine the stability of the climate system, by monitoring "climate-damaging projects";
- the procedural obligation to inform citizens of climatic damage, etc.

### 2.1.2. The need for States to respect their international commitments

There is an urgent need to change the African perception of environmental law as an externality. It would be good policy to "inculturate" this law to make it an endogenous right<sup>77</sup>. In this way, grassroots populations will not feel that they are applying laws that are imposed on them and whose justification they do not always understand. If climate justice is to be implemented effectively, these purely psychological considerations and national frameworks must be overcome.

To date (1<sup>er</sup> October 2023), some countries have signed but not yet ratified the Paris Agreement. These include the Islamic Republic of Iran, Libya and Yemen<sup>78</sup>. This shows a deliberate lack of political will on the part of these countries to take action on climate change. There is simply reason to hope that the States that have ratified the Paris Agreement have done so sincerely and that these ratifications are followed by scrupulous compliance with its provisions. If we take the case of China, for example, which is the leading country in terms of investment in solar energy, we know that in 2015 it approved the construction of at least 150 new coal-fired power stations, with Chinese coal consumption doubling over the decade.

<sup>75</sup> A.-S. Tabau, "Les circulations entre l'Accord de Paris et les contentieux climatiques nationaux ...", *op. cit.*, p. 236.

<sup>76</sup> *Kelsey Cascade Rose Juliana v. the United States of America*, 6:15-cv-01517-TC. Opinion and Order, 10 November 2016.

<sup>77</sup> M. Kamto, "L'impératif de l'inculturation ("endogénéisation") du droit de l'environnement en Afrique", *Revue africaine de droit de l'environnement*, n°1, 2014, p. 153 et seq.

<sup>78</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=XXVII-7-d&chapter=27&clang=\\_fr](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&msgid=XXVII-7-d&chapter=27&clang=_fr).



2004-2014, fuelling endemic air pollution. *Ultimately*, if there is no real commitment on the part of governments, the entry into force of the Paris Agreement will remain a pipe dream. In the face of certain reluctance, Africa must avoid any regressive temptation in reaction to postures of disengagement, wherever they may come from, because it has everything to lose from a possible weakening of the Paris Agreement and everything to gain from its strengthening<sup>79</sup>.

## **2.2. The need to strengthen funding mechanisms**

Strengthening the mechanisms for financing climate action involves making the Green Climate Fund operational, as well as diversifying the sources of financing for climate action.

### **2.2.1. The need to make the Green Climate Fund fully operational**

The Green Climate Fund is a United Nations financial mechanism attached to the UNFCCC. Its aim is to transfer funds from the most advanced countries to the most vulnerable countries in order to set up projects to combat the effects of climate change. Created in 2010, the Green Climate Fund is still struggling to mobilise the sums envisaged when it was set up, which means that it is still unable to achieve the objectives assigned to it. To this end, the Paris Agreement Decision "Further requests the Green Climate Fund to accelerate the delivery of support to the least developed countries and other developing countries..."<sup>80</sup>

### **2.2.2. The need to diversify sources of funding for climate action**

Several climate financing mechanisms have been devised by the international community to date, with relatively satisfactory effectiveness. New financing mechanisms therefore need to be reinvented. Given that MDG 10 advocates the reduction of inequalities within and between countries, for example, official development assistance and financial flows should be stimulated in favour of the countries that need them most, particularly African countries. Similarly, mechanisms for mobilising additional financial resources from various sources for developing countries should be reactivated.

Other financing mechanisms also deserve to be called upon. This is the case, for example, of the Addis Ababa Action Agenda (AAAA), adopted in July 2015 by the III<sup>e</sup> International Conference on Financing for Development as an integral part of the 2030 Agenda and in support of its implementation. The AAAA calls for increased financing for low-carbon and climate-resilient development<sup>81</sup>.

Resilience to climate change is a priority of Agenda 2063 (*The future we want for Africa*), implemented by the African authorities working within the framework of the African Union. This document is a strategic framework for the long-term sustainable development of the African continent. As its objectives converge with those of the United Nations' Agenda 2030, they must be implemented jointly and inclusively. Everything depends on the political will of the States, which in turn depends on the quality of the democratic debate.

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<sup>79</sup> M. A. Mekouar, "L'Afrique à l'épreuve de l'accord de paris : ambitions et défis", *op. cit.*, p. 71.

<sup>80</sup> Dec. 1/CP.21, § 47.

<sup>81</sup> § 60 of the Addis Ababa Action Plan (AAPA).

## 2.3. The decisive role of judges in implementing climate justice

The admissibility of climate litigation brought by NGOs before national courts no longer seems to pose any particular difficulties, especially as a dialogue between national judges is beginning to take shape<sup>82</sup>. This should lead African judges to be bolder in implementing climate justice.

### 2.3.1. The abundance of climate litigation as a source of inspiration for African judges

In recent years, climate justice has entered its procedural phase, with citizens suing governments and large private companies that emit large quantities of greenhouse gases. In a document entitled "The Oslo Principles on Climate Change Obligations", experts list a series of legal arguments to facilitate recourse against States and companies<sup>83</sup>.

It was during the 2000s that the American courts opened the way to climate litigation in the *Massachusetts v. EPA* case, decided in April 2007. In this case, the highest court in the United States ordered the US Environmental Protection Agency to regulate greenhouse gas emissions on the basis of the *Clean Air Act*<sup>84</sup>. In 2018, there were already more than 900 climate litigation cases in 24 countries, two-thirds of them in the United States<sup>85</sup>.

Of all these disputes, the *Urgenda foundation v. Kingdom of the Netherlands* case decided by the court in The Hague (Netherlands) on 24 June 2015 is considered to be "the first historic milestone in climate justice", in that it was the first time that the courts ordered a government to raise its climate ambitions. The case is famous for its groundbreaking nature and the knock-on effect it has had on other domestic courts. By ordering the Dutch government to reduce its GHG emissions in the country by at least 25% by 2020, the ruling vindicated the NGO Urgenda, which had initiated the action.

As we can see, the success of climate litigation rests in the hands of national judges, who can draw on the work of the IPCC on climate risk assessment and on the principles of the UNFCCC and various COPs to control the action (or inaction) of public authorities and companies in climate matters, as the Dutch judge did. Such a paradigm shift should lead African judges to be bolder in implementing climate justice in Africa.

### 2.3.2. African judges call for greater boldness

Case law on climate change is still in its infancy in Africa. Only a handful of rulings have been handed down by African courts, notably in Nigeria.

<sup>82</sup> A.-S. Tabau, "Les circulations entre l'Accord de Paris et les contentieux climatiques nationaux...", *op. cit.*, p. 240.

<sup>83</sup> <https://globaljustice.yale.edu>.

<sup>84</sup> <https://www.oyez.org/cases/2006/05-1120>.

<sup>85</sup> France 24, "Justice climatique : de plus en plus de procès pour sauver la planète", [www.france24.com/fr/20180407-justice-climatique-proces-industrie-fossile-RWE-Exxon-Mobil](http://www.france24.com/fr/20180407-justice-climatique-proces-industrie-fossile-RWE-Exxon-Mobil).



and South Africa, have been published to date<sup>86</sup>. This raises the question of the role of the African judge in the implementation of climate justice.

As one author has pointed out<sup>87</sup>, there are in fact two types of judge: the passive judge and the active judge. The passive judge or "spectator judge" is the one who is distant from the problems of environmental law. The active judge, on the other hand, is daring, incorporating into his reasoning the prescriptions of other legal areas and contributing to the development of new scientific principles and new concepts in environmental law. This is the case, for example, of the "*in dubio pro natura*" principle<sup>88</sup> enshrined by the Brazilian courts.

To achieve this, judges specialising in environmental law need to be trained. This would involve, for example, the creation of a judicial institute for environmental law and courts specialising in environmental disputes. In the same vein, Mathilde Boutonnet states that "we believe it is desirable to create genuine courts specialising in environmental disputes, staffed by competent judges assisted by scientists providing them with the insight they need to assess both the facts and the measures to be prescribed. Having grasped the extent of the damage caused to the environment, its causes and consequences for biodiversity, they would also be able to decide on the best measures to put an end to it or to compensate for it... Far from being incongruous, the idea is already finding concrete expression: Thailand, India and Chile are all experimenting with it. It will be objected that specialisation has a cost? But isn't that the price we have to pay to make [Africa] a model of "environmental justice" which, in time, could then be more legitimately promoted on the international stage?"<sup>89</sup>.

## Conclusion

The implementation of climate justice in Africa is still in its infancy. Timidly effective, it does not yet live up to the expectations of the (effective) claimants, because of the many legal, economic and political bottlenecks that continue to crystallise tensions between the various actors who are unfortunately "not all in the same boat to save the climate"<sup>90</sup> or to work collectively towards the effective implementation of climate justice. As climate change is a global phenomenon, implementing climate justice necessarily requires a multi-scalar response. For the response to be global, the participation of everyone is needed (legislators, judges, NGOs, citizens, etc.) to advance the climate cause. For as former US Secretary of State John Kerry reminded us at COP 22 in Morocco in 2016, failure to act to combat climate change is "not just a political failure, but a moral failure, a betrayal that would have devastating consequences"<sup>91</sup> such as climate injustice.

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<sup>86</sup> Worth knowing: *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd et al* (Federal Court of Nigeria, 2005); *EarthLife Africa Johannesburg (ELA) v. Ministry of Environmental Affairs and others*, No. 65662/16 (Supreme Court of South Africa, 2017), <http://www.saflii.org/za/cases/ZAGPPHC/2017/58.html>.

<sup>87</sup> B. Antonio Herman, "Judges and the environment", paper at the 2<sup>e</sup> International Colloquium on Environmental Law in Africa, Rabat (Morocco), 25 July 2016.

<sup>88</sup> *Ibid.*

<sup>89</sup> M. Boutonnet, "Pour la création de tribunaux environnementaux", <http://www.slate.fr/story/140705/creation-tribunaux-environnementaux>.

<sup>90</sup> A. Dahan, "La gouvernance du climat : entre climatisation du monde et schisme de réalité", *op. cit.*

<sup>91</sup> [https://www.liberation.fr/planete/2016/11/16/john-kerry-s-emploi-a-rassurer-la-cop-22\\_1528816](https://www.liberation.fr/planete/2016/11/16/john-kerry-s-emploi-a-rassurer-la-cop-22_1528816).

# MINING INDUSTRY RESISTANCE TO CLIMATE JUSTICE

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## Summary

More than thirty per cent of the world's mineral reserves are in Africa. This fact is whetting the appetite of several continents. Mining companies are setting up operations in Africa in order to benefit from the riches of the African subsoil. However, in their deployment, these companies are causing a great deal of harm and jeopardising climate justice. These riches, which could be considered blessed bread, are taking on the appearance of curses for the continent. The presence of these companies plunges local residents into a nightmare. People are dispossessed of their land, and agriculture suffers as a result of soil, water and air pollution. People's financial resources are virtually non-existent, leading to famine, violence and other abuses. The environment is being held hostage while extractive companies make colossal profits. With this in mind, the need to protect the terrestrial environment, particularly in Africa, has arisen. This paper will analyse the various avenues that can be explored to restore climate justice in Africa.

**Key words:** extractive industries; climate justice, local populations.

## Abstract

*Over thirty percent of the world's mineral reserves are in Africa. This reality is whetting the appetite of several continents. Mining companies are setting up operations in Africa to benefit from the riches of the African subsoil. However, in their deployment, these companies are causing a great deal of harm and jeopardizing climate justice. These riches, which could unambiguously be considered blessed bread, are turning into curses for the continent. The presence of these companies plunges local populations into a nightmare. People are dispossessed of their land, and agriculture suffers from soil, water, and air pollution. People's financial resources become almost non-existent, leading to famine, violence, and other abuses. The environment is taken hostage, while extractive companies make colossal profits. The need to protect the terrestrial environment, particularly in Africa, has become apparent. In this paper, we analyse the various avenues that can be explored to restore climate justice in Africa.*

**Keywords :** Extractive Industries; Climate Justice, Local Population.

## Introduction

The immense wealth of Africa's sub-soil (gold, bauxite, alumina, aluminium, cobalt, copper, diamonds, uranium and oil, among others)<sup>1</sup> is whetting the appetite of the world's largest mining companies<sup>2</sup>. This obvious attraction of the major multinationals to Africa can be explained by the fact that the extractive industry generates exceptional income for groups and states. The oil industry, for example, is one of the main sources of revenue for countries such as Cameroon, Gabon and the Republic of Congo. World trade in minerals has increased fivefold to almost €150 billion<sup>3</sup>, making it the most dynamic sector of international trade. Both oil and mineral extraction have the greatest environmental impact. The opening up of roads and deforestation to reach the exploitation sites, the destruction of soil, the diversion of watercourses and the drying up of water tables for the need for water, the subsidence of land due to the extraction of subsoil resources, noise pollution and air, water and soil pollution all reflect the impact of the deployment of these industries.

Activities of this nature cannot be carried out without taking account of these repercussions and calling for climate justice. From "environmental justice, which has hitherto focused on ecosystems and biodiversity, we have moved on to climate justice"<sup>4</sup>. This assertion by the Pakistani judge of the *Lahore High Court* in the *Leghari* case highlights the importance now being attached to climate justice as a result of the harmful consequences of climate change. Climate change represents a considerable challenge, firstly for the protection of humanity, but also for the protection of natural systems<sup>5</sup>.

Climate justice has emerged from the demands of various strands of civil society, which have given it a particular understanding depending on the interests they are defending<sup>6</sup>, and appears to be a fundamentally ethical concept that highlights issues of fairness, equality, responsibility and the protection of subjective rights raised by climate change. And, depending on how these issues are understood, there are two main types of climate justice: the corrective justice advocated by the countries of the South, and the distributive justice referred to by economists and philosophers in the countries of the North<sup>7</sup>. Corrective justice aims to 'correct' the inequalities caused by climate change and suffered most severely and directly by the extremely poor and vulnerable. These populations include those living on the African continent, which is highly exposed to climate change and has little capacity to adapt<sup>8</sup>. This justice is based on three key ideas, namely the historical responsibility of Western countries for climate change, their ecological or climate debt to developing countries, and the debt of the poorest countries to the poorest countries. The earth provides "global commons". It therefore represents an argument in

<sup>1</sup> O. Ruppel and E. Kam Yogo (eds.), *Droit et politique de l'environnement au Cameroun - Afin de faire de l'Afrique l'arbre de vie*, Yaoundé, Presses UCAC, 2018, p. 431.

<sup>2</sup> B. Campbell, *Mining resources in Africa. What regulation for development?* Ottawa, PUQ, 2010.

<sup>3</sup> O. Ruppel and E. Kam Yogo, *op. cit.*

<sup>4</sup> Lahore High Court, 25 January 2018, *Asghar Leghari v Pakistan*, Case WP n°25501/2015.

<sup>5</sup> IPCC, 2014: *Climate Change 2014: Impacts, Adaptation and Vulnerability Summaries, frequently asked questions and thematic inserts. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Edited by C. B. Field, V. R. Barros, D. J. Dokken, K. J. Mach, M. D. Mastrandrea, T. E. Bilir, M. Chatterjee, K. L. Ebi, Y. O. Estrada, R. C. Genova, B. Girma, E. S. Kissel, A.

N. Levy, S. MacCracken, P. R. Mastrandrea and L. L. White], Geneva, World Meteorological Organization, 201 p.

<sup>6</sup> A. Kiss "Environment and development or environment and survival", *JDI*, 1991, pp.263-282.

<sup>7</sup> C. Larrère "Qu'est-ce que la justice climatique?" in A. Michelot (ed.), *Justice climatique / Climate justice: enjeux et perspectives / Challenges and perspectives*, n°2, 2023 www.industries-extractives.org.

<sup>8</sup> O. Ruppel and E. Kam Yogo, *op. cit.*



climate negotiations to enable countries in the South to obtain aid to implement policies to combat climate change<sup>9</sup>. Distributive justice, on the other hand, aims to distribute responsibility for climate change in proportion to the level of greenhouse gas (GHG) emissions, given that this only becomes problematic once a minimum threshold is exceeded<sup>10</sup>. This justice is embodied in the principle of common but differentiated responsibilities expressly set out in the Rio Declaration on Environment and Development<sup>11</sup> and reaffirmed in the 1992 United Nations Framework Convention on Climate Change<sup>12</sup>. Thus, unlike corrective justice, distributive justice is based on the idea that all States share responsibility for the occurrence of climate change.

This raises the question of how to reconcile the needs of the mining industries with the challenges of climate justice. In order to complete this analysis, it seems imperative to highlight the mining industries' resistance to climate justice (1), and then to look at the means used to overcome this resistance (2).

## **1. The mining industry's resistance to climate justice**

The interests generated by the extraction of Africa's subsoil resources leads the beneficiaries to trample on numerous standards. This state of affairs leads us to examine the reluctance of mining companies to comply with environmental protection rules in host countries (1.1) and the frequent use of highly polluting mining techniques (1.2).

### **1.1. The reluctance of mining companies to comply generally with environmental protection rules in host countries**

In *Pitfalls and Pipelines*, extractive industries are defined as "those involving the physical extraction of non-renewable raw materials from the earth, through mining, quarrying, dredging or drilling. Forestry, hydro or large-scale monoculture are sometimes included in this definition, but are generally not because they involve resources that can be regenerated"<sup>13</sup>.

The construction of open-cast mines by the industries that exploit raw materials is carried out in violation of the regulations in force and has numerous consequences for the health of local residents. One example is the Mbalam iron ore project in Cameroon, which the Australian company *Sundance Resources* embarked on in 2005. The project covers an area of 937 km<sup>2</sup> and involves the construction of a mine with a lifespan of more than 25 years, located near the Nki park<sup>14</sup>. It includes, among other things, the construction of an ore terminal in the area of the deep-water port of Kribi and the construction of a railway line dedicated to transporting the extracted ore.

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Principle 7, 1992 Rio Declaration on Environment and Development.

<sup>12</sup> Article 3, United Nations Framework Convention on Climate Change.

<sup>13</sup> P. Kromarek, "La mise en œuvre du droit de l'environnement à l'échelle nationale et internationale", in *Environnement et droit de l'homme*, Paris, UNESCO, 1987.

<sup>14</sup> O. Ruppel and E. Kam Yogo, *op.cit.*

In terms of environmental impacts and impacts on biodiversity in general, this line, which will open up a new transport corridor, is also likely to increase and facilitate poachers' access to the so-called TRIDOM (Tri national Dja-Odzala-Minkebe) interzone<sup>15</sup>. It also passes through HEVECAM's agro-industrial plantations and could cross up to five allocated forest management units. This gives an idea of the potential conflicts between the various holders of exploitation rights for various natural resources. The direct consequence of open-pit mining will be the complete deforestation of the entire mining right-of-way and the disruption of the biotope of various animal and plant species.

With regard to compliance with texts and laws, in the absence of Cameroonian provisions in certain areas, the company applies its own environmental performance standards, which are supposed to be in line with the requirements of the relevant Australian standards. However, no content or references are given on Cameroon's internal standards and the relevant Australian standards, nor on the fields to which they are applied in preference to Cameroonian legislation.

Collaborations between the *Queenway* Group and the governments of resource-rich African countries have often failed to improve the living standards of African citizens. Allegations of corruption among senior government officials who control contracts for the extraction of natural resources are widespread<sup>16</sup>. This extractive industry giant continues to prosper and remain active in every country on the African continent.

Ghana, a country with major mineral deposits (manganese, diamonds, bauxite)<sup>17</sup> attracts a number of international mining companies, including *AngloGold*, *Ashanti Gold Fields* and *Newmont Mining*. A study conducted by the University of Cape Coast in Ghana, along with two other institutions, showed that *Ahafo's* mining operations deprived women of access to drinking water, agricultural land and other economic means of subsistence<sup>18</sup>. On the environmental front, the negative effects of mining are not addressed in Ghana's mining regulatory framework. According to WACAM, a human rights and environmental organisation that works specifically with mining communities, current mining regulations have failed to protect communities, forest resources and key sites.

Mining in Mali creates risks. The mining companies that set up operations there cause deforestation, soil erosion and a reduction in the population's drinking water reserves. The same is true in other African countries where these companies operate.

## 1.2. Frequent use of highly polluting mining techniques

Among the techniques used by the mining industries, we can identify very significant harmful emissions. Greenhouse gas emissions and atmospheric pollutants can be observed on the sites. These pollutants come from the combustion process (boilers, furnaces, etc.),

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<sup>15</sup> TRIDOM is a cross-border complex of protected areas in the Congo Basin: Cameroon [Dja], Congo [Odzala] and Gabon [Minkebe] are committed to promoting conservation, the rational use of natural resources and sustainable development, with a view to helping reduce poverty in local communities.

<sup>16</sup> J.R Mailey, *Anatomy of the Natural Resource Curse: The Predatory Investor in Africa's Extractive Industries*, Africa Center for Strategic Studies Special Report, 2015, p. 8.

<sup>17</sup> A. A. Komassi, *Double défi de l'industrie minière en Afrique subsaharienne : droits humains et changements climatiques*, Centre universitaire de formation environnement et développement durable, 2017, p. 42.

<sup>18</sup> *Ibid.*



engines) as well as from certain production processes that release ammonia and nitric acid. Sulphur dioxide from the mine's lead and copper smelter creates a visible plume over the area.

Ore extraction begins with heavy equipment and specialised machinery, such as loaders and dump truck mine wagons, which transport the ore to processing facilities over material haulage roads. This activity creates a particular group of environmental impacts, such as fugitive dust emissions from the roads. These are harmful to local residents insofar as they affect water and air quality. These practices can be seen in eastern Cameroon.

Furthermore, metal ores contain high levels of metals, which produce large quantities of waste. Another highly polluting practice is the reopening of inactive or abandoned mines and the reprocessing of tailings.

The beneficiation process generates large volumes of waste known as tailings, i.e. the waste from an ore after it has been crushed and the desired metals extracted, for example with cyanide (gold) or sulphuric acid (copper). These practices, which are very common in the extractive industries, are all-likely to contribute to pollution. But we cannot afford to stand idly by and watch as the extractive industries repeatedly go astray in their host countries, which is why we need to find ways of putting an end to them.

## **2. Ways of overcoming resistance**

To put an end to the mining companies' resistance to environmental protection and, beyond that, to achieve a degree of climate justice, all that is needed is to force them to apply both the international texts governing their activities and the codes of good conduct that they themselves have drawn up (2.1), and to oblige them to repair the damage that their activities cause (2.2).

### **2.1. Compliance with major international texts and codes of conduct to establish climate justice**

The 1972 Stockholm Conference on the Human Environment initiated recognition of the right to a healthy environment, which was subsequently reaffirmed: "Man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being" (principle 21).

The United Nations Framework Convention on Climate Change (UNFCCC), the foundation of this regime, states that "Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". This means taking into account the historical responsibility of emitters, the capacity of rich countries to act, and the right of all to development. This principle means that, while all countries have an obligation to protect the climate system, their obligations vary according to the level and needs of their development.



Compliance with the recommendations of the International Council on Mining (ICMM)<sup>19</sup>, in particular respecting the rights, interests, special relationships to land and water and perspectives of indigenous peoples when mining projects are to be located on traditional lands owned or customarily used by local people. Adopt and apply traditional decision-making processes based on good faith negotiation.

All stakeholders should be guided by the United Nations Declaration on the Rights of Indigenous Peoples. It states that all companies should undertake the following key actions<sup>20</sup>, some of which may be necessary in combination to enable local and state governments to fulfil their responsibility to respect the rights of indigenous peoples/communities:

1. Adopt and implement a formal policy (on a stand-alone basis or as part of a broader human rights policy) that addresses the rights of indigenous peoples/communities and commits companies to respecting the rights of indigenous peoples/communities;
2. to provide human rights due diligence in assessing potential negative impacts on the rights of indigenous populations/communities, to integrate findings and take action, and to monitor and share performance externally;
3. to consult in good faith with indigenous peoples/communities on all matters that may affect them or their rights;
4. undertake to obtain (and maintain) the free, prior and informed consent of indigenous peoples/communities for projects affecting their rights, in the spirit of the United Nations Declaration;
5. to establish or cooperate in using legitimate processes to remedy adverse impacts on the rights of indigenous peoples/communities;
6. establish or co-operate with an effective and culturally appropriate complaints mechanism.

The application of the Natural Resources Charter must be observed. The Charter provides governments, companies and the international community with policy options and practical guidance on how best to manage natural resource wealth<sup>21</sup>.

Industries operating in the extractive sector must scrupulously respect the codes of good conduct, whose objectives include transparency in the extractive industries, the promotion of good governance and, above all, the economic and social development of its players.

The John Ruggie Framework set out "three core principles": the duty of states to protect against human rights abuses by third parties such as business; the responsibility of business to respect human rights; and the need for more effective access to remedy. These principles need to be taken into account in order to truly

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<sup>19</sup> Created in 2001 to improve sustainable development performance in the mining and metals sector.

<sup>20</sup> *United Nations Declaration on the Rights of Indigenous Peoples/Communities*, Geneva, 2013 p. 11.

<sup>21</sup> *Natural Resources Charter*, 2014, second edition p. 4.

implement climate justice. The Guiding Principles<sup>22</sup> are based on the recognition that: a. States have genuine obligations to respect, protect and fulfil human rights and fundamental freedoms; b. business, as a specialized organ of society with specialized functions, has a role to play in complying with all applicable laws and in respecting human rights; c. rights and obligations must be subject to appropriate and effective remedies when they are violated.

These Guiding Principles apply to all States and to all enterprises, transnational and otherwise, irrespective of their size, sector, location, ownership or structure. These principles should be understood as a coherent whole and should be taken, individually and collectively, in the sense of their objective to raise standards and practices with regard to business and human rights in order to achieve tangible results for affected individuals and communities and thereby contribute to a socially sustainable globalisation. Nothing in these Guidelines should be interpreted as creating new obligations under international law or undermining legal obligations that a State may have undertaken or should undertake under international human rights law. These guiding principles should be implemented in a non-discriminatory manner and with particular attention to the rights, needs and challenges faced by members of groups or populations most at risk of becoming vulnerable or marginalized, taking into account the different types of risks faced by women and men.

## 2.2. Reparations for climate justice

They may take the form of compensation for victims of violations of the right to a healthy environment or assistance with resettlement. Land and rivers polluted or damaged by oil production operations can also be cleaned up<sup>23</sup>. Appropriate environmental and social assessments for all oil development projects, the provision of information on health and environmental risks<sup>24</sup> to local communities, and effective access to regulatory and decision-making bodies by communities likely to be affected by oil operations<sup>25</sup> are also measures in favour of greater climate justice. Appropriate reparation for the harm caused by violations of environmental law may take the form of restitution, compensation or rehabilitation<sup>26</sup>. Restitution aims, as far as possible, to restore the victim to the situation that existed before the violation of the right to a healthy environment occurred. Restitution may involve the return of despoiled land or the restoration of degraded land and ecosystems<sup>27</sup>. It may also involve introducing into nature the equivalent of declining, weakened or damaged biodiversity<sup>28</sup>.

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<sup>22</sup> *Ibid.*

<sup>23</sup> M. Prieur, "Le respect de l'environnement et les études d'impact", *Revue juridique de l'environnement*, n° 2, 1981, pp.103-128.

<sup>24</sup> *Ibid.*

<sup>25</sup> G.M. Nono, "La possible réparation du préjudice d'éco-anxiété en Afrique : vers une meilleure protection des peuples autochtones dans le contexte des activités des industries extractives", *Canadian Yearbook of International Law*, 2023, p. 29.

<sup>26</sup> *Ibid.*

<sup>27</sup> L. Neyret, *La réparation des atteintes à l'environnement par le juge judiciaire*, Paris, Dalloz, 2008, p. 7.

<sup>28</sup> B. Queffelec and J. Hay, *L'évaluation du préjudice environnemental en droit international*, in A. Cudennec and C. de Cet Bertin (eds.), *Mer et responsabilité*, Paris, Pedone, 2009, pp. 125-126.



Climate justice can be demanded through the guarantee of free and informed consent. Communities facing the multiple problems associated with extractivism need help to claim their right to autonomous development and other fundamental community rights.

The sanctions imposed on these extractive industries must go beyond the monetary aspect. They must be much more dissuasive and serve as an example to others operating in the same sector. In practical terms, for example, operating licences could be withdrawn for a period of varying length depending on the extent of the damage caused. This measure would considerably reduce the discrepancies between sites in different host countries.

## Conclusion

At the end of this discussion, which looked at the resistance put up by mining companies and ways of overcoming it, it has to be said that social, economic and environmental problems need to be tackled in the short, medium and long term. First and foremost, this requires a clear understanding of how the extractive system works. Such an understanding already allows us to realise that, just as no single country can defeat climate change, no single country will be able to defeat extractivism. In other words, fighting extractivism requires action in both the South and the North. This understanding also helps us to target the main perpetrators of extractivism in African countries, the governments of capitalist centres and transnational corporations. The 2019 IPCC Special Report on Land<sup>29</sup> recognises the importance of land security for rural communities in the climate debate. Only when their rights to land, their land tenure systems and their environment are effectively protected can they fulfil their role as "guardians of ecosystems" based on their sustainable land and forest management practices.

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<sup>29</sup> IPCC, "Summary for Policymakers", in P. Shukla *et al* (eds), *Climate Change and Land: IPCC Special Report on Climate Change, Desertification, Land Degradation, Sustainable Land Management, Food Security and Greenhouse Gas Fluxes in Terrestrial Ecosystems*, 2020, [www.ipcc.ch/site/assets/uploads/sites/4/2020/06/SRCCL\\_SPM\\_en.pdf](http://www.ipcc.ch/site/assets/uploads/sites/4/2020/06/SRCCL_SPM_en.pdf).

***REGIONAL AND NATIONAL APPROACHES TO  
CLIMATE JUSTICE IN AFRICA***



# MINING INDUSTRIES AND CLIMATE JUSTICE IN CENTRAL AFRICA: A STUDY OF INTERNATIONAL AND COMPARATIVE LAW

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## **Summary**

The countries of Central Africa are counting on their mining resources to ensure their development. However, this objective should not be achieved at the expense of climate requirements. Mining is likely to pollute the atmosphere through the greenhouse gases it releases through the destruction of the forest basin and the excessive use of fossil fuels. The study calls for compliance with the climate obligations to which they themselves have subscribed, both internationally and domestically. If they fail to do so, the mechanisms for bringing climate change to justice should be activated so that citizens who are direct or indirect victims of this scourge can demand enforcement and compensation in the name of climate justice. Judges, as actors in the fight against climate change, should use their actions to ensure that the desired development is as sustainable as possible.

**Key words:** climate change; climate justice; climate obligations; mining.

## **Abstract**

*Central Africa countries are counting on their mineral resources to ensure their development. However, this objective should not be achieved at the expense of climate requirements. Mining is likely to pollute the atmosphere with the greenhouse gases it releases through the destruction of the forest basin and the excessive use of fossil fuels. The study calls for compliance with the climate obligations to which they have subscribed both internationally and internally. If they fail to do so, the mechanisms for bringing climate change to justice should be highlighted and activated so that citizens who are direct or indirect victims of this scourge can demand enforcement and compensation in the name of climate justice. The judge, as an actor in the fight against climate change, should use his actions to ensure that the desired development is as sustainable as possible.*

**Keywords:** Climate Change; Climate Justice; Climate Obligations; Mining.

## Introduction

Climate change is by definition attributed directly or indirectly to human activity that alters the composition of the global atmosphere<sup>1</sup>, in particular through greenhouse gas (GHG) emissions. Among the climate-damaging activities, this study focuses on mining, particularly in the Central African region<sup>2</sup>, which is rich in mineral resources and contains a major global carbon reserve due to its forests and peat bogs<sup>3</sup>. For example, many mining operations in Cameroon, the DRC and the Congo contribute to deforestation and threaten the preservation of peatlands by releasing carbon in the form of greenhouse gases<sup>4</sup>. Similarly, the region's mining industry, like that elsewhere, consumes excessive amounts of polluting energy, including electricity and hydrocarbons<sup>5</sup>. All these factors are undermining efforts to combat climate change.

While this situation benefits mining operators, local communities in the region remain vulnerable to the effects of climate change, which are hitting them hard. This is the case in the DRC, where the recent floods in the east of the country, a region rich in minerals, have been described as a climatic disaster<sup>6</sup>. Disasters of this kind can also be seen in other countries in the sub-region. So what are the climate obligations imposed on governments and mining companies, and whose violation can give rise to a right of legal recourse for the victims, as is already the practice in other countries? This raises the question of "climate justice", a concept first enshrined in the preamble to the Paris Agreement and expressing the obligation imposed on those involved in global warming to eliminate or reduce climate-damaging activities and/or contribute to the adaptation efforts of those who are vulnerable, with a view to preventing or repairing the consequences<sup>7</sup>. However, this paper approaches the issue from the angle of justiciability, corresponding to "climate litigation", understood as the raising of questions of law or fact relating to climate change, or quite simply litigation concerning responsibility for its causes and effects<sup>8</sup>.

The study finds that climate obligations are not being effectively applied and that, despite a number of legal bases enabling them to be brought to court, the engine of climate litigation has not yet been set in motion in the region. For it to get off the ground, citizens and judges need to

<sup>1</sup> Article 1<sup>er</sup>, paragraph 2 of the 1992 United Nations Framework Convention on Climate Change (UNFCCC).

<sup>2</sup> The region includes Burundi, Cameroon, CAR, Chad, Congo, DRC, Rwanda, Equatorial Guinea, Gabon and Sao Tome and Principe. The study will focus on some of these countries.

<sup>3</sup> SWAMP, *Revue du cadre juridique propice à la gestion des tourbières en RDC*, Report, 2021, p. 6; World Bank, *Journey to the Congo Basin - the lungs of Africa and the beating heart of the world*, 2022, <https://www.banquemondiale.org/>.

<sup>4</sup> A. A. Komassi, *Double défi de l'industrie minière en Afrique subsaharienne : droits humains et changements climatiques*, Maîtrise, Université de Sherbrooke, 2017, p. 19; G. C. Dargie et al., "Les tourbières du bassin du Congo : les menaces et les mesures de conservation", *Mitigation Adaptation Strategies for Global Change*, 2018, <https://doi.org/10.1007/s11027-017-9774-8>.

<sup>5</sup> A. A. Komassi, *oc. cit.*; S. A. Kaboré, "Activité minière, changement climatique et droits des communautés locales," in D. Dormoy and C. Kuyu (eds.), *Droit(s) et changements climatiques*, Paris, Les éditions du NET, 2020, p. 453.

<sup>6</sup> VOA, *Inondations dans l'Est de la RDC : plus d'une centaine de morts*, 5 May 2023, <https://www.voaafrique.com/a/>.

<sup>7</sup> N. Klein, *Vaincre l'injustice climatique et sociale*, Actes Sud, 2021; L. Laigle, "Justice climatique et mobilisations environnementales", *VertigO*, vol. 19, no. 1, 2019, § 1 et seq.; M. Torre-Schaub, A. Jezequel, B. Lormeteau and A. Michelot (dir.), *Dictionnaire juridique du changement climatique*, Paris, Mare et Martin, 2022, pp. 321-323; M. Torre-Schaub,

"L'affirmation d'une justice climatique au prétoire (quelques propos sur le jugement de la Cour du district de La Haye du 24 juin 2015)", *Revue québécoise du droit international*, vol. 29, no. 1, 2016, pp. 161-183.

<sup>8</sup> C. Cournil, "Introduction", in C. Cournil and L. Varison, *Les procès climatiques. Entre le national et l'international*, Paris, Pedone, 2018, p. 20.



each play their part. For this reason, following a three-pronged critical, comparative and dialectical approach, the study will focus first on a critical examination of the climate obligations provided for in the international law or comparative law of the Central African States that could be applied to mining activities in the region (1) before verifying their justiciability (2).

## **1. Cross-sectional study of some climate obligations applicable to mining activities**

The countries of Central Africa have undertaken to comply with a number of climate obligations, which translate into measures to mitigate (1.1) or adapt (1.2) to climate change, constituting the two pillars of climate action<sup>9</sup>.

### **1.1. Weaknesses in climate obligations relating to mitigation measures**

Mitigating climate change involves rapidly stabilising GHG concentrations in the atmosphere at a level that minimises any adverse impact on humans and ecosystems<sup>10</sup>. Whether these obligations derive from the universal (1.1.1) or regional (1.1.2) international legal frameworks, or from the legal frameworks of the states studied (1.1.3), they still suffer from ineffectiveness in the face of the damage caused by the extractive industry in the region.

#### **1.1.1. On a universal level**

At this level, our climate obligations are mainly set out in the 1992 UNFCCC, the 1997 Kyoto Protocol and the 2015 Paris Climate Agreement<sup>11</sup>. The most important of these is the very objective of international climate law, which is to limit the average temperature of the planet to 1.5° C without exceeding 2° C compared with pre-industrial levels<sup>12</sup>.

Within this framework, the States of the region have undertaken, among other things, to encourage rational management and support the conservation and, where appropriate, enhancement of sinks and reservoirs of all GHGs, of which forests are one<sup>13</sup>. To this end, they are obliged to adopt positive incentive measures concerning activities to reduce emissions resulting in particular from deforestation and forest degradation<sup>14</sup> by promoting sustainable methods of forest management, afforestation and reforestation<sup>15</sup>. However, this obligation still suffers from ineffectiveness in that the implementation of certain mining projects requires deforestation without any reforestation policy.

In addition to the obligation to protect forests, the States have also undertaken to promote the increased use of renewable energy sources<sup>16</sup> whose contribution to

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<sup>9</sup> M. Torre-Schaub, A. Jezequel, B. Lormeteau and A. Michelot (eds.), *op. cit.* p. 35.

<sup>10</sup> ADEME/France, *Forêts et usages du bois dans l'atténuation du changement climatique*, Angers, 2021, p. 7.

<sup>11</sup> All Central African states are party to these instruments.

<sup>12</sup> Article 2, paragraph 1, point a, Paris Agreement.

<sup>13</sup> Article 4, paragraph 1, point d, UNFCCC; article 2, paragraph 1, point a, *litera ii*, Kyoto Protocol; and article 5, paragraph 1, Paris Agreement.

<sup>14</sup> Article 5, paragraph 2 of the Paris Agreement.

<sup>15</sup> Article 2, paragraph 1, point a, *litera ii* of the Kyoto Protocol.

<sup>16</sup> *Idem*, *litera iv*. Renewable energy sources include wind, solar, geothermal, aerothermal, hygrothermal and marine energy.



the mitigation of climate change is obvious<sup>17</sup>. However, the mining industry in Central Africa continues to consume mainly fossil fuels that emit large quantities of greenhouse gases<sup>18</sup>.

### 1.1.2. At regional level

Despite their embryonic nature, some climate obligations relating to mitigation stem from the legal frameworks of the African Union, the Economic Community of Central African States (ECCAS) and the Central African Forest Commission (COMIFAC).

The study of the Maputo Convention on the Conservation of Nature and Natural Resources reveals that States Parties must conserve forests and woodlands<sup>19</sup>. They must also ensure that development activities and projects are carried out in an environmentally sound manner and do not have harmful effects on the environment in general. Hence the requirement for such projects to be subject to prior environmental impact assessments (EIA)<sup>20</sup>.

The revised ECCAS Treaty (2019) requires states to implement a policy against deforestation and the promotion of renewable energies as mitigation measures<sup>21</sup>.

Within the framework of COMIFAC, the Member States are obliged to draw up an inventory of forests likely to be economically exploited in order to guarantee their multiple functions, particularly those linked to climate change<sup>22</sup>.

### 1.1.3. In the comparative law of Central African States

Like the universal and regional legal frameworks, the forestry laws of the states studied all promote the policy of combating forest degradation as a means of mitigating climate change. Their mining legislation also sets out other obligations, such as the requirement for an EIA, which is a prerequisite for any mining project in almost all the countries in the region<sup>23</sup>. It should be pointed out that environmental impact extends to climatic aspects<sup>24</sup> in that GHG emissions from any project must be quantified.

Of all the legislation studied, that of the DRC expressly takes climatic aspects into account in the preparation of EIAs. Article 29 of Annex VIII of the Mining Regulations, which sets out guidelines for such studies, requires all mining projects to specify, in particular, the following types of project

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<sup>17</sup> O. Edenhofer, R. Pichs-Madruga and Y. Sokona (eds.), *Renewable Energy Sources and Climate Change Mitigation*, IPCC Special Report, 2011, pp.7 et seq.

<sup>18</sup> B. Lormeteau, "Une lecture énergétique du droit international du climat", in M. Torre-Schaub, C. Cournil, S. Lavorel and M. Moliner-Dubost (eds.), *Quel(s) droit(s) pour les changements climatiques?* Paris, Mare et Martin, 2018, p. 350.

<sup>19</sup> Article VIII.

<sup>20</sup> Article XIV, paragraph 2.

<sup>21</sup> Articles 72, paragraph 1, point b and 74, paragraph 2, point b.

<sup>22</sup> Article 7 of the Sub-regional Agreement on Forest Law Enforcement in Central Africa of 26 October 2008.

<sup>23</sup> Article 135, paragraph 2, Law no. 2016-17 of 14 December 2016 on the Cameroon Mining Code; Article 204, paragraph 1, Law no. 007/2002 of 11 July 2002 as amended and supplemented by Law no. 18/001 of 9 March 2018 on the Congolese Mining Code (DRC); Article 34, Law no. 9-005 of 29 April 2009 on the CAR Mining Code; article 78, law no. 037/2018 of 11 June 2019 regulating the mining sector in Gabon; article 284, order no. 004/PR/2018 of 21 February 2018 establishing the mining code of Chad; article 68, law no. 1/21 of 15 October 2013 establishing the mining code of Burundi, etc.

<sup>24</sup> This is recommended in Article 1<sup>er</sup>, point vii of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context. Article 4, paragraph 1, point f of the UNFCCC also refers to this obligation.

climate, temperature, rainfall and annual evaporation. It must also determine the risk and probability of meteorological disasters such as torrential rains, hurricanes, cyclones, tornadoes, floods, drought, etc.

Despite these regulatory advances, it has to be said that the measures enacted are not effective when a number of mining projects are authorised without prior EIA. This is the case with Chinese companies in the DRC<sup>25</sup>.

## 1.2. The ineffectiveness of climate obligations relating to adaptation measures

The idea behind the principle of adaptation is that if mitigation measures fail, the State must take measures to prevent and cope with climate damage caused in particular by extreme weather phenomena such as flooding and drought, which are recurrent in the region. Like the previous obligations, the adaptive climate obligations derive from legal provisions of universal (1.2.1), regional (1.2.2) and national (1.2.3) scope.

### 1.2.1. Universal provisions

International climate law recognises adaptation as a global challenge for all States to increase resilience to climate change and reduce vulnerability, in order to contribute to sustainable development and ensure an adequate response<sup>26</sup>.

To this end, the main obligation on States is to adopt national adaptation plans<sup>27</sup>. The measures to be planned include the establishment of early warning systems and damage insurance schemes. It should be noted that it is difficult to find a climate early warning system in the region and that both the DRC's Insurance Code and that of the International Conference of Insurance Markets, applicable in some of the countries studied such as Cameroon, Congo, Central African Republic and Gabon, do not yet cover climate risks.

Another obligation formulated in terms of adaptation is that of developed countries, the biggest emitters of GHGs, to compensate financially, bilaterally, regionally or multilaterally, for the efforts of developing countries, including those in Central Africa, which are highly vulnerable to the effects of climate change<sup>28</sup>. Indeed, if they have to forego income from climate-damaging mining activities, the countries in the region are reducing the financial resources that could be used to cope better with climate risks and ensure their development at the same time. This is why financial support from the developed countries, which are the main culprits of climate change, is becoming essential and mandatory. However, despite the many international conferences organised to highlight this need, to date this support has not been forthcoming.

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<sup>25</sup> J. Mwetaminwa and T. Vircoulon, *Un scandale sino-congolais. L'exploitation illégale des minerais et des forêts par les entreprises chinoises au Sud-Kivu*, IFRI Notes, 2022, p. 11.

<sup>26</sup> Article 7, paragraphs 1<sup>er</sup> and 2, Paris Agreement.

<sup>27</sup> Article 7, paragraph 9, Paris Agreement. In the region, the DRC in 2021 and Cameroon in 2015, among others, have met this obligation.

<sup>28</sup> Article 11, paragraph 5, UNFCCC; article 11 of the Kyoto Protocol and article 9 of the Paris Agreement.



## 1.2.2. Regional provisions

In terms of adaptation measures, the legal framework of the African Union is silent, so the revised ECCAS Treaty fills the gap. In fact, as provided for at universal level, it stipulates that the Central African States should develop and harmonise climate risk management plans<sup>29</sup>, although their adoption and implementation remain mixed.

## 1.2.3. National provisions

Among the adaptation measures, the imposition of a deforestation tax should be noted. One of the rights conferred by a mining licence is the right to use or cut timber within the mining perimeter<sup>30</sup>. For this reason, it was deemed necessary to introduce a deforestation tax based on the "polluter pays" principle, so to speak, in order to offset the cost of measures taken in response to climate change. The DRC's Mining Code is fully in line with this logic, stating that, given the contribution of the proceeds of the deforestation tax to the overall fight against climate change, no holder of mining and/or quarrying rights may be exempted from paying it<sup>31</sup>. This rule is also enshrined in the legislation of other states in the sub-region<sup>32</sup>. However, it remains to be seen whether the funds generated by the tax will contribute to climate change mitigation.

In the face of this failure to comply with climate obligations, the advent of a climate-compliant mining industry presupposes their justiciability through the courage, even the activism, of judges driven by a concern to ensure climate justice in the region.

## 2. Justiciability of climate obligations in the face of a climate-defying mining industry

To speak of justiciability at this level is to imagine the possibility that the implementation of climate obligations could be ensured by a judge through climate litigation as one of the mechanisms of climate justice. It is therefore important to provide a brief overview of the practice of climate litigation worldwide (2.1), before looking at how the countries of the region are opening up to this judicial approach to mining (2.2), and proposing ways of making it effective (2.3).

### 2.1. Worldwide practice

The judicialization of climate change is flourishing before national courts, to the point where there are now nearly a thousand climate lawsuits<sup>33</sup>. In both liability cases (2.1.1) and compensation cases (2.1.2), foreign judges base their decisions on constitutional and legal grounds.

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<sup>29</sup> Article 74, paragraph 2, point e.

<sup>30</sup> Article 64 bis, DRC mining code; article 105, Chad mining code; article 121, Cameroon mining code; article 128, Burundi mining code; etc.

<sup>31</sup> Article 527 sexies, mining regulations.

<sup>32</sup> Article 162, law no. 33-2020 of 8 July 2020 on the Congolese forestry code (Brazzaville); article 93, paragraph 3, Central African mining code; etc.

<sup>33</sup> M. Delmas-Marty, "Justice climatique et mondialisation", in C. Cournil and L. Varison, *op. cit.* p. 13.



### 2.1.1. The successes of climate liability litigation

The aim of this type of litigation is to resolve the thorny issue of the causal link establishing that climate change and its harmful consequences are due to the action or inaction of the State or companies. Since the *Urgenda* case in the Netherlands, this issue has been resolved. In its first instance judgment of 24 June 2015, the District Court of The Hague recognised this causal link and hence the responsibility of the State to reduce its GHG emissions<sup>34</sup>. In this decision, the judge relied on Article 21 of the Dutch Constitution, which states that "the public authorities shall ensure the habitability of the country and the protection and improvement of the living environment". Decisions handed down both on appeal and in cassation have upheld this ruling, also on the basis of respect for the constitutional right to life or to a healthy environment.

Also recognising the existence of a causal link between the deforestation policy and climate change, the Colombian Supreme Court, in its decision of 5 April 2018, acknowledged the government's inability to protect the Colombian Amazon and ordered the implementation of action plans against this climate-damaging behaviour<sup>35</sup>. It also based its decision on the protection of fundamental rights, including the right to health. Similarly, the judge in the *Thabametsi, Kipower* and *Acwa Power* cases in South Africa and *Save Lamu* in Kenya<sup>36</sup>, aware of the climate impact of certain projects for which EIAs had not actually been carried out, annulled the projects on the basis of fundamental constitutional rights. The question remains as to whether climate damage is compensable before the courts.

### 2.1.2. Unsuccessful claims for damages in climate litigation

Claims for compensation, particularly financial compensation, for climate-related losses are not being pursued with any success. This is due to the fact that the loss and damage mechanisms provided for in Article 8 of the Paris Agreement do not give rise to compensation<sup>37</sup>. A number of cases along these lines have so far been rejected. This was the case in *In re Katrina Canal Beaches Litigation* (2005) and *Juliana et al. v. United States et al.* (2016-2020) in the USA, as well as *Lliuya v. RWE AG* (2015-2016), which pitted a Peruvian farmer against a German company<sup>38</sup>. In these cases, the judge considered that climate change is a fact of several emitters all over the world and that there is not yet a legal technique allowing the burden of reparation to be shared<sup>39</sup>.

The *Case of the Century* judged by the Paris Administrative Court has laid the foundations for the start of compensation for damage in the context of climate litigation. In its ruling handed down on 3 February 2021, the court upheld the claim for compensation of a symbolic "one euro" for non-material damage. This confirms the argument that

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<sup>34</sup> O. De Schutter, *Climate change and human rights: the Urgenda case*, UCL, 2020, pp.4 et seq.

<sup>35</sup> E. Petrisko, "De la décision d'Urgenda aux perspectives d'un nouveau contentieux climatique", in C. Cournil and L. Varison, *op. cit.* pp.113 et seq.

<sup>36</sup> D. Owona, "Droits de l'homme et justice climatique en Afrique", *Annuaire africain des droits de l'homme*, vol. 3, 2019, pp.169-170, 172-173.

<sup>37</sup> M. Petsoko, "Réflexion critique sur l'effectivité et l'efficacité de la mise en œuvre de la justice climatique en Afrique", in D. Dormoy and C. Kuyu (eds.), *op. cit.* p. 561.

<sup>38</sup> UNEP, *The state of climate litigation. Global Review*, May 2017, p. 35.

<sup>39</sup> L. Canali, "Les contentieux climatiques contre les entreprises : bilan et perspectives", in C. Cournil and L. Varison, *op. cit.* p. 75.

the success of an action for compensation would be favoured by "more down-to-earth claims"<sup>40</sup>. In the case of ecological damage<sup>41</sup>, compensation will be rejected<sup>42</sup> as it can only be paid in kind. What is the situation in Central Africa?

## 2.2. The state of climate disputes in Central Africa

In theory, there are constitutional, legal and regulatory openings for the judicialization of climate change in the region (2.2.1). Unfortunately, it has so far stalled in practice (2.2.2).

### 2.2.1. Constitutional, legal and regulatory openings

Following the example of comparative legislation at global level and in general, the Central African States all enshrine in their constitutions the human right to a healthy environment and the duty of the State to protect it. Even if these provisions do not expressly enshrine the right to a stable climate, the region's national courts could rely on them when dealing with breaches of climate obligations.

As regards the mining sector in particular, one provision that could serve as a basis for climate liability is article 285 ter of the Congolese mining code, which expressly states that "mining operators are liable in the event of direct or indirect contamination as a result of mining activities leading to environmental degradation, in particular pollution of the atmosphere, and causing damage to humans, fauna and flora". This should also apply to the negligence of the State. This liability is objective under article 405 bis of the Mining Regulations, which states that it is established even in the absence of any fault or negligence. This form of liability is the only one capable of ensuring fair reparation or compensation for the victims of climatic damage<sup>43</sup>. The Gabonese Mining Code also provides for the same form of liability<sup>44</sup>.

As regards compensation, article 405 ter of the same Mining Regulations is even more explicit when, following climatic damage, it provides that "in the event of refusal to compensate or disagreement between the mining operator responsible and the victims of the damage caused by it, the matter shall be referred to the competent court". The Chad Mining Code would base such compensation on the polluter-pays principle<sup>45</sup>.

On the basis of the foregoing and despite the vagueness that remains, it may be considered that the victims of deadly floods, the drying up of watercourses or any other damage linked to the effects of climate change in the region may obtain compensation from mining companies or the State when it is established that their respective climate obligations have been breached. Unfortunately, the practice of climate litigation is still lacking in Central Africa.

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<sup>40</sup> E. Gebre, "Juliana et al. C. États-Unis et al. (2016-2020)", in C. Cournil, *Les grandes affaires climatiques...*, *op. cit.*, p. 276.

<sup>41</sup> Compensation for such loss is provided in accordance with articles 1246 to 1252 of the French Civil Code.

<sup>42</sup> C. Cournil and M. Fleury, "De 'l'Affaire du siècle' au 'casse du siècle'?", *La Revue des droits de l'homme*, February 2021, <https://doi.org/10.4000/revdh.11141>.

<sup>43</sup> F. Lafforgue, "L'établissement des responsabilités en matière de santé-environnement devant le juge français et son potentiel pour le contexte climatique", in C. Cournil and L. Varison, *op. cit.*, p. 75.

<sup>44</sup> Article 4.

<sup>45</sup> Article 290.



### 2.2.2. The absence of legal proceedings

The formal advances on climate liability are strangely disconcerting given the lack of precedents. In fact, the seven cases of climate litigation recorded in Africa have taken place only in South Africa, Kenya, Nigeria and Uganda<sup>46</sup> ; no trial has been recorded in Central Africa.

This firstly reveals the fact that the victims of climate damage in the region are caught between disinterest and ignorance of their rights. What's more, this implies a lack of training and information, not only for the general public, but also and above all for legal professionals, lawyers and public prosecutors, who do not take advantage of this legal avenue. So what are the ways out?

### 2.3. Prospects for the effectiveness of climate litigation in Central Africa

In order to ensure that their judicial bodies are "climate-controlled", the countries of the region should activate climate citizenship (2.3.1), encourage judicial activity and creativity (2.3.2) and begin to constitutionalise the right to a stable or balanced climate (2.3.3).

#### 2.3.1. Activating climate citizenship

The emergence of climate litigation around the world has been fuelled by the activism of civil society<sup>47</sup> , including NGOs, children, young people, women and lawyers, since judges cannot take matters into their own hands. This means that citizens are the driving force behind effective climate litigation.

To encourage the emergence of lawsuits as a "weapon"<sup>48</sup> against global warming, we should promote awareness-raising, training and information for the population, particularly through teaching programmes and in the social projects of political parties. In addition, popular figures, opinion leaders, NGOs and court officials should be given the power to take legal action directly on behalf of local communities, who are the direct victims of climate damage.

#### 2.3.2. The judge's activity and creativity

The action of the regional judge is essential. To do this, they must boldly state and make the law on climate change through a more dynamic and strategic interpretation<sup>49</sup> of the texts. Judicial engineering of constitutional, legal and regulatory provisions is essential. Judges should free themselves from the procedural and legal constraints associated with the status of claimants, evidence, time limits and the causal link, in order to ensure that the law is applied in the best possible way.

"All this only makes sense if the matter is referred to the courts. All this only makes sense if the matter is referred to the courts. At this

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<sup>46</sup> D. Owona, "Earthlife Africa Johannesburg v. Ministère des affaires environnementales et autres", in C. Cournil, *Les grandes affaires climatiques*, Aix-en-Provence, Confluence des droits [online], DICE, 2020, p. 317.

<sup>47</sup> M. Torre-Schaub, "Les dynamiques du contentieux climatique : anatomie d'un phénomène émergent", in M. Torre-Schaub, C. Cournil, S. Lavorel and M. Moliner-Dubost (eds.), *op. cit.* p. 121.

<sup>48</sup> C. Cournil, "Les ONG et 'l'arme du droit' pour tenir le réchauffement en deçà d'1.5 degrés", in C. Cournil (ed.), *op. cit.* p. 411.

<sup>49</sup> L. Canali, "Les défis du juge dans les contentieux climatiques", in C. Cournil (ed.), *op. cit.* pp. 446 et seq.

In this respect, the public prosecutor's office should be called upon to ensure that breaches of the provisions relating to climate obligations are brought before the courts.

### 2.3.3. Explicit constitutionalisation of the right to a stable and balanced climate

According to one doctrine, the inclusion in the Constitution of a provision on climate change does not seem relevant in substance<sup>50</sup>. It considers that the right to a healthy environment constitutionally recognised in several States would extend to aspects of climate. However, this is not always obvious. An explicit constitutional enshrinement of the right to a stable climate would better serve the cause of climate justice, in particular through its precision and would avoid any restrictive interpretation by the courts.

In fact, by giving constitutional status to this principle, it is clear that all legislation within the States of the region should depend on it, and thus we would increase the "density and normative thickness of the obligations"<sup>51</sup> or even elevate them "to the rank of superior interest of the State"<sup>52</sup> which can be set up against the judge.

### Conclusion

Since 2 August 2023, humanity has already been living with an ecological deficit that is greater than expected, in that we have already emitted more greenhouse gases than the forests and oceans can absorb<sup>53</sup>. This confirms the fact that climate change is one of the major civilisational challenges<sup>54</sup> for the centuries to come. Africa, which accounts for just 6.99% of global greenhouse gas emissions, is nonetheless affected by "acute climatic vulnerability"<sup>55</sup>, which has serious consequences for humanity, including drought, floods and a host of diseases.

The economic model based on the crude and precautionary exploitation of mining resources for the development desired by the Central African states is contributing to the worsening of this situation and is not conducive to the sustainable development desired by all. This study has attempted to demonstrate that there is a causal link between mining activities and climate change.

Consequently, the justiciability of climate obligations arising from the universal or regional legal framework on the one hand, and from the mining legislation of some Central African countries on the other, should form part of government policy in the fight against this scourge in the mining sector. In order to do this, relying on the openness of their legislation to the dynamics of climate litigation as second-degree environmental litigation, the States should focus on the activity of civil society as well as on the activism of the courts and tribunals and their respective prosecutors' offices.

<sup>50</sup> M. Torre-Schaub, A. Jezequel, B. Lormeteau and A. Michelot (eds.), *op. cit.* p. 137.

<sup>51</sup> F. Bokona, "La réglementation des déchets dangereux en Afrique à l'aune du développement durable", *RADE*, n° 7, 2022, p. 214.

<sup>52</sup> A. Akono Olinga, "La constitutionnalisation du développement durable dans les États d'Afrique noire francophone", *RADE*, no. 7, 2022, p. 20.

<sup>53</sup> UN, *Environment: 2 August, the day on which the Earth's resources will be exceeded*, 1<sup>er</sup> August 2023, <https://unric.org/fr/environnement-2-aout-jour-du-depassement-mondial-des-ressources-sur-terre/>.

<sup>54</sup> UN General Assembly Resolution AG/1297 of 29 March 2023, p.1/4.

<sup>55</sup> M. A. Mekouar, "L'Afrique à l'épreuve de l'Accord de Paris : ambitions et défis", *Revue juridique de l'environnement*, special issue, 2017, p. 60.



Although the study focused on the case of formal mining operations, we should not ignore the climate degradation caused by illicit and informal extractive activities in the context of armed conflicts in Central Africa, and more particularly in the DRC. These wars, which are aimed among other things at plundering mining resources, are at the root of the destruction of forests and other environmental damage<sup>56</sup>. In the name of climate justice, there should be no statute of limitations on such acts<sup>57</sup> in view of their climate-damaging consequences for local communities in the region. In this way, the study could contribute to the effectiveness and development of climate change law in both peacetime and wartime on the continent.

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<sup>56</sup> P. Kaningu *et al*, "Conflits armés et autorité publique en RDC : vers la gestion de l'environnement par les groupes armés", in R. Ndayiragije *et al* (eds), *Conjonctures de l'Afrique centrale*, no. 97, 2021, pp. 194-196.

<sup>57</sup> F. Bokona, "Réflexions sur la régénération du système pénal congolais. Casuistique du droit pénal des ressources naturelles", in J.-P. Segihobe and I. Mingashang, *Le droit pénal entre douleur et enchantement dans le contexte contemporain*, Brussels, Bruylant, 2021, p. 1373.



# CONTRACTUALISING CLIMATE JUSTICE IN MINING IN FRENCH-SPEAKING SUB-SAHARAN AFRICA

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## **Summary**

Climate justice is an emerging concept in environmental governance. It is built around principles whose common denominator is ecological preservation for the well-being of populations vulnerable to climate change for which they are less responsible. However, it should be an imperative contractual requirement for mining operations, given the proliferation of environmental injustices caused by climate change induced by the damaging activities of the extractive industries. However, there are gaps in contractualisation in French-speaking sub-Saharan Africa, with erratic incorporation into mining contracts and asymptotic implementation by mining contractors. In general, all of these factors require not only harmonisation of contractual standards in terms of climate justice, but also rationalisation of the governance of the extractive industries. Structuring a sustainable and profitable extractive industry depends on it.

**Key words:** contractualisation; mining; climate justice; climate governance; human rights; sustainable development.

## **Abstract**

*Climate justice is an emerging concept in environmental governance. It's built around principles, whose common denominator is ecological preservation, for the well-being of populations vulnerable to climate change for which they are less responsible. However, it should indeed be part of the mandatory contractual requirements for mining, given the proliferation of environmental injustices caused by climate change induced by the harmful activity of the extractive industries. However, its contractualization is lacking in French-speaking sub-Saharan Africa through its erratic incorporation into mining contracts, and its asymptotic implementation by mining contractors. All things that require in general, not only a harmonization of mining legislations in terms of climate justice, but also a rationalization of the governance of extractive industries. The structuring of sustainable and productive industry depends on it.*

**Keywords:** Contractualization; Mining; Climate Justice; Climate Governance; Human Rights; Sustainable Development.

## Introduction

Development is a constant objective of the policies initiated by governments as part of their governance. To achieve this, mining is one of the main levers. It is also a key sector of activity that is at the centre of a host of interests<sup>1</sup>. It is even seen as the key to Africa's development<sup>2</sup>. However, while it is clear that its contribution to socio-economic development is substantial as an engine of growth<sup>3</sup>, it is also clear that its ecological and socio-economic impacts are striking, not to say worrying. In essence, between climate crises, ecological imbalances and socio-political tribulations, the operationalisation of climate justice in the extractive industries galaxy is becoming an urgent necessity in view of its protective and restorative virtues. All of which may justify the holding of the 6<sup>e</sup> "Mining on Top Africa" conference in Paris on 12 and 13 July 2023 to stimulate partnerships for sustainable and profitable mining.

In addition to general standards, extractive industry activities are legally governed by specific standards. These include contracts. In this case, the extractive industries are bound to States by a contract that sets out the rules governing their activities. In line with the obligation to respect the international conventions to which States are party, these contracts must be imbued with aspects of climate justice in the context of the quest for sustainable development and the construction of a world with a human face.

Climate justice is a recent concept<sup>4</sup>. Globally, it is a transnational concern linked to the impacts of climate change. However, it is an ethical and political issue of the utmost urgency. The urgency clearly stems from the growing inequalities and social and environmental injustices generated by climate change, which is mainly caused by high CO<sub>2</sub> emissions from human activity, in particular the disproportionate extraction and combustion of fossil fuels<sup>5</sup>. Climate justice is based on the premise that the effects of climate change are caused and manifested unequally in space and time, and affect people differently according to their gender, class, ethnic group, age, etc. It emphasises the fact that the States and "peoples who have historically contributed least to climate change are those who suffer its impacts most and have the least opportunity to protect themselves or adapt to it"<sup>6</sup>. It differs from environmental justice, which is seen as a component of<sup>7</sup>. The two are therefore consubstantial. However, it retains its distinctive feature, which lies in its emphasis on defending the rights of vulnerable populations through the

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<sup>1</sup> A. Ondoua, "Introduction", in J. C. Ngnintedem, A. Ondoua (eds.), *Le droit minier africain : regards croisés*, Québec, Ed. IQAI, 2020, p. 12.

<sup>2</sup> African Union, *Vision for Africa's Mining Regime*, February 2009, p. 2.

<sup>3</sup> Overview of the extractive sector's contribution to the economy according to the Extractive Industries Transparency Initiative (EITI) reports: Cameroon EITI (2018): 4.77% of GDP, 16.13% of the state budget, 28.38% of exports. EITI Senegal (2021): 6.94% tax revenue from the extractive sector, 4.98% of GDP. EITI Mali (2020) 20.73% contribution to government revenue, 9.74% of GDP.

<sup>4</sup> The term climate justice was first used at COP 6. But it really took shape in 2002 in Bali with the drafting of the Bali Charter for the Promotion of Climate Justice, then in 2007 on the sidelines of COP 13, also organised in Bali.

<sup>5</sup> N. Jungo, El-Najjar, *Climate Justice Glossary*, Latin American and Caribbean Platform for Climate Editors, June 2022, p. 5.

<sup>6</sup> L. Laigle, "Justice climatique et mobilisations environnementales", *La Revue électronique en sciences de l'environnement*, vol. 19, no. 1, March 2019, p. 2.

<sup>7</sup> M. Tsayem Demaze, C. Philippe, "Repères et caractéristiques épistémiques de la justice climatique", *Natures, sciences et sociétés*, n° 30, vol.1, 2022, p. 15.

promoting social justice, equity, morality, ethics, transparency, compensation, education, health, gender, local communities, climate migrants and socio-ecological interdependence. Its aim is to combat the injustices associated with climate change. Despite its recent integration into environmental governance, climate justice is taking root in the collective consciousness and in the mining sector, despite some reluctance. This is the case in the extractive industries, hence its contractualisation.

Contractualisation is a legal concept with multiple meanings. *First*, it "is an instrument of regulation as a mode of normative production"<sup>8</sup>. It therefore leads to the adoption of either an agreement or a contract. It can also be understood as "recourse to contract"<sup>9</sup>. *Secondly*, contractualisation in its simplified form can be understood as the insertion of a datum into a contract, as well as its application in the context of the performance of the contract. Thus conceived, the analysis focuses on the inclusion and operationalisation of climate justice in the contractual framework for mining.

In essence, mining is a variable concept. Thus, on analysis of the mining legislation of the States under study, it is generally agreed that it refers to the process through which operations are carried out with a view to extracting mineral substances from a deposit, treating them by washing, transforming them by refining in order to dispose of them for utilitarian or commercial purposes. In addition, the mineral substances covered by the mining contracts discussed in this report alternate between solid and liquid mining<sup>10</sup>.

In any case, the causal link between mining operations and climate change is clear<sup>11</sup>. Our ambition, therefore, is to analyse the operationalisation of climate justice from the contractual angle of mining. To achieve this, we ask the following question: do mining contracts sufficiently incorporate aspects of climate justice given the proliferation of socio-economic injustices and inequalities caused by climate change as a result of mining in French-speaking sub-Saharan Africa?

By adopting legal, sociological and comparative methods, we will first assess the extent to which climate justice is taken into account in mining contracts. Next, we will identify the shortcomings in terms of linking the formal and operational frameworks of contracts to climate justice. Finally, we will propose ways to optimise the consideration of climate justice both formally and materially in mining contracts. We therefore assume that there are gaps in the contractual arrangements. This can be seen in the erratic incorporation and asymptotic implementation of climate justice.

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<sup>8</sup> J. Chevallier, "Contractualisation et régulation", in *La contractualisation de la production normative*, Actes du colloque de clôture du programme de recherche sur "Le système juridique à l'ère de la contractualisation", Université de Lille 2, 11-13 October 2007, p. 2.

<sup>9</sup> P.-Y. Verkindt, "La contractualisation collective de l'instance", in *La contractualisation de la production normative*, *ibid.*, p. 145.

<sup>10</sup> S. Essaga, *Les sources du droit des hydrocarbures en Afrique*, Paris, L'Harmattan, 2018, p. 33.

<sup>11</sup> According to the International Union for Conservation of Nature (IUCN) in a 2017 report, "Mining activities cause 7% of deforestation. After the oceans, forests are the second largest carbon sink on Earth. Globally, 15% to 17% of CO<sub>2</sub> emissions are attributable to deforestation. And while GHG emissions generated by the extractive industries have already doubled between 1970 and 2010, they are set to increase by 45-60% between now and 2050 in response to the strong growth in global demand for minerals".



## 1. The erratic incorporation of climate justice into mining contracts

The acceptance of climate justice in mining contracts in the countries under study is not harmonised. It alternates between excessive incorporation of the environmental dimension and restrictive integration of non-environmental aspects.

### 1.1. Excessive incorporation of the environmental dimension

In view of the expansion of the extractive industries, it has become necessary "for each mining law to act as a spokesperson for the environmental cause"<sup>12</sup> ; hence "the enshrinement of environmental obligations at all stages of the mining cycle"<sup>13</sup> . This increase in the environmental dimension can be seen in the focus on the protection of nature and cultural heritage, and the promotion of nature restoration.

#### 1.1.1 Focus on protecting nature and cultural heritage

Environmental protection concerns abound in the mining contracts signed by the countries under review. Cameroon's<sup>14</sup> , Chad's<sup>15</sup> and Burkina Faso's<sup>16</sup> contracts include environmental protection. The Ivorian conventions<sup>17</sup> provide for environmental protection. In Mali<sup>18</sup> and Senegal<sup>19</sup> , the conventions provide for the protection of nature and cultural heritage. The Congolese experience<sup>20</sup> is similar to that of Mali and Senegal in that it focuses on the protection of the environment and cultural heritage. In the Congo, the conventions go a step further by referring to the protection of biodiversity and the implementation of sustainable development<sup>21</sup> .

However, this semantic variation does not entail any change in substance, or even more so in practice. The fact remains that the aim of all these measures is to prevent the degradation of ecosystems and, more importantly, biodiversity. This objective of environmental governance is achieved through the joint implementation of specific development and planning programmes for environmental protection. It can also involve more concrete measures such as environmental monitoring, environmental audits and site rehabilitation.

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<sup>12</sup> E.-D. Kemfouet Kengny, "Les préoccupations relatives à la protection de l'environnement dans les codes miniers des pays de la communauté économique et monétaire de l'Afrique centrale (CEMAC) et de la République Démocratique du Congo" in J. C. Ngnintedem, A. Ondoua (eds), *op. cit.*, p. 258.

<sup>13</sup> *Ibid.*, p. 261.

<sup>14</sup> Article 11 of the mining agreement between the Republic of Cameroon and Cameroon and Korea Mining Incorporation; article 13, paragraph 2 of the mining agreement between the Republic of Cameroon and SINOSTEEL Cam SA, relating to the industrial exploitation of the Lobé iron deposit.

<sup>15</sup> Title V of the production sharing contract between the Republic of Chad and EWAAH Investors Limited; Title V of the production sharing contract between the Republic of Chad and the MASHAK Petroleum LLC-CLOGOILS consortium.

<sup>16</sup> Article 11 of the mining agreement between the State of Burkina Faso and KONKERA SA; article 11 of the mining agreement between RIVERSTONE KARMA SA and the State of Burkina Faso.

<sup>17</sup> Article 6, para. 6 of the Hydrocarbon Production Sharing Contract between the Republic of Côte d'Ivoire and Total Bloc CI-706; Article 6, para. 6 of the Hydrocarbon Production Sharing Contract Bloc CI-801 between the Republic of Côte d'Ivoire and ENI Côte d'Ivoire Limited and PETROCI Holding.

<sup>18</sup> Article 21 of the Establishment Agreement between the Government of the Republic of Mali and Société des Mines de GOUNKOTO SA; Article 22 of the Establishment Agreement between the Government of the Republic of Mali and SANDEEP GARG et Company SARL.

<sup>19</sup> Article 8 of the phosphate mining agreement between the State of Senegal and G-PHOS SA.

<sup>20</sup> Article 10 of the mining agreement relating to the Mont Nabemba iron deposit between the Republic of Congo and Congo Iron SA.

<sup>21</sup> *Ibid.*, article 10, paragraph 3.

It is clear that mining agreements in French-speaking sub-Saharan Africa do provide for greater protection of the environment and biodiversity. However, it cannot account for all the requirements of climate justice. In fact, if you look at it, it would appear to be a fashion statement rather than a conviction based on the urgency of climate change. The fact remains that today, environmental protection is at the heart of a number of issues, including climate justice. Today, it is eminently considered to be a measure of general interest<sup>22</sup>. What can we say about the value of restoring nature?

### 1.1.2. Enhancing the value of nature restoration

In view of the effects of mining on resources and the environment, the legislator has introduced a large number of regulations aimed at ensuring the sustainability and protection of the environment<sup>23</sup>.

In essence, the State's co-contractors in mining operations must take measures to preserve ecosystems and contribute to climate justice. States must therefore adopt environmental protection and management programmes that include, among other things, a rehabilitation plan for mined sites<sup>24</sup>. In addition, co-contractors are required to open a bank account to be used to finance the restoration and rehabilitation of mining sites<sup>25</sup>.

In addition, the restoration of nature also stems from the requirement that the co-contractors carry out the abandonment work on expiry of the contractual deadlines<sup>26</sup>. In practical terms, this means: the management, control and execution of operations leading to the definitive cessation of exploitation of a deposit and the corresponding wells, in whole or in part, the cessation of service and the making safe of all or part of the contractual area concerned, as well as the restoration of the sites, in particular by dismantling the installations. In any event, the rehabilitation of mining sites in Africa is essential<sup>27</sup>. It also aims to restore the ecological balance. What about the restrictive inclusion of non-environmental aspects in contracts?

## 1.2. Restrictive integration of non-environmental aspects

Climate justice incorporates a number of aspects close to human and socio-economic concerns. However, these elements are almost non-existent in the mining contracts signed by the countries under study. It is therefore striking to note that social justice is being undermined and that the protection of vulnerable groups is being downplayed.

<sup>22</sup> Ab. Sani, *Les enjeux contemporains de la protection de l'environnement au Niger*, PhD thesis, University of Bordeaux, 19 December 2014, p.126.

<sup>23</sup> U. N. Ebang Mvé, *L'encadrement juridique de l'exploitation minière au Cameroun*, Yaoundé, L'harmattan, 2015, p. 16.

<sup>24</sup> Preamble to the mining agreement between the Republic of Cameroon and Cameroon and Korea mining incorporation ;

<sup>25</sup> *Ibid.* Article 11(3) of the mining agreement between the State of Burkina Faso and KONKERA SA; Article 7 of the mining agreement for phosphates between the State of Senegal and G-PHOS SA.

<sup>26</sup> Article 37 al. 1 of the production sharing contract between the Republic of Chad and EWAH investors limited; article 6 al. 1 of the NSOKO II production sharing contract between the Republic of Congo and the national oil company of Congo, Total E et P Congo; Cevron Overseas (Congo) Limited.

<sup>27</sup> G. L. Ambomo, "La réhabilitation des sites extractifs : Analyse comparée en droits miniers africains", in J. C. Ngnintedem, A. Ondoua (eds.), *op. cit.*, p. 239.



### 1.2.1. Undermining social justice

Climate change is a powerful vector of social inequality. The promotion of social justice as a corollary to climate justice is a palliative to these urgent issues of environmental governance. Climate justice focuses on the social and democratic dimensions of public policy. It is also based on the principles of equality and solidarity<sup>28</sup>.

In essence, social justice can be seen in the fact that contracts provide for the construction of social infrastructure, in particular health, education, sports and electricity facilities, but mainly for the benefit of employees and their families, and secondarily for neighbouring communities. There is also the contractual requirement to finance and implement an integrated community development programme to improve local socio-economic conditions<sup>29</sup>.

Furthermore, according to the International Labour Organisation's Declaration on Social Justice for a Fair Globalisation<sup>30</sup>, social justice means social protection and social security by promoting employment, social dialogue and respect for fundamental rights.

While it is true that these aspects should not be overlooked in the quest for climate justice, the fact remains that this is a limited perception, as it applies only to employees of mining companies and their families. The benefits of applying these principles do not extend to local and indigenous populations. However, the concept of climate justice under consideration is intended to be broad and diverse. For this reason, climate justice is generally understood in terms of distributive justice<sup>31</sup>.

Distributive justice here implies the differentiated contributions of different countries to global greenhouse gas emissions and the means of offsetting these responsibilities through climate change mitigation policies and aid for the adaptation of the poorest and most vulnerable to climate variations. However, this approach to justice still seems too restrictive to take effective account of the many facets of social and environmental injustice generated by climate change. It should therefore incorporate other forms of justice, such as corrective or restorative justice. It needs to be forward-looking in order to achieve climate justice that is conducive to sustainable and inclusive development and that does not minimise the protection of vulnerable groups<sup>32</sup>.

### 1.2.2. Minimising protection for vulnerable groups

Climate justice makes it possible to combat poverty and protect vulnerable social groups. It is generally accepted that the deterioration of the environment primarily affects the poorest people and minorities, because their way of life is more dependent on variations in their environment. According to the report by the Intergovernmental Panel on Climate Change

<sup>28</sup> F. Augagneur, J. Fagnani, "Enjeux environnementaux, protection sociale et inégalités sociales", *Revue française des affaires sociales*, n° 160, 2015, pp. 100-118.

<sup>29</sup> Article 10 of the mining agreement between the Republic of Cameroon and Cameroon and Korea Mining Incorporation; Article 14 of the mining agreement between the State of Burkina Faso and Société des Mines de Sandrabo (SOMISA) SA.

<sup>30</sup> This Declaration was adopted by the International Labour Conference at its 97<sup>e</sup> session in Geneva on 10 June 2008.

<sup>31</sup> L. Laigle, *op. cit.* p. 1.

<sup>32</sup> S. J. Teche Ndeno, "Le secteur minier en Afrique subsaharienne à l'épreuve du développement durable" in J. C. Ngnintedem, A. Ondoua (eds.), *op. cit.*, pp. 223-236.



climate change (IPCC, 2014), socially, economically, culturally, politically and institutionally marginalised populations are particularly vulnerable to climate change.

In the countries under study, women, children, rural populations and indigenous peoples are of primary concern. However, their protection appears to be minimised in mining conventions in French-speaking sub-Saharan Africa. In essence, these conventions are limited to the provision of so-called general measures. These include environmental and social impact studies and development programmes for local communities. They do not include initiatives specifically dedicated to women, children and indigenous populations<sup>33</sup>. In the case of children, for example, according to a WHO report published in 2014, by 2030, 7.5 million children under the age of 15 will face famine as a result of climate change. As far as women are concerned, they are an essential link in Africa's vulnerable groups, and it is vital to protect their rights<sup>34</sup>.

In any case, mining is a vector of the climate crisis. This crisis "must be understood as a human rights crisis"<sup>35</sup>. However, guaranteeing the rights of vulnerable groups is fundamentally linked to protecting the environment, and therefore the climate, according to the preamble to the 2015 Paris Agreement. This interdependence is further highlighted in the statement by the United Nations Special Rapporteur on Human Rights and the Environment: "a safe climate is a vital component of the right to a healthy environment and is absolutely essential for human life and well-being"<sup>36</sup>. And while the relationship between mining and fundamental rights remains paradoxical, there is still a way to reconcile them<sup>37</sup>. All of which will strengthen the contractual anchoring of climate justice, the implementation of which is proving asymptotic.

## **2. The asymptotic implementation of climate justice by mining contractors**

The implementation of mining contracts shows that there is room for improvement in terms of climate justice. This calls for real action and an imperative reaction to ensure that climate justice is optimally contractualised.

### **2.1. Contrasting performance of mining contracts**

The few requirements relating to climate justice contained in mining contracts are little respected in practice. On analysis, there is an intentional underwriting of compensation measures and a reluctance on the part of contractors to make reparation measures operational.

#### **2.1.1 Intentional subscription to compensation measures**

"Mining has environmental impacts that legislation requires to be reduced, treated and compensated for as mining proceeds or as part of the post-mining process"<sup>38</sup>. In essence, compensation is a contractual requirement to take measures to

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<sup>33</sup> 2007 United Nations Declaration on the Rights of Indigenous Peoples.

<sup>34</sup> Article 4 of the United Nations Declaration on the Rights of Peasants and Others Working in Rural Areas, adopted in December 2018.

<sup>35</sup> S. Cognuck González, E. Numer, *Tools for climate action*, UNICEF, 2020, p. 6.

<sup>36</sup> 2019 report.

<sup>37</sup> M. Petsoko, *Exploitation minière et droits fondamentaux en droit camerounais: Concilier développement économique et droit à la santé et à la vie*, Paris, L'Harmattan, coll. Logiques juridiques, 2022, p. 69.

<sup>38</sup> M. Petsoko, *op. cit.* p. 68.



during and after operation, with the aim of controlling the effects that may contribute to the degradation of biodiversity. It involves the implementation of measures to restore, create, improve or prevent the loss or degradation of a type of ecosystem in order to offset the residual impacts on the ecosystem as a whole<sup>39</sup>. Compensation is therefore a mechanism that should only be implemented after measures have been taken to avoid and reduce the impacts initially identified. Compensatory measures deal only with the residual, unavoidable damage to biodiversity caused by operations. *In concrete terms*, these measures may involve the conversion of environments and the restoration of environments rich in biodiversity.

On analysis, compensation is an ontologically limited practice, because not all environmental damage can be compensated. Excessive demands for compensation measures may therefore entail a risk. This is the risk of reversing priorities. At present, the priority is ecosystem conservation rather than economic development.

Clearly, compensation has been enshrined in mining contracts in French-speaking sub-Saharan Africa, with particular reference to financial compensation. It is one of the fundamental requirements because of its direct link with the protection of the environment and biodiversity. The only problem is that the State's co-contractors seem to be subscribing to this requirement as a fashion statement, with the aim of formally satisfying the requirements of donors and, more importantly, international bodies monitoring the governance of the extractive industries. In general, there is a deliberate adherence to certain requirements that are included in mining contracts as a condition of validity. This enthusiasm for enshrining these requirements, which are well thought out to make climate justice a reality in mining, contrasts paradoxically with the reluctance of the co-contracting parties to operationalise the resulting reparation measures.

### 2.1.2 Reluctance to put reparation measures into practice

In addition to the traditional methods of repair, in particular compensation, rehabilitation and restoration, there are also compensation and indemnification. The advantage of these two elements is that they enhance the human element in the methods used to repair ecological damage. The first three would only concern the restoration of mining sites.

Indeed, reparation and responsibility are consubstantial<sup>40</sup>. However, there is an organised reluctance<sup>41</sup> on the part of mining companies not only to comply with their social and societal responsibility charters, but also to show ecological solidarity in view of the negative impact of their activities<sup>42</sup>. It can be seen that in several of the countries under study, many environmental violations have still not been remedied. In some cases, the failure to remedy environmental damage is simply due to shortcomings in the law and, to a greater extent, in the governance of the extractive industries.

Essentially, almost all the companies selected for the reconciliation do not report transfers in the site rehabilitation account. This is the case in

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<sup>39</sup> H. Soyer, *La compensation écologique : état des lieux et recommandations*, IUCN, French Committee, 2011, p. 6.

<sup>40</sup> A. A. Djakpo, *La réparation des dommages environnementaux : Cas de la Belgique francophone et du Bénin*, Thèse de doctorat en droit, Université d'Abomey-Calavi et École liégeoise de criminologie J. Constant, 2017, p. 8.

<sup>41</sup> The reluctance is said to be organised because, while there may be a lack of concern on the part of the State's co-contractors, there is more complicity on the part of African States.

<sup>42</sup> E. David, G. Lefèvre, *Juger les multinationales : Droits humains bafoués, ressources naturelles pillées, impunité organisée*, Mardaga, 2015, 192 p.

Côte d'Ivoire<sup>43</sup>. Others do not defer to the social expenditure required. The cases of Cameroon<sup>44</sup> and Chad<sup>45</sup> are illustrative. However, Senegal seems to be doing better by publishing some funding, albeit well below the required threshold, earmarked for climate justice activities<sup>46</sup>. In general, this failure to publish figures suggests either the non-payment of compulsory expenditure or the payment of derisory amounts that cannot be published.

In any case, compensation for ecological damage is limited, which makes it imperative that climate justice be optimally contractualised.

## 2.2 The need for optimal contractualisation of climate justice

Climate justice is becoming an imperative in a context of ecological crisis accentuated by the proliferation of extractive industries. Optimum contractualisation would therefore require the harmonisation of contractual standards in terms of climate justice and the rationalisation of the governance of extractive industries.

### 2.2.1 Harmonising contractual standards for climate justice

The legalisation of climate justice is embryonic, even beyond the lack of harmony observed in its contractualisation. Optimum contractualisation of climate justice depends on its explicit, broad and harmonised enshrinement in mining agreements.

The notion of climate justice does not appear in any mining contract examined in French-speaking sub-Saharan Africa. It can be perceived through a few aspects linked mainly to environmental protection and summarily, if at all, to human rights, equity, morality, ethics, transparency, education, health, gender, climate migrants, socio-ecological interdependence, intergenerational interdependence, etc. In addition to formalising them as contractual requirements, they must first be explicitly codified and their contractualisation harmonised. All of which would optimise the operability of climate justice and the rationalisation of the governance of the extractive industries.

### 2.2. Rationalising the governance of the extractive industries

The extractive industry is a hermetic sector in French-speaking sub-Saharan Africa. In Central Africa specifically, "transparency in this sector is at an impasse"<sup>47</sup>. However, the lack of information is not the only problem that requires the sector to be rationalised.

The problems in this sector are varied. Rationalising the governance of the extractive industries would involve: increasing non-financial sanctions against mining companies; consolidating the monitoring of companies' compliance with their social obligations; strengthening the activism of EITI representations within companies; boosting corporate social responsibility; rationalising relations between players in the sector, and so on.

<sup>43</sup> Côte d'Ivoire EITI Report, 2020, p. 136; Chad EITI Report, 2020.

<sup>44</sup> Cameroon EITI Report, 2018, p. 123.

<sup>45</sup> Chad EITI Report, 2020, p. 132.

<sup>46</sup> According to the EITI Senegal report, half-year 1, 2022, environmental expenditure amounted to 469,124,271 CFA francs for 2021, while social expenditure amounted to 1,296,962,096 CFA francs for the half-year 1<sup>er</sup> 2022.

<sup>47</sup> R. Atéba Eyong, "La divulgation des conventions minières, 'question prioritaire de légalité' pour les États d'Afrique centrale?", in A. Saa Lapa (coord.), *Initiatives de surveillance de la gouvernance des industries extractives en Afrique francophone*, Yaoundé, PUCAC, May 2016, p. 151.

mining; stepping up support for environmental action through a strong inclusion of civil society<sup>48</sup> ; promoting an ecological tax system that promotes climate justice. This should be a dissuasive tax rather than an attractive one, as is currently the case in these countries<sup>49</sup> .

From the above, it should be noted that streamlining the governance of the extractive industries will help to consolidate climate justice and sustainable development.<sup>50</sup>

## Conclusion

There is room for improvement in the contractualisation of climate justice in mining in French-speaking sub-Saharan Africa. This is due to its erratic appropriation and asymptotic implementation. Africa is experiencing a mining boom that is not without consequences for the environment. Promoting climate justice in such a context is urgent, given the growing socio-economic injustices linked to the climate crisis. However, it is more the solidarity of the States of the North that is required. This is because the relationship between these countries and those of the South in terms of climate justice is more marked by the increase in the climate debt, thereby posing the problem of its reparation to the States of the South that are suffering the most. Furthermore, it is up to the African states to become truly aware of the importance of a humanised extractive industry. The development of climate justice depends on it. In any case, there is hope. It's just a question of time and political will.

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<sup>48</sup> B. M. Ndongmo, "Gouvernance des industries extractives et société civile en Afrique subsaharienne: Une approche constructiviste du cas camerounais", in A. Saa Lapa (coord.), *op cit*, p. 203.

<sup>49</sup> Article 22 of the mining agreement between the Republic of Cameroon and Cameroon and Korea Mining Incorporation; article 20 of the mining agreement between the State of Burkina Faso and KONKERA SA; article 17 of the hydrocarbon production sharing contract Block CI-801 between the Republic of Côte d'Ivoire and ENI Côte d'Ivoire Limited and PETROCI Holding; articles 9 and 10 of the mining agreement for phosphates between the State of Senegal and G-PHOS SA.

<sup>50</sup> M. Ba, "Initiatives sous-régionales et appropriation par les États: Gouvernance des industries extractives et développement durable dans la zone CEDEAO", in A. Saa Lapa (coord.), *op cit*, p. 19.

# EXTRACTIVE INDUSTRIES, CLIMATE JUSTICE AND THE PROTECTION OF THE ENVIRONMENTAL RIGHTS OF LOCAL AND INDIGENOUS COMMUNITIES BEFORE AFRICAN NATIONAL COURTS: THE CASE OF NIGERIA AND SOUTH AFRICA

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## **Summary**

The fight against environmental damage has forced international players to adopt conventions, including those on climate change. While these conventions place obligations on States to combat climate change, it must be acknowledged that States are reluctant to meet their obligations. It is against this backdrop that citizens, NGOs, associations and local communities, as part of the climate justice movement, are endeavouring to challenge the responsibility of the South African and Nigerian governments before the national courts, on the basis of violations of the right to a healthy environment or of more stringent environmental and climate regulations. This litigation, opportunely based on human rights or the violation of the environmental content of environmental assessments, offers prospects for better environmental protection.

**Key words:** climate litigation; climate justice; right to a healthy environment.

## **Abstract**

*The fight against environmental damage has forced actors on the international scene to adopt conventions, including those on the climate. If these conventions impose obligations on States in the fight against climate change, it must be recognized that States are reluctant to respect their obligations. It is in this context that citizens, NGOs, associations, and local communities, within the framework of climate justice, are working to bring into play the responsibility of the South African and Nigerian States before national courts, is based on the violation of the right to a healthy environment or better climate-environmental prescriptions. This dispute opportunely founded on human rights or the violation of environmental contents of the environmental assessments offer prospects for a better environmental protection.*

**Keywords:** Climate Dispute; Climate Justice; Right to a Healthy Environment.

## Introduction

Climate justice, understood as all the legal actions taken by citizens against the perpetrators (State, company) of the causes of climate change, continues the fight against inequalities between States and the strengthening of intergenerational and intragenerational equity.

In the context of states, climate justice refers to litigation relating to the causes and consequences of climate change. Initiated by citizens, NGOs, associations and sometimes by the State and its agencies, climate litigation makes it possible to hold accountable those actors who, by their action, abstention or silence, encourage the occurrence and worsening of acts that damage the climate.

In the extractive industries sector, whose activities are the cause of various forms of pollution and greenhouse gas emissions, climate justice means that the State assumes its responsibility for setting environmental standards, its obligation to ensure that they are complied with and to punish offenders. On the other hand, the State is obliged to respect its national and international commitments to combat the effects of climate change.

In particular, the effects of climate change resulting from the activities of the extractive industries in the energy sector in Nigeria and South Africa present cases of climate justice which engage the responsibility of the State in the supervision of extractive activities.

Climate litigation, which is rare or even embryonic in Africa, is becoming more and more visible. In Nigeria, for example, the Federal High Court<sup>1</sup>, hearing a case brought by Jonah Gbemre against the multinational *Shell Petroleum Company Nigeria*, ruled in 2005 on the flaring of gas produced by the oil industry. Similarly, in South Africa, the association *Earthlife Africa Johannesburg* launched an appeal in 2016 against a permit for extractive activities issued by the Department of Environmental Affairs<sup>2</sup>.

In light of this emerging climate dispute, we have decided to tackle the subject of "climate change". "Extractive industries, climate justice and the protection of the environmental rights of local and indigenous communities before African national courts: the case of Nigeria and South Africa".

Initiated by local communities accompanied by environmental associations, these climate actions are based on the one hand on the violation of their right to a healthy environment enshrined in various national and international legal texts (1) and on the other hand on the State's obligation to assume its responsibilities by respecting its international commitments and enforcing its legislation. (2)

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<sup>1</sup> Federal High Court of Nigeria *Jonah Gbemre v Shell Petroleum Development Company Nigeria LTD & Others* Case no. FHC/B/CS/53/05 (judgment of 14 November 2005).

<sup>2</sup> High Court of South Africa *Earthlife Africa Johannesburg v The Minister of Environmental Affairs & Others* Case no. 65662/16 (judgment of 8 March 2017) (*Thabametsi*).

## 1. Climate litigation in the extractive industries in South Africa and Nigeria: litigation based on local and indigenous communities' right to a healthy environment

Climate litigation resulting from the actions of governments and the extractive industries at domestic level aims to protect populations and guarantee them a healthy environment. This healthy environment for local communities is achieved by protecting or guaranteeing their right to an adequate environment, conducive to their existence and the exercise of their activities. The extractive industries in the context of this dispute concern the oil industry in Nigeria and the coal-based energy industry in South Africa. Both of these industries pollute the environment by emitting and releasing gases into the atmosphere.

Faced with the dispute brought before it by Jonah Gbemre on behalf of his *Iwherekan* community, the Nigerian federal judge recognised that the applicants' human right to a healthy environment had been violated through the link he established between the right to life, the right to human dignity and the right to a clean and healthy environment, free from poison and pollution.

Twelve years later, on 8 March 2017, the South African judge recognised the violation of the right to a healthy environment of the applicants from the association *Earthlife Africa Johannesburg* in the Thabametsi case through the omission of the assessment of the climatic impact of the coal extraction and thermal energy production activity<sup>3</sup>.

The human right to a healthy environment highlighted in these two national decisions has a prominent place among the fundamental rights recognised to citizens and local communities in both international (1.1) and national (1.2) legal systems.

### 1.1. The right to a healthy environment in international instruments ratified by States

Awareness of the various ways in which the environment is being damaged has mobilised governments to adopt environmental protection instruments. From the 1972 Stockholm Conference, which diagnosed a planet suffering from the harmful effects of human activity, the cause of pollution and climate change, to the recent climate negotiations, governments have adopted binding and non-binding instruments to combat the damage caused to the planet.

As members of this international community, the Nigerian and South African governments have participated in these forums and adopted the tools developed by the community. The conventions that came out of these meetings, and the declarations that resulted, enshrined major rights for citizens, including the right to a healthy environment.

The 1972 Stockholm Declaration established a link between environmental protection and the protection of human rights, stating that "Man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being. He has a solemn duty to protect and improve the environment for present and future generations<sup>4</sup>.

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<sup>3</sup> *National Environmental Management Act*, section 24.

<sup>4</sup> Principle 1 of the 1972 Stockholm Declaration.



Through this principle, the Declaration outlines the right to a healthy environment for present and future generations. It places on the participating States the obligation to protect the environment against harmful and noxious actions which could lead to its deterioration and compromise the life of human beings and other living beings. These include human actions that cause climate change.

The human right to a healthy environment, which is reflected in this principle, would undergo a fundamental evolution, eventually being enshrined by UN bodies more than 50 years later. Indeed, the United Nations General Assembly<sup>5</sup> and the United Nations Human Rights Council<sup>6</sup> will ensure formal recognition of this right through two resolutions adopted in 2021 and 2022 respectively.

This approach at international level will fundamentally influence the mechanisms for protecting this right at national level and encourage its "justiciability" in favour of the people. Specifically, in the field of climate justice, this right to a healthy environment is positioned as a relevant tool in the hands of litigants to bring lawsuits to demand that States and companies take better care of the environment in the fight against climate change.

At regional level, the African States, within the framework of the continental body<sup>7</sup>, have created a regional system for the protection of human rights in general and environmental rights in particular, with the adoption of conventions and the establishment of mechanisms for sanctioning violations of these conventions.

In practice, African states have adopted the African Charter on Human and Peoples' Rights<sup>8</sup>, the African Convention on Nature and Natural Resources of Algiers<sup>9</sup> and subsequently the revised Maputo Convention<sup>10</sup>, the instruments relating to the African Court of Human Rights<sup>11</sup> and the African Commission on Human Rights<sup>12</sup>.

The African Charter recognises the right of African peoples to a satisfactory and comprehensive environment, conducive to their development<sup>13</sup>. This right includes an adequate environment for life, health and the physical and moral development of the people, as well as a healthy framework for the socio-economic and cultural activities of the people. The recognition of such a right already augured well for the desire to make the human right to a healthy environment a pillar of the African Charter. Such an approach was a precursor in 1981 because environmental issues, although

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<sup>5</sup> At its 76th session on 28 July 2022, the United Nations General Assembly adopted resolution A/76/L.75 on the right to a clean, healthy and sustainable environment.

<sup>6</sup> On 8 October 2021, the Human Rights Council adopted resolution A/HRC/RES/48/13 enshrining the right to a healthy environment.

<sup>7</sup> The Organisation of African Unity (OAU) and later the African Union (AU).

<sup>8</sup> The African Charter on Human and Peoples' Rights was adopted on 27 June 1981 and came into force on 21 October 1986.

<sup>9</sup> The Algiers African Convention on the Conservation of Nature and Natural Resources was adopted on 15 September 1968 and came into force on 16 June 1969.

<sup>10</sup> The Maputo Convention on the Conservation of Nature and Natural Resources was adopted on 11 July 2003 and entered into force on 10 July 2016.

<sup>11</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights was adopted on 10 June 1998 and entered into force on 25 January 2004.

<sup>12</sup> The African Commission on Human and Peoples' Rights was inaugurated on 2 November 1987 in Addis Ababa. Its headquarters are in Banjul.

<sup>13</sup> Article 24 of the African Charter.



present on the international agenda had not reached the level of maturity required to enshrine such rights, particularly in Africa<sup>14</sup>.

Nigeria ratified the African Charter on 22 June 1983, while South Africa did so on 9 July 1996. The provisions of the African Charter are taken up by the Maputo Convention in its article

3.1. The African Convention postulates the obligation for all to guarantee a satisfactory environment for human life, activity and development. It specifies that needs relating to the environment and development must be based on justice, equity and sustainability. It commits States Parties to sustainable, just and equitable actions for the environment. The Convention has been ratified by South Africa<sup>15</sup> and its obligations apply to South Africa.

These timid advances are set to receive renewed attention with the adoption of resolutions by the United Nations General Assembly and the Human Rights Council. By adopting the resolution of 28 July 2022, the United Nations General Assembly recognises that a clean, healthy and sustainable environment is a human right<sup>16</sup> necessary for the full enjoyment of all other human rights.

The value of the resolution lies in the fact that it was adopted by a broad consensus, with 161 States voting in favour and none against. In addition, it calls on States to fulfil their environmental commitments, in particular by adopting relevant policies and fully implementing international commitments, notably environmental conventions.

It is worth noting that on 5 October 2021, the Human Rights Council also adopted a resolution enshrining the right to a safe, clean, healthy and sustainable environment.

Although these resolutions are non-binding on States, they remain instruments with definite moral and political force, encouraging States, particularly Nigeria and South Africa, to respect them and incorporate them into their national legislation.

## 1.2. The right to a healthy environment in national legal instruments

The right to a healthy environment is enshrined in the domestic legal systems of Nigeria and South Africa. Article 24 of the 1996 South African Constitution states that

The Constitution also provides that "everyone has the right to an environment which is not harmful to their health and well-being, to have the environment protected for the benefit of present and future generations by reasonable legislative and other measures that may prevent pollution and degradation of the environment"<sup>17</sup>. These constitutional provisions, in line with international instruments, explicitly recognise the right to a healthy environment in South Africa. They oblige the State to adopt the policies, institutions and legislation necessary to make this right effective.

Based on the Constitution, the South African legislature passed the *National Environmental Management Act* (NEMA) in 1998. This Act provides for

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<sup>14</sup> The African Charter reflects the place given to the environment by the African continent a decade before the advent of the Rio Summit and the global conventions on the environment.

<sup>15</sup> South Africa ratified the Maputo Convention on 23 May 2013.

<sup>16</sup> <https://www.ilo.org>.

<sup>17</sup> <https://w.w.w.goz.za>.

environmental assessment as a tool for managing the environment by applying the mechanisms of precaution, prevention and, above all, correction of the harmful effects of human activities on the environment. Specifically, the impacts identified by the environmental assessment must relate to the relevant aspects of the activity. In the *Thabametsi* case, for example, in addition to the existence of an environmental assessment in the application for authorisation, the applicants contested the omission of an assessment of the climatic impact of the coal-fired power station project. Even though this impact is not expressly provided for in NEMA, it was important and even unavoidable insofar as the thermal power station, both for the extraction of coal and for the production of thermal energy, emits emissions that contribute enormously to climate change. In his interpretation, the judge of the *North Guaten High Court* extended the range of effects to be investigated in an environmental study to the specific features and impacts that can be generated by a sector of activity.

In Nigeria, the Federal Constitution adopted in 1999 enshrines the right to life and human dignity in sections 33(1) and 34(1). These fundamental rights provisions compensate for the absence of express provisions on the right to a healthy environment. In addition to the Nigerian Constitution, national legislation prescribes measures to protect and safeguard the environment. In this context, the *Environmental Impact Assessment Act* of 2004 requires environmental assessments to be carried out on applications for authorisations submitted to the decision-making authority<sup>18</sup>. In addition, the quality of these assessments, together with environmental and social management measures, is a condition for authorisation of the activity.

It was in this context that the Nigerian judge in the *Jonah Gbemre* case was asked to assess whether "the practice of gas flaring carried out by the oil companies Shell Petroleum Development Company Nigeria LTD and Nigerian National Petroleum Corporation violated the fundamental rights to life and human dignity, including a healthy environment" of the claimant and the Iwherekan community in Delta State.

In his interpretation of the Constitution, the judge came to the conclusion that the right to life and human dignity as fundamental rights in Nigeria, implies the existence and guarantee by the State of an environment free from pollution, poison and harmful effects that would be detrimental to life. In this sense, it establishes that human life and dignity necessarily require a healthy environment; hence the enshrinement of this right and the finding that it is being undermined by gas flaring activities as far as members of the Iwherekan community are concerned.

This move by the Nigerian judge reinforces the awareness that environmental rights in general, and the right to a healthy environment in particular, are human rights, the guarantee and exercise of which contribute to the promotion of the first fundamental right of human beings: the right to claim to be human and to live.

In this sense, judges, as guardians of fundamental rights and freedoms, are bound to be sensitive to any infringement of them. In addition to the Constitution and environmental laws, international commitments also enshrine the obligation to respect and protect people's right to an environment.

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<sup>18</sup> Sections 1, 3 and 7 of the *Environmental Impact Assessment Act* of 2004.



## 2. The obligation of States to respect their commitments and obligations

Environmental issues mobilise players on the international scene. States, as well as international and specialised regional organisations, are involved in setting environmental protection standards and creating specialised institutions. States contribute to the development and application of environmental standards. Specifically, with regard to climate change, achieving the objectives of combating climate change in general and protecting the right to a healthy environment in particular requires States to apply their international commitments (2.1) and comply with their national obligations (2.2).

### 2.1. A responsibility that stems from their international commitments

The round of climate negotiations has made it possible to obtain commitments from governments to take action in favour of the climate. The United Nations Framework Convention on Climate Change and the Kyoto Protocol set greenhouse gas emission reduction targets for industrialised countries<sup>19</sup> and actions to support developing countries in the fight against climate change<sup>20</sup>.

Developing countries, which are considered victims of past action by industrialised countries and are vulnerable to the effects of climate change, must be supported in preserving the carbon sinks under their jurisdiction and encouraged to adopt green development technologies.

This international approach to the fight against climate change will undergo a major change with the Paris Agreement<sup>21</sup>. From that point onwards, efforts to reduce emissions became universal, i.e. they concerned both industrialised and developing countries, through the mechanism of nationally determined contributions<sup>22</sup> and the reporting of efforts made by countries to achieve the targets set.

The Paris Agreement is a major legal instrument in the context of climate change litigation relating to the extractive industries in Africa. Under the Kyoto Protocol, African countries classified as developing countries were not subject to emission reduction obligations. This situation will undergo a major change with the Paris Agreement, which provides for the nationally determined contribution<sup>23</sup> (NDC) as an essential mechanism for States' commitments. Each State Party must now determine its national contribution to reducing GHG emissions and, above all, update it every five years<sup>24</sup>, so as to reflect its will and commitment to the climate.

The contribution determined at national level, which is incumbent on all States Parties, although voluntary, is nonetheless binding insofar as it stems from the Agreement and determines adherence to the Convention. In this sense, for Hugues Hellio<sup>25</sup>, the NDCs are "acts

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<sup>19</sup> Annex B of the Kyoto Protocol.

<sup>20</sup> Mitigation and adaptation actions through the preservation of carbon sink ecosystems, the popularisation of the use of green technologies for economic activities and the financing of actions to conserve and/or restore the environment.

<sup>21</sup> Adopted on 12 December 2015 and entered into force on 4 November 2016.

<sup>22</sup> Articles 3 and 4 of the Paris Agreement.

<sup>23</sup> Article 3 of the Paris Agreement.

<sup>24</sup> Article 4 of the Paris Agreement.

<sup>25</sup> H. Hellio, "Les 'contributions déterminées au niveau national', instruments au statut juridique en devenir", *Revue juridique de l'environnement*, 2017/HS (special issue), pp 33-48.

In Africa, the Agreement has been signed by all the countries on the continent and ratified by forty-two countries. At the African level, we can congratulate ourselves on the signing of the Agreement by all the States of the continent and its ratification by forty-two States on 7 September 2017<sup>26</sup>.

With regard to the two countries covered by our study, South Africa and Nigeria, it is relevant to note that South Africa, in its NDC updated in September 2021, stated that its share of global GHG emissions was 1.13%. The country has set itself a conditional emissions reduction target of between 398 and 510 MtCO<sub>2</sub>-eq by 2025 and between 350 and 420 MtCO<sub>2</sub>-eq by 2030. It also indicated that the areas for adaptation and resilience are transport, agriculture, energy, housing, biodiversity and water<sup>27</sup>. Nigeria signed the Paris Agreement on 22 September 2016 and ratified it on 16 May 2017<sup>28</sup>.

As part of its commitments under the Agreement, the Nigerian government produced and submitted an NDC report on 2 July 2021. In this report, the Nigerian energy sector emitted between 150 and 209 Mt of CO<sub>2</sub>-eq from 2010 to 2018<sup>29</sup>, compared with total national emissions of 240 to 340 Mt of CO<sub>2</sub>-eq over the same period.

The approach taken by the South African and Nigerian governments in the context of the NDC resulting from the Paris Agreement indicates that the extractive industries sector linked to the energy sector, in this case the extraction of coal for the production of thermal energy, gas and oil, is a major gas-emitting sector. Reducing such emissions contributes to efforts to combat climate change. With this in mind, the South African Department of Environmental Affairs, by failing to require the promoter to carry out a climate assessment of its activity in its decision to authorise the thermal power plant project, has called into question the South African government's climate commitments resulting from its accession to the Paris Agreement. Similarly, the Nigerian government, by failing to regulate or prohibit oil companies from flaring gas produced during oil extraction, is in breach of its obligations to reduce emissions and to protect the environment and the quality of life of local communities. These omissions constitute breaches of their international commitments to protect the environment and combat climate change.

This position is identical to those adopted by the Dutch and Pakistani judges in condemning the governments of the Netherlands and Pakistan for non-compliance with their international commitments to reduce GHG emissions<sup>30</sup>.

As far as the Kyoto Protocol is concerned, the industrialised countries were called upon to reduce their emissions<sup>31</sup>. To achieve this, three key mechanisms were adopted: emissions permits, joint implementation and the clean development mechanism.

The latter mechanism, aimed at developing countries, enabled developed countries to achieve their GHG emissions reduction targets by financing GHG emissions reduction projects in developing countries and, in return, obtain emissions credits to be booked against their assets.

<sup>26</sup> M. A. Mekouar, "L'Afrique à l'épreuve de l'accord de Paris : ambitions et défis", *Revue juridique de l'environnement*, 2017/HS, pp. 59-71.

<sup>27</sup> <https://climatepromise.undp.org>; <https://unfccc.int>.

<sup>28</sup> <https://unfccc.int>.

<sup>29</sup> Emissions in the energy sector account for 60% of Nigeria's total GHG emissions. The oil and gas sector accounts for 36% of GHG emissions in the energy sector, <https://unfccc.int>.

<sup>30</sup> *Urgenda foundation v. Kingdom of Netherlands and Leghari v. Republic of Pakistan*.

<sup>31</sup> Ch. de Perthuis C., "Kyoto Protocol: the post-2012 challenges", *Revue internationale et stratégique*, 2005/4, no. 60, pp. 127-138.

To this end, various projects have been initiated for developing countries with resources that constitute carbon sequestration sinks. In return, these countries have an obligation to guarantee the protection of these areas and to protect them from damage that would be detrimental to their survival.

## **2.2. The responsibility of the State in adopting and enforcing its legislation**

Under international conventions on the environment in general and climate change in particular, governments are obliged to adapt their legislation and to ensure that all stakeholders comply with their provisions.

Among the relevant tools created by environmental legislation that make it possible to achieve a certain degree of climate justice are those relating to the prevention and punishment of environmental damage, such as environmental policing and environmental assessments.

Environmental assessments are included in the legislation of most of the world's countries. They are based on the precautionary and preventive principles laid down in the Rio Declaration. Not only do they make it possible to assess the initial state of the environment before an activity is carried out, but above all they make it possible to set out the likely impacts and possible corrective measures. As a decision-making tool, environmental assessments are intended to inform the authority's decision to authorise or prohibit the activity.

The existence of environmental assessments in a country's legal system makes it possible to strictly control activities, guarantee compliance with environmental standards and preserve a healthy environment for the population. This is why the South African judge, in the absence of a climatic assessment that was essential for the thermal energy production sector, decided to cancel the authorisation issued by the Department of the Environment.

In cases where the promoters of activities infringe the legislation, the environmental police, as a public service, are responsible for recording infringements and seeking out the perpetrators so that penalties can be applied. These sanctions must involve stopping the activity, correcting and/or restoring the environment.

In the Jonah Gbemre case, despite the pollution of the environment and the infringement of the right to a healthy environment of members of the Iwherekan community as a result of gas flaring by oil companies, the State of Nigeria did not take any action to ascertain and punish violations of the law by offenders. This attitude clearly reflects a refusal to enforce Nigerian legislation. Moreover, the federal judge sanctioned this inertia on the part of the Nigerian state by acknowledging that the human rights of the Iwherekan communities had been violated.

In short, the adoption of domestic measures to apply international commitments and the obligation to ensure compliance with the environmental standards thus adopted remain obligations incumbent on States in order to effectively ensure the effectiveness of local communities' right to a healthy environment as part of the fight against climate change.





## Conclusion

Stimulated by the absence of a legal and jurisdictional framework for calling into question the responsibility of States and companies, the perpetrators of harmful acts against the climate, the actions initiated by local communities and associations are finding favour with national courts, which see them as actions to protect human rights or to ensure compliance with national legal frameworks on environmental assessments.

This favourable inclination on the part of national judges means that other possible arguments used by other national jurisdictional systems in the context of climate litigation, which make it easier to make the perpetrators of climatic actions assume their responsibilities, are now in place.

Judges in English-speaking countries have set the pace in the fight against climate change, and it is now up to their French-speaking peers to dare to take the plunge, should a case be referred to them, in order to make climate justice a reality on the continent, within States, for the protection of citizens, local communities and the environment.

# CIVIL SOCIETY ACTION TO PROTECT THE ENVIRONMENT AND PEOPLE IN THE MINING SECTOR IN CAMEROUN

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## **Summary**

If climate justice is to be effective, everyone needs to get involved, especially civil society, in order to make mining operators face up to their responsibilities. The aim is to use existing levers to force mining companies operating in Cameroon to respect their socio-economic commitments, but above all to repair the damage caused to people and the environment as a result of their activities. Civil society will act as a regulator and educator to guide mining policies, but also as a victim with a mandate to seek justice.

**Key word** : civil society; protection; environment; people; mining sector.

## **Abstract:**

*If climate justice is to be effective, everyone needs to be involved, especially civil society, to hold mining operators face up to their responsibilities. The aim is to use existing levers to force mining companies operating in Cameroon to respect their socio-economic commitments, and above all to repair the damage caused to people and the environment by their activities. On occasion, civil society acts as a regulator and educator to guide mining policies, but also as a victim and an agent for justice.*

**Keywords:** Civil Society; Protection; Environment; People; Mining Sector.

## Introduction

Mining represents a real threat to the climate. The consequences of this activity are increasingly visible in the indeterminate variations of the seasons, the health of populations and agricultural production. This situation poses serious problems, as it exposes people and the environment to insecurity; hence the need to protect them<sup>1</sup>. With this in mind, a number of players have been trying for some years to obtain justice for the environment and people<sup>2</sup>. Alongside the state, civil society has gradually established itself as a key player in defending the rights of people and the environment who are victims of abusive mining.

In contrast to the commercial company<sup>3</sup>, the civil company refers to any entity to which the law does not attribute another character because of its form, nature or purpose<sup>4</sup>. For the purposes of this study, we will use the term civil society to include mining workers' unions, approved citizens' and consumers' associations, and national and international non-governmental organisations whose mission is to safeguard the environment and contribute to its protection<sup>5</sup>.

Protection is the action of watching over and defending someone or something against danger or aggression. It is the support, assistance, assurance, safeguard or guarantee offered to something or someone<sup>6</sup>. At the same time, the environment is seen as all the components of a given environment that legislation designates<sup>7</sup>. The person is the holder of the rights to be protected<sup>8</sup>. It is also the being who enjoys legal personality, i.e. a subject of law<sup>9</sup>. The protection of the person as we envisage it will relate to all the measures taken to prevent the violation of human rights in the extractive industry. In this way, the protection applied to the individual and the environment refers to the measures prescribed by national<sup>10</sup> and international<sup>11</sup> legislators to the mining operator to preserve the balance of the environment, the physical integrity of individuals, ensure their well-being and, if necessary, repair the damage caused by its activities.

Cameroon's mining sector refers to the regulatory framework governing the exploitation of mines in Cameroon. Mines are defined as deposits of mineral substances not classified as quarries, with the exception of liquid or gaseous hydrocarbons, or places where substances are exploited.

<sup>1</sup> S. Maljean-Dubois, "Quel droit international face aux changements climatiques", *Recueil Dalloz*, 2015, p. 2263.

<sup>2</sup> F.-G. Trébulle, "Quelle entreprise face au changement climatique?", *Recueil Dalloz*, 2015, p. 2272.

<sup>3</sup> Article 4 of the Uniform Act relating to Commercial Companies and Economic Interest Groups: "A commercial company shall be formed by two (2) or more persons who agree, by contract, to allocate to an activity assets in cash or in kind, or industry, with a view to I sharing the profits or benefiting from any savings which may result therefrom. The partners undertake to contribute to losses under the conditions laid down in this Uniform Act".

<sup>4</sup> B. Saintourens, "Société civile", *Rép. Soc.* 2017, no. 2.

<sup>5</sup> Article 9 of Law no. 096/12 of 5 August 1996 on environmental management in Cameroon; C. Ott Duclaux-Monteil, "African civil society, international environmentalist NGOs and the financing of environmental law in Africa", *RADE*, no. 1, 2014, p. 131.

<sup>6</sup> G. Cornu, *Vocabulaire juridique*, 12<sup>e</sup> ed, PUF, 2018, p. 1743.

<sup>7</sup> *Ibid.*, p. 889.

<sup>8</sup> J.-C. Saint-Pau (ed.), *Droits de la personnalité*, Lexisnexis, 2013.

<sup>9</sup> G. Cornu, *Vocabulaire juridique*, *op. cit.* p. 1609.

<sup>10</sup> Law no. 2016/017 of 14 December 2016 on the Cameroon Mining Code; Civil Code of 1804; Law no. 92/007 of 14 August 1992 on the Cameroon Labour Code.

<sup>11</sup> African Charter on Human and Peoples' Rights; OECD Guidelines; UN Global Compact; ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy; UN Guiding Principles on Business and Human Rights.



mineral deposits, whether in the open air or underground, including the installations and movable or immovable equipment used in mining<sup>12</sup>. However, this study is intended to be more comprehensive. Consequently, the concept of mining will be used in a broad sense to refer not only to solid mining, but also to quarrying<sup>13</sup>. It is in these activities that civil society intervenes to preserve the balance of the environment and the safety of property and people.

The contribution of civil society to the preservation of the environment and people in Cameroon is recognised by article 8 paragraph 2 of the framework law of 05 August 1996 on environmental management, which states: "Grassroots communities and approved associations contributing to any action taken by public and semi-public bodies with the aim of protecting the environment, may exercise the rights granted to civil parties with regard to acts constituting breaches of the provisions of this law and its implementing texts, and causing direct or indirect harm to the collective interests that they are intended to defend". This provision promotes public participation in environmental management through consultative mechanisms for gathering public opinion, representation on consultative bodies and free access to environmental information.

However, justice is not limited to prevention; it also encompasses compensation for damage<sup>14</sup>. We therefore need to define the scope of civil society's powers to obtain justice for people and the environment. So how should civil society go about forcing mining companies to honour their commitments? Certainly through the channels available to it as a regulator and as a victim of harm. While the involvement of civil society in mining augurs well, in practice their actions all too often come up against difficulties inherent in the nature of the sector and the administrative and judicial procedures in force. The approach taken must therefore be rigorous, or risk compromising the laudable ambitions it defends. Be that as it may, there is limited preventive control (I) and perfectible curative control enabling civil society to force mining companies to respect their commitments (II).

## 1. Limited preventive control

Preventive control takes place upstream of mining. In this phase, civil society has an educational role (1.1) and its intervention is limited in the development of mining governance standards (1.2).

### 1.1 The educational mission of civil society

Civil society's role in educating mining companies is essentially to promote respect for human rights and the environment in areas affected by mining operations. This is in line with the directives of the framework law on environmental management, which stipulates that associations working in the field of the environment and development must be mobilised in order to organise information and education campaigns.

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<sup>12</sup> Article 4 of Act no. 2016/017 of 14 December 2016.

<sup>13</sup> *Ibid*; a quarry is any area where construction materials or industrial minerals such as phosphates and nitrates are mined, along with dedicated facilities.

<sup>14</sup> Ph. Brun, *Responsabilité civile extracontractuelle*, Paris, Litec, 5<sup>e</sup> édition, collection Manuels, 2018; C. Jubault, "Legal action by stakeholders in the context of corporate social responsibility", *RTDCiv.* 2018, pp. 524-525.



raising public awareness through the media and all other means of communication<sup>15</sup>. This mission is deployed through actions aimed at informing and training mining companies on the legal framework that regulates mining activity in Cameroon.

Civil society action has made it possible to address issues of collective concern, with a view to preserving the environment and human rights<sup>16</sup>. Thanks to NGOs, citizens can learn about current issues in the mining sector and, if they wish, influence the activities of mining companies<sup>17</sup>. NGOs now play a key role in environmental protection and are regularly called upon by public authorities in many circumstances. This is the case, for example, with the PWYP cooperation platform<sup>18</sup>, a Cameroonian coalition set up as part of Cameroon's EITI compliance process<sup>19</sup>. The associations in this coalition<sup>20</sup> have made a plea for Cameroon to join the EITI.

The other means used by civil society is the constant dissemination of study reports to make mining companies aware of the risks incurred by illegal mining. These reports indicate the penalties and potentially devastating effects of mining activities on the health and socio-economic activities of local communities. It is in this context that the Réseau de lutte contre la faim au Cameroun constantly publishes studies to improve the management of mining activities in Cameroon and positions itself not only as defenders of the environment, but also as the voice of local communities and defenders of Cameroon's cause in its quest for development through the extractive industries<sup>21</sup>.

Despite the scarcity of associations working to defend mining workers, particularly in the northern part of the country, it has to be said that some local civil society organisations are fighting on a daily basis for better governance in this sector, acting as local support bodies and sometimes playing a trade union role; This is the case of the Centre pour l'éducation, la formation et l'appui aux initiatives de développement au Cameroun (Centre for education, training and support for development initiatives in Cameroon), which is conducting a number of studies in the Boumba and Ngoko department, mainly around the Mobilong diamond project in the East Cameroon region<sup>22</sup>.

Be that as it may, these actions make it possible to a certain extent to orient social and environmental responsibility policies in line with the local context with a view to protecting the environment, goods and people. The data collected from 93 executives and company directors operating in Cameroon showed that most of the companies involved in CSR are subsidiaries of multinationals, which not only do what the parent company tells them to do, but also behave in a way that is not in line with the principles of corporate social responsibility (CSR).

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<sup>15</sup> Article 74 of law no. 96/12 of 5 August 1996.

<sup>16</sup> J. A. Fuentes Veliz, "The changing role of non-governmental organisations in environmental law", *Agenda Internacional*, Año XIV, n° 45, 2007, p. 43.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Publish what you pay.*

<sup>19</sup> Extractive Industries Transparency Initiative.

<sup>20</sup> Among them, the Centre for Environment and Development, *Transparency International*, Ecumenical Peace Service and Global Youth Dynamics are members of the EITI Committee.

<sup>21</sup> B. M. Ndongmo, "Reconfiguration de la gouvernance des industries extractives et société civile au Cameroun. Entre restructuration et reproduction des modes de gouvernance extractive", *Cahiers tchadiens: Archéologie, Anthropologie, Sociologie*, n° 1, 2017, p. 1. <http://catchas.mmsh.univ-aix.fr/n/Pages/n01/07.aspx>.

<sup>22</sup> Friedrich Ebert Stiftung Cameroon/Central Africa, *État des lieux sur le travail décent dans le secteur minier au Cameroun : Le cas des travailleurs miniers des régions de l'Adamaoua et de l'Est du Cameroun*, PUA, 2015, <https://library.fes.de/pdf-files/bueros/kamerun/11573.pdf>.



The aim is to gain a good reputation and a better image in the eyes of the public<sup>23</sup>.

## 1.2. Limited involvement of civil society in the mining sector

Civil society is involved in drawing up the standards regulating the mining sector, but its participation is limited by the restrictions on its powers. Approved associations are constantly taking part in forums to voice the concerns and expectations of local people. They act on behalf of the people and channel messages from civil society with increasing success. The concerns expressed in these forums and the objections raised at public hearings can influence the adoption or revision of mining companies' social and environmental responsibility policies. One of their remarkable actions was their involvement in the drafting of the 2016 Cameroon Mining Code<sup>24</sup>. This text has made civil society organisations a partner of choice in extractive governance. This document requires holders of mining titles operating in Cameroon "to comply with the international commitments made by the State and applicable to their activities, to improve governance in the mining sector, in particular those relating to the Kimberley Process and the Extractive Industries Transparency Initiative"<sup>25</sup>.

Civil society efforts led to the creation of the EITI<sup>26</sup> and the Kimberley Process<sup>27</sup> to develop standards and promote best mining practice. Since joining the Kimberly Process in 2003, Cameroon has been striving to put its recommendations into practice. The country has a working group responsible for monitoring activities involving diamond mining. This group is made up of a permanent national committee that serves as a gateway for all national diamond production<sup>28</sup>. Civil society has a seat on this committee, which enables it to give its opinion on improving the work and to participate in understanding the modelling process of this institution.

Alongside the Kimberly Process, there is the Extractive Industries Transparency Initiative (EITI), an international initiative set up by civil society to promote transparency in the governance of the extractive industries, to which several countries have signed up. Unlike the first institution, the EITI is more global and concerns all extractive industries, as well as the entire value chain of extracted resources. Requirement 1 of the 2016 EITI standard calls for the establishment of a functional multi-stakeholder group comprising the

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<sup>23</sup> J. L. Djounda Tchinda, H. Boukar, V. Tsapi, "L'engagement des entreprises dans la RSE au Cameroun : une vision à partir de la théorie néo-institutionnelle", *REMSES*, No. 7, January-June 2018, p. 123, <http://revues.imist.ma/?journal=REMSES&page=index>.

<sup>24</sup> C. Anangue, "La prise en compte du contenu local dans le nouveau Code minier 2016: Quels enjeux pour le Cameroun?", *RELUFA Newsletter*, March 2017, p. 4.

<sup>25</sup> Art. 142 of Law no. 2016/017 of 14 December 2016.

<sup>26</sup> The EITI is an international not-for-profit organisation under Norwegian law, responsible for updating and overseeing the implementation of a standard. The purpose of the standard is to assess the extent to which a country's oil, gas and mining revenues are managed transparently. The standard is developed and its implementation monitored by a tripartite board made up of representatives of governments, companies active in the extractive sector and civil society organisations. <https://eiti.org/fr/qui-sommesnous>.

<sup>27</sup> The Kimberley Process is a tripartite international negotiating forum established in May 2000, bringing together representatives of governments, the diamond industry and civil society. It sets up an international diamond certification scheme to prevent illicit diamonds from entering the international market, [https://fr.wikipedia.org/wiki/Processus\\_de\\_Kimberley](https://fr.wikipedia.org/wiki/Processus_de_Kimberley).

<sup>28</sup> Articles 4 and 6 of Decree No. 2011/3666/PM of 2 November 2011 on the creation, organisation and operation of the Kimberley Process certification scheme in the Republic of Cameroon.

government, companies and civil society to monitor the implementation of EITI requirements. In Cameroon, this group was created in 2005<sup>29</sup> and was reorganised by Decree No. 2018/6026/PM of 17 July 2018 on the creation, organisation and functioning of the EITI implementation monitoring committee<sup>30</sup>. The regulations prescribed by these bodies are general, abstract and mandatory<sup>31</sup>. By subjecting the mining operator to the rules established by these institutions, the Cameroonian legislator is enshrining the normative control of civil society over mining activities in Cameroon.

However, the composition of these committees is anomalous. There is an imbalance between the players, with local communities under-represented, hence the need to restructure the EITI Implementation Monitoring Committee and the Kimberly Process National Standing Committee so that they achieve the objectives assigned to them. In addition, the involvement of civil society in national mining governance committees is generally limited, as stated in Article 72 of the Framework Law of 5 August 1996, to an advisory role<sup>32</sup>. What is more, most of the members of these committees come from the executive and political sectors. They have a strong influence on the decision-making process. In addition, the involvement of civil society is made more difficult by the restriction on access to information imposed by the environmental impact assessment regime<sup>33</sup>. These difficulties inherent in preventive control should not hinder civil society action, which also extends to compensation for damage caused by mining companies.

## 2. A curative control that can be improved

In the event of a breach of mining legislation, civil society can denounce and obtain compensation for the social and environmental damage suffered (2.1). In practice, however, this is made difficult by the complexity of the procedures in force and the existence of certain socio-political factors; hence the plea to strengthen reparation measures (2.2).

### 2.1 From denunciation to the difficult task of obtaining compensation...

On a daily basis, civil society monitors compliance with the commitments entered into by mining companies. Mining workers' unions and NGOs play a monitoring, inspection and warning role in this sector. They constantly issue statements highlighting the failure of mining companies to meet their obligations, especially those relating to their social and environmental responsibilities<sup>34</sup>. The work of the Figuil monitoring and protection unit for victims of mining operations is a case in point. This organisation brought the demands of local people to the attention of CIMENCAM to ensure that the company fulfilled its commitments. A few years ago, the NGO Forêts et Développement, in partnership with *Transparency International*, launched the "Environment-Mining-Health-Society Project". The implementation of this

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<sup>29</sup> By decree no. 2005/2176/PM of 16 June 2005 on the creation, organisation and operation of the monitoring committee for the implementation of the principles of the Extractive Industries Transparency Initiative.

<sup>30</sup> Articles 11 and 12 of Decree No. 2018/6026/PM of 17 July 2018.

<sup>31</sup> L. Bach, "Lois et décrets" *Rép. civ.*, March 2014, no. 58.

<sup>32</sup> "The participation of local people in environmental management can take place through consultative mechanisms that make it possible to gather their opinions and their representation on bodies".

<sup>33</sup> As set out in Article 4 of the 2013 decree, the environmental and social impact assessment seems to be a possibility rather than an obligation.

<sup>34</sup> M. Abanda Amany, *Droit des industries extractives et développement durable au Cameroun*, PhD thesis in private law, University of Yaoundé II, 2018.

The initiative has helped to reduce and denounce the various forms of illegal mining in the East and Adamaoua regions<sup>35</sup>.

The violations identified are contained in reports sent to the government, the international community and the mining companies. Alongside these reports, civil society, particularly trade unionists, often express their discontent through work stoppages and strikes. These actions aim to draw the attention of the national and international community to the abuses caused by illegal mining. Denunciations can be preventive when they aim to stop the threat of an infringement of consumer rights, or remedial when they aim to repair the infringement of consumer rights.

The right to take legal action against those responsible for environmental damage is enshrined in article 8, paragraph 2 of the above-mentioned framework law on environmental management. However, there are two limits to this right. On the one hand, the action of civil society is conditional on that of public and semi-public bodies, whose diligence is uncertain<sup>36</sup>. On the other hand, it is limited and conditional on the existence of direct or indirect harm to the collective interest that they aim to defend. Fortunately, framework law no. 2011/012 of 6 May 2011 on consumer protection in Cameroon makes it possible to circumvent these limitations. It enshrines a group action directly beneficial to people harmed by mining activity<sup>37</sup>. This action is provided for in Article 3(a), which states that "(...) consumers have the right to protection of life, health, safety and the environment (...)", and is backed up by paragraph (e) of the same article, which enshrines the principle of full reparation for the damage suffered, which may be requested by consumer associations<sup>38</sup>.

## 2.2...reinforcing means of action and reparation measures

Strengthening civil society's means of action is more necessary than ever to confront mining companies with their responsibilities. A number of associations and NGOs set up to protect the environment and local communities are characterised by a lack of cohesion, expertise and culture when it comes to extractive industries.

Incoherence is manifested in conflicts of interest and greed. A number of civil society players engage in merciless warfare whenever opportunities arise<sup>39</sup>. These facts, which reveal "the weaknesses of civil society, relate mainly to their difficulties in defining themselves as a group in order to give themselves legitimacy as a group, which implies limited experience of sharing information between them, limited contacts between national representatives and local associations and insufficient consultation between them on major social problems such as corruption"<sup>40</sup>. As a result, civil society is acting as one. As a logical consequence, the demands made are very often incoherent,

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<sup>35</sup> Mining in Cameroon <https://forest4dev.org/>.

<sup>36</sup> M. Abanda Amanya, *Droit des industries extractives et développement durable*, op. cit, p. 367.

<sup>37</sup> A group action may be defined as an action brought either directly by the victims themselves or by a group with a view to obtaining compensation for the individual losses suffered by each of the victims as a result of the same harmful event: A. Akam Akam, "L'émergence de l'action collective en droit camerounais", *Bulletin de droit économique*, 2017, no. 2, p. 1.

<sup>38</sup> Articles 26 and 27 of Framework Act 2011/012 of 6 May 2011.

<sup>39</sup> *Ibid.*

<sup>40</sup> E. Oum, *Le partenariat public-privé dans la lutte contre la corruption et le renforcement de l'économie au regard du programme de promotion de la bonne gouvernance : le cas du Cameroun*, Tangiers, 2010, p. 8.



scattered and poorly coordinated<sup>41</sup> hence the need to define action plans that go far beyond egocentric interests.

The strengthening of the means of action is explained more by the lack of expertise of civil society, which is incapable of synthesising the problems and proposing relevant solutions<sup>42</sup>, the low weight of civil society in the face of the power of the mining companies, the low interest of public opinion in mining issues<sup>43</sup>, the omnipresence of politics in the mining sector<sup>44</sup>, the resurgence of "crocodile" NGOs<sup>45</sup>. These facts are obstacles to the expression and management of mining issues by civil society.

The cultural deficit is also an obstacle to civil society action. This deficit manifests itself in ignorance of the workings of the system of governance, both official and unofficial, of the cutting-edge technology essential to the extractive industries, of valuable information relating to decision-making, and of the economic and political stakes of the extractive industries. To remedy this situation, the State must stop treating the mining sector as a reserved domain and give civil society real powers to assess and sanction the standards governing mining activity in Cameroon.<sup>46</sup> What is more, the public authorities must create an incentive framework for CSR, enshrining an obligation for mining companies and civil society to cooperate<sup>47</sup>.

Strengthening civil society's means of action can also be achieved by reconfiguring the structure in which it is deployed. This is particularly true of the EITI Committee. The committee is merely a consultative body within which a technical secretary appointed by decree of the President of the Republic has decision-making powers<sup>48</sup>. However, in order to carry out its tasks peacefully, civil society must be included in the decision-making process, which presupposes that it has real powers of assessment.

In addition, the strengthening of measures to repair socio-environmental damage must be supported by civil society, as was the case with the EITI and the Kimberly Process. This is easily explained by the reasons given above, and even more so by: the obstacles to identifying the debtor of the obligation to compensate, the difficulties in compensating certain types of damage (such as mass damage and objective damage), the poverty of the population, the complexity and cumbersomeness of legal proceedings, and above all by the insolvency or disappearance of the mining operator<sup>49</sup>. It would also be wise to make

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<sup>41</sup> C. Fioroni, "Micro-politique de revendications pour l'emploi dans le bassin minier Sud Jordanien", in A. Allal, M. Catusse, B. Monserrat Emperador (eds.), *Quand l'industrie proteste : fondements moraux des (in)soumissions ouvrières*, Presses Universitaires de Rennes, 2018, p. 143.

<sup>42</sup> B. M. Ndongmo, "Reconfiguration de la gouvernance des industries extractives et société civile au Cameroun. Entre restructuration et reproduction des modes de gouvernance extractive", *op. cit.* p. 5.

<sup>43</sup> Collège de la société civile impliquée dans le suivi de la gouvernance du secteur extractif au Cameroun, *Code de représentation et de redevabilité des organisations de la société civile camerounaise impliquées dans le suivi de gouvernance du secteur extractif au Cameroun*, Yaoundé, 2018.

<sup>44</sup> M. Kamto, *Droit de l'environnement en Afrique*, EDICEF/AUPELF, 1996.

<sup>45</sup> Term used by Gautier Pirotte to explain the need for multiple investments in Beninese NGOs. This term also applies to NGOs created by political leaders to consolidate their social base.

<sup>46</sup> B. M. Ndongmo, *op. cit.* p. 3.

<sup>47</sup> Association pour la communication sur les maladies tropicales-ASCOMT, *Résultats de l'enquête sur la perception de la RSE au Cameroun : le top 30 des entreprises responsables au Cameroun*, Yaoundé, 2014, [www.mediaterrre.org](http://www.mediaterrre.org).

<sup>48</sup> Articles 9 and 10 of Decree No. 2018/6026/PM of 17 July 2018.

<sup>49</sup> J. Olivier, *L'Union mondiale pour la nature, une organisation singulière au service du droit de l'environnement*, Bruylant, 2005.

legal action by associations against mining operators and to create a uniform legal framework for CSR in Cameroon.

However, as regards the insolvency or disappearance of the mining operator, prior guarantees must be lodged by the mining operators and endorsed by the State before mining activities begin. In some cases, once a mining operator has achieved its objective, it disappears in such a way that it is virtually impossible to trace it, either through death in the case of a natural person, or through dissolution in the case of a legal entity. This situation is recurrent in the Adamaoua and East regions of Cameroon, where there are many abandoned sites<sup>50</sup> or sites that have not been restored for lack of money<sup>51</sup>. What can be done in such a situation?

The introduction of a State guarantee could facilitate compensation for damage caused in such cases. This proposal is inspired by the solution put forward by the French legislator, which provides that in the event of the disappearance or default of the mining operator, the State guarantees compensation for mining losses<sup>52</sup>. As the State is the guarantor of the public interest, this guarantee is easily explained. Such a guarantee must be provided prior to the commencement of mining operations and must be honoured in the event of the failure or disappearance of the mining operator<sup>53</sup>.

The strengthening of reparation measures can also be achieved through the establishment of a Compensation Fund for Victims of Damage. The creation of this institution could be inspired by many others already in force in the Cameroonian legal system. These include the Motor Guarantee Fund set up by Law No. 2015/013 of 16 July 2015, which meets a requirement of the Community insurance authorities in the CIMA zone, the advent of which has been unanimously welcomed by road users<sup>54</sup>; and the African Deposit Guarantee Fund set up by Regulation No. 01/09/CEMAC/UMAC/COBAC of 20 April 2009. These two funds have virtually the same ideology, namely the compensation of victims of human activities. The aim is to create a favourable legal framework for socio-economic activities.

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<sup>50</sup> J. L. Chekoua, *État des lieux de la gouvernance des ressources minières : cas des régions de l'Est et l'Adamaoua*, FODER, 2016, p. 9.

<sup>51</sup> M. Abanda Amanyana, *Droit des industries extractives et développement durable au Cameroun*, op. cit, p. 339.

<sup>52</sup> Article 155, paragraph 3 of Law no. 2016/017 of 14 December 2016.

<sup>53</sup> TA Lyon, 31 October 2019, no. 1708503.

<sup>54</sup> Y. R. Kalieu Elongo, "Le fonds de garantie automobile au Cameroun, deux ans après la loi...", 2017, <http://kalieu-elongo.com/le-fonds-de-garantie-automobile-au-cameroun-deux-ans-apres-la-loi/>.







## MADAGASCAR: TAKING CLIMATE JUSTICE INTO ACCOUNT IN THE MINING SECTOR

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### Summary

Madagascar is one of the countries most vulnerable to climate change. This vulnerability is further accentuated by the existence of large-scale mining operations that generate socio-environmental impacts of which mining communities are the main victims. From a legal point of view, it is essential to incorporate the issue of climate justice into environmental and mining legislation. The adoption of a specific law on climate change would be the first step in this process. In addition, inconsistencies and legal loopholes in mining and environmental legislation can violate the rights of local communities. In order to ensure that climate justice is integrated into mining operations in Madagascar, it is essential to reform the institutions responsible for the environment and climate change. This article looks at the possibilities for improving the inclusion of climate justice in Madagascar's legal arsenal in order to better protect the interests of communities.

**Key word** : Madagascar; extractive industries; climate justice; environment.

### Abstract

*Madagascar is one of the most vulnerable countries to climate change. This vulnerability is further accentuated by the existence of large-scale mining operations in the country, which generate socio- environmental impacts of which mining communities are the main victims. On the legal front, it is imperative to integrate the issue of climate justice into environmental and mining legislation. The adoption of a specific law on climate change would be the first step in this process. Moreover, inconsistencies and legal loopholes in mining and environmental legislation can constitute a violation of local communities' rights. To ensure that climate justice is integrated into mining operations in Madagascar, it is essential to reform the institutions in charge of the environment and climate change. This article examines the possibilities for improving the inclusion of climate justice in Madagascar's legal arsenal, to better protect the interests of communities.*

**Keywords** : Madagascar; Extractive Industries; Climate Justice; Environment.

## Introduction

Madagascar is renowned for its wealth of natural, biological, fisheries and mineral resources. Despite this exceptional potential, the global climate crisis is putting considerable pressure on these resources, as the country is currently one of the most vulnerable to global climate change<sup>1</sup>. Climatic hazards such as temperature rises, floods, cyclones, drought, reduced rainfall and water shortages pose risks for every key sector of the country's activity<sup>2</sup>, leading to large-scale environmental degradation and further weakening of the population, 81% of whom are estimated by the World Bank (2022) to be living below the poverty line.

Climate change and global environmental degradation are caused by many factors, including mining and oil activities. Madagascar's total mining production was worth 654,138,106.43 US dollars (USD) in 2019, compared with USD 245,808,826.41 in 2020. The weight of the extractive industries in exports reached 29.24%, compared with 18.33% between 2019 and 2020. In 2020, the weight of the extractive sector in the Malagasy economy showed some regression, with a contribution of 3.58% compared with 6.41% in 2019<sup>3</sup>.

Furthermore, the major mining companies present in Madagascar, namely Ambatovy and Rio Tinto/QMM, state that they are implementing initiatives to reduce CO<sub>2</sub> emissions in an attempt to mitigate the effects of climate change. Despite these commitments, their social and environmental footprint is problematic. A study carried out by Publish What You Pay (PWYP) Madagascar, for example, reported suspected pollution and contamination of the waterways around the Mandena mine operated by Rio Tinto/QMM.

While the possibility of water pollution is the subject of endless debate between scientists from different backgrounds<sup>4</sup>, the perception of local communities is very clear: the discharge of waste mining water from QMM is said to be the source of various diseases and the gradual disappearance of fish species available for fishing.

Madagascar's mining and extractive resources, as in other similar countries, are both a potential source of development and a breeding ground for injustice if they are not used in a way that respects the rights of communities and the environment.

Faced with the numerous scandals implicating various companies in the destruction of the environment around the globe, a movement for climate justice has developed in recent years. According to Greenpeace France, the principle of climate justice consists of

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<sup>1</sup> According to the ND Gain Index data (2023), Madagascar has a vulnerability score of 0.557, placing it in the top 20<sup>e</sup> countries most vulnerable to climate change and where urgent action is needed.

<sup>2</sup> Ministère de l'Environnement et du Développement durable, Plan national d'adaptation au changement climatique (PNA Madagascar, Antananarivo, December 2021, pp. 17-20, <https://unfccc.int/sites/default/files/resource/PNA-Madagascar.pdf>).

<sup>3</sup> EITI Madagascar, Adapted Report 2019-2020, pp. 28-35

<sup>4</sup> S. Swanson, *Uranium in water: Memorandum to Y. Orenge (The Andrew Lees Trust)*, 2019, <http://www.andrewleestrust.org/blog/wpcontent/uploads/2019/11/Swanson-Uraniumin-Water-MEMO-Aug-2019-for-ALT-UK-.pdf>; JBS&G, *QMM Mandena Mine Madagascar: Incidental water quality sampling report: Report to Rio Tinto*, 2020; S. H. Emerman, *Impact on regional water quality of the Rio Tinto QMM ilmenite mine, southeastern Madagascar: Report to The Andrew Lees Trust*, 2019, [http://www.andrewleestrust.org/blog/wpcontent/uploads/2020/02/ALT\\_Water\\_Quality\\_Report\\_Emerman\\_Revised3.pdf](http://www.andrewleestrust.org/blog/wpcontent/uploads/2020/02/ALT_Water_Quality_Report_Emerman_Revised3.pdf).

"In other words, to hold them legally responsible for the human and environmental damage they cause. Environmental degradation is a violation of fundamental rights, such as the right to live in a healthy environment and the right to health. Environmental degradation is a violation of fundamental rights, such as the right to live in a healthy environment and the right to health.

What legislative provisions, then, can guarantee the limitation of greenhouse gas emissions and legal certainty for the local population, while at the same time favouring the implementation of large-scale mining operations in Madagascar? Two options can be envisaged to achieve this: the reorganisation of the existing legislative framework by introducing or strengthening climate justice considerations in mining and environmental legislation, and the creation of appropriate institutions or the reform of existing ones in order to adapt them to deal with the challenges arising from climate justice.

### **1. Redesigning the existing legislative framework by introducing climate justice considerations into mining and environmental legislation**

An analysis of Madagascar's existing legal texts suggests that the legal and political corpus governing climate change needs to be reformed so that it can be incorporated into mining and environmental legislation. In addition to the objectives of limiting greenhouse gas emissions, the rights of local communities must also take precedence to ensure greater climate justice.

#### **1.1. The need for an in-depth overhaul of existing laws and policies**

Madagascar does not have a law specifically dedicated to climate change. Indeed, the Malagasy legal framework governing the phenomenon is essentially made up of the main international conventions and treaties on the subject, including the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement.

Law 2015-003 of 20 January 2015 on the Environmental Charter does address the issue of climate change, but the provisions relating to it are incomplete or even non-existent. In the same vein, there is a desire to incorporate reciprocity between mining and the environment into the Mining Code and the Environmental Charter. On the other hand, there are no concrete provisions dealing with the issue of climate change in general and climate justice in particular in the mining sector.

However, given Madagascar's particular vulnerability to climate change<sup>5</sup>, it is more necessary than ever for the country to have a solid body of law to mitigate, or at least attempt to mitigate, the harmful consequences of the phenomenon. The first step would be to adopt a law on climate change. The aim of such a law would be to set limits on greenhouse gas emissions in the country in order to strengthen resilience and increase the country's capacity to adapt to climate change.

The cross-cutting nature of climate change means that this issue needs to be addressed in every sector of activity, and in this case the mining sector is of particular interest given the existing large-scale mining operations<sup>6</sup> and future operations given the

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<sup>5</sup> Madagascar National Adaptation Plan, 2021, p. 7.

<sup>6</sup> [www.ambatovy.com](http://www.ambatovy.com): "Ambatovy is the largest foreign investment ever made in the country and one of the largest in sub-Saharan Africa".



country's mining potential. It would therefore be logical for Madagascar's climate change legislation to be adopted in a manner consistent with environmental protection and mining legislation, and also consistent with current national policies.

This consistency seems to be rather difficult, as the effects of mining activities on the climate seem to be virtually neglected by Malagasy policies. Inconsistencies have been identified in the country's development policies and strategies, starting with the National Adaptation Plan (NAP), which highlighted the government's view of the relationship between climate change and the mining sector. Analysis of the NAP reveals that the mining sector is not one of the priority sectors it addresses, as the government states that the mining sector's link with climate change is indirect<sup>7</sup>.

This is totally illogical because the mining sector is indicated in the general policy of the State as being the flagship sector on which the country is supposed to propel its economy<sup>8</sup>. What's more, Madagascar is home to major mining projects for which greenhouse gas emissions are unavoidable<sup>9</sup>. The mining sector should therefore be one of the priority sectors in national climate change documents.

Consequently, the first step towards institutionalising climate justice must be a thorough overhaul and alignment of existing texts and policies. What's more, reciprocity between mining and the environment needs to be incorporated into the Mining Code and the Environmental Charter. These texts should contain provisions dealing with the issue of climate change in general and climate justice in particular.

## **1.2. Climate justice aimed at respecting and protecting the absolute rights of local communities**

The UNCAC enshrines the principles of precaution and public participation. These principles have been incorporated into Madagascar's Environmental Charter and Mining Code, and implemented through Decree no. 99-954 of 15 December 1999, amended by Decree no. 2004-167 of 3 February 2004 on making investments compatible with the environment (MECIE).

On the one hand, the precautionary principle is embodied in the requirement for an environmental impact assessment (EIA) prior to any mining project. This is a precautionary measure against the possible impact of mining activities on the environment, as well as a means of mitigation and adaptation.

The concern is that the MECIE decree stops at the EIA and does not provide for an impact study on the possible consequences of the mining project on the lives of local communities. This failure violates the fundamental rights of local populations, who are the first to be affected by mining projects. This limitation of the MECIE decree is compounded by its obsolescence. The decree came into force in 2004, while the Environmental Charter dates from 2015. It is therefore essential to issue a new MECIE decree, with the obligation to conduct an environmental and social impact study as the main provision.

On the other hand, the texts on mines and the environment provide for the adoption of an inclusive approach through the participation of the local population in the process. In this respect, the

<sup>7</sup> Ministère de l'Environnement et du Développement durable, Plan national d'adaptation, 2021, p. 34.

<sup>8</sup> General State Policy/IEM 2019-2023.

<sup>9</sup> Ambatovy Sustainability Report 2021, p. 48.

The MECIE decree provides for public participation, but through on-site consultation of documents (10 to 30 days) in Madagascar's capital (Antananarivo), a public enquiry (15 to 45 days) and a public hearing (25 to 70 days)<sup>10</sup>. This is detrimental to mining communities, as mining activities often take place on the outskirts rather than in the capital. As a result, there is a gap between the intention of inclusiveness expressed in the texts and its practical implementation.

Since democracy and local governance are among the foundations of the Republic, it is necessary to ensure that communities are more involved in all phases of mining projects. They should have a say and decision-making power over all mining projects. However, the population is still unaware of its rights with regard to prior consultation and free and informed consent, and the remedies available if the State fails to fulfil its consultation obligation are also unclear. These are shortcomings that must be corrected.

In addition, Madagascar's Environmental Charter and Mining Code provide for financial compensation for environmental damage caused by mining operations, through application of the polluter pays principle. The Mining Code requires an environmental provision to be set aside for the rehabilitation and protection of the environment<sup>11</sup>. This means that mining companies must, under the law, answer for their acts of environmental degradation.

Finally, complaints about environmental degradation are often ignored and, in the rare cases where they are taken into consideration, complainants suffer reprisals. For example, a study carried out by Publish What You Pay (PWYP) in 2022 on the Rio Tinto / QMM mining operation in Mandena showed that those seeking compensation for pollution caused by the mining company face intimidation and even arrest. This highlights the need for the law to provide protection for complainants in cases of environmental degradation caused by mining operations.

This analysis shows that a new MECIE decree should be promulgated, with the obligation to conduct a social impact study and to include the local population throughout the decision-making process for a mining project as key changes. It would also be useful to include in mining and environmental legislation a mechanism to protect complainants in the event that they come under external pressure as a result of their claims and demands. The implementation of appropriate structures is a logical extension of the proposed reform.

## **2. Institutional reform to improve climate justice in Madagascar's mining sector**

Taking climate justice into account in Madagascar's extractive industries sector requires significant reform of the existing institutions dedicated to environmental regulation and the supervision of mining activities.

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<sup>10</sup> Order no. 6830/2001 of 28 June 2001 laying down the terms and procedures for public participation in environmental assessment.

<sup>11</sup> Article 102 of the 2005 Malagasy Mining Code.



## 2.1. The National Office for the Environment (ONE)

ONE is the key institution responsible for implementing the MECIE decree. It is also responsible for the prevention, monitoring and assessment of environmental risks for any activity likely to harm the environment, including the extractive industries. Its key roles and responsibilities, listed in decree no. 2008-600 of 23 June 2008 amending and supplementing certain provisions relating to its creation and organisation, include the implementation of a mechanism for monitoring greenhouse gas emissions.

This role of ongoing monitoring of mining operations would involve regular on-site inspections to ensure that companies are complying with their environmental commitments and climate-related regulations. The ONE should also ensure that companies report their environmental data transparently.

To achieve this, mining companies should be required to follow specific protocols for carrying out their climate impact studies. This could include the assessment of GHG emissions throughout the life cycle of the mine, from extraction to reclamation, including the transport and processing of minerals. In addition, these studies should take into account potential impacts on the population. The results of these climate impact studies should be fully integrated into the environmental permitting process. In other words, environmental permits would only be granted on condition that companies demonstrate their commitment to climate justice.

However, ONE's effectiveness would also depend on its powers to impose penalties. The ONE should have the power to impose sanctions in the event of non-compliance with environmental and climate regulations. These sanctions could include significant financial fines, the temporary suspension of activities or, in the most serious cases, the revocation of operating licences. Empowering the ONE to take these dissuasive measures would encourage companies to comply scrupulously with the regulations.

Furthermore, in order for ONE to fulfil its role effectively, it is crucial to guarantee its independence from political and economic pressures. It should have adequate financial resources and qualified staff to carry out its tasks and avoid any compromised relationship with mining companies.

## 2.2. The National Committee on Climate Change in Madagascar

This Committee was created by Decree No. 2014-1588 of 7 October 2014 to support the Ministry of the Environment in several aspects related to climate change, including:

- assisting in the creation of climate policies, strategies and plans by providing essential data and information;
- technical validation of documents relating to climate change to be submitted to the United Nations Framework Convention on Climate Change;
- Promoting awareness and lobbying decision-makers to encourage them to take decisions to combat climate change;
- integrating the climate dimension into various sectors;
- formulating Madagascar's position at meetings of the Framework Convention on Climate Change;
- proposing actions and measures to improve implementation of the national policy to combat climate change.

Made up of 21 representatives from ministries and two representatives from non-governmental organisations and the private sector involved in the fight against climate change and sustainable development, this committee should play a crucial role in decision-making on climate justice in all sectors, including the mining sector. Its composition should be much more diversified and include climate experts, representatives of environmental organisations and members of civil society.

This committee should be a platform for dialogue on climate justice aspects related to sectors of activity such as mining. In addition to its original remit, it should review current policies, projects and practices and make recommendations for improvements. In addition to this, the committee could also play an active role in raising awareness of climate issues in local communities. This would enable communities to participate more fully in discussions and decision-making processes. In addition, transparency should be an essential component of the committee's operation, in particular by making all decisions and recommendations public, thus enabling the public to understand the issues and the choices made. This transparency would strengthen public confidence in the decision-making process and ensure that climate justice interests are properly represented.

## **Conclusion**

In conclusion, Madagascar faces a major challenge in terms of climate justice in the mining sector, even though the country is exceptionally rich in natural resources. The consequences of climate change, such as rising temperatures, floods, cyclones, drought and reduced rainfall, are having a devastating impact on the environment and on Madagascar's population, which is already one of the most vulnerable in the world. To tackle these challenges and promote climate justice, two main approaches are suggested. Firstly, it is imperative to fundamentally reform the legal framework by introducing climate justice considerations into mining and environmental legislation. In parallel, institutional reform is essential to ensure that climate justice is better taken into account in the mining sector. The National Environment Office should play a central role in monitoring and regulating mining activities, by requiring detailed climate impact assessments and having sanctioning powers. In addition, the National Committee on Climate Change should be reformed to include more diverse representation and be actively involved in reviewing policies and projects related to climate justice, including in the mining sector. Transparency of its decisions and recommendations is necessary to build public trust. Advocacy for these reforms must be led by a strong, structured and committed civil society that is also aware of the issues involved.







## PROPOSALS FOR A MINING LAW TO HELP THE CLIMATE IN CAMEROON

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### **Summary**

Given the growing threat posed by mining to climate stability in Cameroon, it is essential to look at ways of dealing with it. This study explores how mining law, as a tool for regulating mining activity, can contribute to the fight against climate change. This involves optimising the levers available under existing law and overcoming the current constraints of liability law.

**Key words:** mining; climate protection; climate justice.

### **Abstract**

*Given the growing impact of mining on climate sustainability in Cameroon, consideration must be given to ways of addressing the issue. This study explores how mining law, as a tool of regulating mining activity, can contribute to the fight against climate change. This involves optimizing the available levers in current law and overcoming the existing constraints of liability law.*

**Keywords:** Mining; Climate Protection; Climate Justice.

## Introduction

Over the last few decades, climate change has become "a major social and political issue"<sup>1</sup>. Warnings about climate disruption continue to multiply<sup>2</sup> while efforts at all levels of society are intensifying<sup>3</sup>. The measured action of national and EU legislation<sup>4</sup>, international law<sup>5</sup>, and civil society<sup>6</sup> is clear. The anthropogenic dimension of the phenomenon has been recognised since the 1992 United Nations Framework Convention on Climate Change<sup>7</sup>. Climate change is affecting almost every country in the world, and Cameroon is no exception. Three factors help us to understand the issues involved in preserving the climate in a country like Cameroon. Firstly, mining has become a major economic activity in Cameroon<sup>8</sup>. Extractive activity contributes to an increase in the average temperature at the earth's surface<sup>9</sup>. Secondly, 40% of Cameroon's territory is part of the Congo Basin, one of the three largest forests in the world. This basin is the only stable carbon sink, storing around 610 million tonnes of CO<sub>2</sub> per year, with average emissions of around 500 million tonnes and average absorption of 1.1 billion tonnes of CO<sub>2</sub> in 2021<sup>10</sup>. We know how important forests are for climate stability<sup>11</sup>. Finally, Cameroon is increasingly exposed to the effects of climate change<sup>12</sup>. Given the threat to human survival posed by climate imbalance, a consensus has emerged on the need to promote climate justice.

<sup>1</sup> L. Fonbaustier *et al.*, "Propositions pour un droit au secours du climat", *Recueil Dalloz*, 2015, p. 2282.

<sup>2</sup> IPCC special report on the impacts of global warming of 1.5 °C, <https://www.ipcc.ch/sr15/>.

<sup>3</sup> Just think of the international grassroots movement launched by the young Greta Thunberg, who was invited to address the UN in autumn 2019, the recent Citizens' Climate Convention (R. Radiguet, "Aléa climat est?", *AJDA*, 2019, p. 2145), or the flood of climate lawsuits in Europe and beyond: M. Torre-Schaub, B. Lormetieu, "Aspects juridiques du changement climatique", *JCP*, 2019, pp. 957 and 2382.

<sup>4</sup> P. Thieffry, "Le Pacte vert pour l'Europe", *RTDEur*, 2020, p. 451.

<sup>5</sup> See the 1992 United Nations Framework Convention on Climate Change, its 1997 Kyoto Protocol and the Paris Climate Agreement, which aims to keep "the increase in global average temperature well below 2°C above pre-industrial levels" and to continue "efforts to limit the increase in temperature to 1.5°C above pre-industrial levels": S. Maljean- Dubois, "Quel droit international face aux changements climatiques", *Recueil Dalloz*, 2015, p. 2263.

<sup>6</sup> J. Vieira, "L'émergence de l'activisme climatique et l'accès au juge", *RFDA*, 2019, p. 636.

<sup>7</sup> F.-G. Trébulle, "Quelle entreprise face au changement climatique?", *Recueil Dalloz*, 2015, p. 2272.

<sup>8</sup> On Cameroon's mining potential: M. Abanda Amanya, *Droit des industries extractives et développement durable au Cameroun*, PhD thesis in law, University of Yaoundé II, 2018, pp. 14-15; S. Fouedjio Nguetsa, *La protection de la personne humaine dans le secteur de l'exploitation minière au Cameroun*, PhD thesis in law, University of Aix-Marseille, 2023, p. 3.

<sup>9</sup> Notably as a result of the construction of transport infrastructures, the use of fossil fuels and deforestation: G. B. Tchoumba *et al.*, "Industries extractives et aires protégées en Afrique Centrale: Pour le meilleur et pour le pire?", 2021, p. 6, <https://agritrop.cirad.fr/598785/>. In *Wildlife Preservation Society of Qld v. Min. for Environment & Heritage*, a case concerning the proposed development of two coal mines, the Australian Federal Court recognised that the development of the mines would increase greenhouse gases and that this has an effect on biodiversity: *Wildlife Preservation Society of Qld v. Min. for Environment & Heritage* (2006) FCA 736, *Australian Federal Court*, 15 June 2006; M. Hauterau-Boutonnet, "Quel droit climatique?", *Recueil Dalloz*, p. 2260.

<sup>10</sup> The tropical forests of the Congo Basin cover 269 million hectares, making them 2<sup>ème</sup> after the Amazon Basin. They are larger than the forests of South-East Asia.

<sup>11</sup> J. Delliaux, *Le mécanisme visant la conservation des forêts tropicales de la Convention-cadre sur les changements climatiques (REDD+) : illustration de l'adaptativité du droit international*, PhD thesis in law, University of Aix-Marseille, 2017, p. 21.

<sup>12</sup> The average annual temperature has risen by 0.86°C over 46 years, from 24.28°C in 1974 to 25.14°C in 2020. At the same time, average annual rainfall in Cameroon has fallen by 2.9 millimetres per decade since 1960, with particularly low average rainfall in 2015: *World Bank Group report on climate and development in Cameroon*, <https://reliefweb.int/report/cameroon>.



The notion of climate justice emerged from environmental activism in the 1980s<sup>13</sup>. Climate justice stems from the idea of environmental justice and reflects the need for "distribution of and access to natural resources, knowledge, power and representation" and the imperative of "a living, clean and healthy environment" underpinned by a stable climate<sup>14</sup>. It is an objective aimed at restoring equity between states, within states, between individuals and between generations, and at combating the injustices arising from the climate crisis<sup>15</sup>. Its implementation is based on the identified pillars of equity, balance and responsibility, and human rights. The aim is to remedy the causes and adverse consequences of the climate crisis, including inequalities in impact, contribution and access to resources. Climate justice is also the current movement to bring climate protection before the courts, in the hope that litigation will make it possible to correct the shortcomings of state regulation<sup>16</sup>.

When applied to mining, climate justice is intended to help steer the extractive industries sector towards an energy transition, promote the implementation of measures to mitigate and adapt to climate change and guarantee the human right to enjoy a climate favourable to the living conditions of humanity<sup>17</sup>. As a tool for regulating the mining industry, mining law is a lever for action to save the planet. The challenge is therefore as follows: to transform Cameroon's mining law into an instrument capable of achieving climate justice. But can it be met? The challenge is all the more stimulating in that mining law appears to be marked by "climate-destroying" practices resulting from the exploitation of mines<sup>18</sup>. The contribution of mining law must therefore be encouraged if the fight against climate change is to become more effective and efficient. This study is an extension of the thinking initiated by eminent lawyers on the role of law in the fight against global warming<sup>19</sup>. The optimistic view is that mining law can make it possible to achieve climate justice, provided that the available levers are optimised (1) and the current constraints are overcome (2).

## 1. Optimising the levers available

Cameroon's positive law contains powerful instruments whose use or improvement could make it easier to take climate data into account in the context of mining activities. Some of these instruments are common to all forms of mining (1.1.), while others are specific to industrial mining (1.2.)<sup>20</sup>.

<sup>13</sup> J.-P. Rivaud, "Réquisitions en faveur d'une justice environnementale", *AJ Pénal*, 2017, p. 520.

<sup>14</sup> J. Vieira, *Eco-citoyenneté et démocratie environnementale*, doctoral thesis in law, University of Bordeaux, 2017, p. 254.

<sup>15</sup> A. Michelot, "La justice climatique et l'Accord de Paris sur le climat", *RJE*, 2016, p. 77.

<sup>16</sup> Ch. Cournil, L. Varison, "Introduction", in Ch. Cournil, L. Varison (eds.), *Les procès climatiques: du national à l'international*, Pedone, 2018, p. 19.

<sup>17</sup> L. Fonbaustier *et al*, *op. cit.*, p. 2282.

<sup>18</sup> This includes the phenomenon of deforestation, which has its origins in the issuing of mining exploration and exploitation permits in the Congo Basin. S. Nguiffo, F. Mbianda, "Une autre facette de la malédiction des ressources? Chevauchements entre usages différents de l'espace et conflits au Cameroun", *Revue Politique Africaine*, No. 131, October 2013, pp. 148 et seq.

<sup>19</sup> L. Fonbaustier *et al*, *op. cit.* p. 2282 et seq.

<sup>20</sup> According to the Cameroon Mining Code, mining can be carried out in a variety of ways: artisanal (article 11), semi-mechanised (articles 2 and 11) and industrial. Artisanal mining is the most common and widespread form of mining in sub-Saharan Africa. It is the prerogative of a population that is mostly needy and is carried out using archaic methods that are very often dangerous for the population. The second combines traditional law with modern techniques. The third requires the deployment of significant financial and human resources. For this last form of exploitation, the legislator has seen fit to regulate its organisation through the development of a legal regime applicable to contracts relating to mining (articles 40 et seq. of the Mining Code).

## 1.1. Levers common to all forms of operation

A number of levers can be used to build a mining law that is more attentive to climate issues. These include the development of a climate law, the environmental assessment regime, the obligation to rehabilitate mining sites, the financial and tax regime and the harmonisation of environmental protection legislation.

To prevent climate change, the Government of Cameroon has ratified the United Nations Framework Convention on Climate Change, the Kyoto Protocol in 2002, the Paris Climate Agreement<sup>21</sup> and numerous other climate protection instruments<sup>22</sup>. These texts have supported the preparation of several national policy documents<sup>23</sup>. However, Cameroon still lacks a comprehensive regulatory framework to achieve its adaptation and decarbonisation objectives in the extractive industries sector. Neither the Mining Code nor any other law explicitly obliges the State or mining operators to integrate climate change into their mining policy and planning instruments. No text sets a maximum threshold for greenhouse gas emissions. It is true that Law 96/12 of 5 August 1996 on the framework law for environmental management aims to protect the environment as a whole. The climate is implicitly taken into account. However, this environmental protection strategy based on the idea of comprehensiveness has the disadvantage of diluting the climate issue among other socio-environmental challenges, which leads to the climate phenomenon being relegated to second place. The adoption of comprehensive, multi-sectoral legislation on climate change could make it possible to oblige the State and mine operators to integrate the climate dimension into all stages of the extractive process. This will involve setting a carbon neutrality target, reducing primary energy consumption from fossil fuels, integrating "climate risk" into public policies, creating "green funds" for the climate, developing the "green bond" market and including the climate dimension in risk modelling<sup>24</sup>.

Mandatory environmental assessments for mining projects<sup>25</sup> can also help to improve understanding of climate issues. Decree no. 2013/0171/PM of 14 February 2013 laying down the procedures for conducting environmental and social impact assessments, repealing decree no. 2005/0577/PM of 23 February 2005 on the same subject, aims to identify and assess the possible effects of implementing a mining project on the natural and human environment, as well as the measures taken to offset these effects. This requirement should be understood in the broadest possible sense. The idea is to include the consequences for the climate and the project's contribution to the increase in greenhouse gases in the impact studies. The *Australian Conservation Foundation v Minister for Planning* case in 2004 illustrates this trend. In this case, the court

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<sup>21</sup> Cameroon submitted its updated Nationally Determined Contribution in November 2021, committing to a 35% reduction in GHG emissions by 2030, subject to the availability of funding.

<sup>22</sup> This is the case of the Ramsar Convention, which requires Parties to conserve wetlands, particularly wooded areas, within their territory, and the UNESCO Convention, which allows forests of exceptional value to be included on the World Heritage List.

<sup>23</sup> Cameroon's main climate policy document is the National Climate Change Adaptation Plan (NCCAP) 2015-19, which is accompanied by a costed implementation plan: *World Bank Group Report on Climate and Development in Cameroon*, <https://reliefweb.int/report/cameroon>.

<sup>24</sup> M. Teller, "Quel financement pour le changement climatique?", *Recueil Dalloz*, p. 2275.

<sup>25</sup> With the exception of artisanal mining authorisations, research permits and domestic quarrying authorisations (article 135, paragraph 2 of the Mining Code).

The Victoria Civil and Administrative Court ruled that issues relating to greenhouse gas emissions had to be taken into account when authorising the operation of a coal mine. A number of recent court cases show that insufficient consideration of the effects of the planned project on climate stability is increasingly being used to call into question the quality of environmental assessments carried out<sup>26</sup>.

The obligation to restore mining sites can also be a tool in the fight against the climate crisis. The obligation to restore a mining site is a personal obligation of the mine or quarry operator<sup>27</sup>. The aim is to restore degraded mining sites to a safe and productive state for agroforestry. It involves various operations such as reforestation, hole closure and waste disposal<sup>28</sup>. However, the duty to rehabilitate is only envisaged for "old" mining sites, i.e. once mining operations have been completed. This option has the disadvantage of allowing deforestation and pollution by waste to continue for as long as the mines are in operation, thereby contributing to global warming. Like its Algerian counterpart<sup>29</sup>, the Cameroonian legislator would benefit from conceiving rehabilitation as a series of gradual operations, the implementation of which follows the progress of the exploitation work. This approach allows for the gradual revegetation and reforestation of forest areas on degraded mining sites.

Using fiscal and financial leverage can also help develop policies to combat climate change. In particular, on the basis of Article 26 of Law No. 98/015 of 14 July 1998 on establishments classified as dangerous, unhealthy or inconvenient, tax reductions can be granted to mine operators who are concerned about eliminating the greenhouse gases that their activity creates<sup>30</sup>. The proof of technical and financial capacity required prior to the issue of mining permits<sup>31</sup>, can also help to promote climate justice, in particular by creating the conditions for attractive ecological financing for the mining sector, which incorporates the climate risk through the insurance or bank credit mechanism.

Taking the climate dimension into account in mining projects also requires mining, forestry and protected areas legislation to be brought into line with each other. In order to protect the forests and enable them to play their full role, Law 94-01 of 20 January 1994 establishing the forest, wildlife and fisheries regime classifies certain areas as permanent forests and makes them unavailable for any form of exploitation other than research, ecotourism, education, hunting and fishing<sup>32</sup>. Unfortunately, this provision contradicts article 15 paragraph 1 of the Mining Code, which establishes the principle that the entire territory is available for mining, unless a regulatory act excludes it. By making exclusion a mere hypothesis, the choice seems to have been made to prioritise mining production over forest preservation<sup>33</sup>. Such an option contradicts article 22 of law no. 94/01 of 20 January 1994 on the mining regime.

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<sup>26</sup> *Australian Conservation Foundation v/ Minister for Planning*, VCAT (2004) 2029, *Victoria Civil and Administrative Tribunal*, 4 October 2004.

<sup>27</sup> Cass. com, 01-06-1993, *Recueil Dalloz*, 1993, p.163.

<sup>28</sup> Article 140 of the Mining Code.

<sup>29</sup> Article 141 of Law No. 14-15 of 24 February 2014 on Algeria's mining law.

<sup>30</sup> Any form of mining is considered to be a classified establishment, because of the dangers it poses to public health and safety, the environment and neighbours (article 2 of law no. 98/015 of 14 July 1998 on establishments classified as dangerous, unhealthy or inconvenient).

<sup>31</sup> Article 15, paragraph 4 of the Mining Code.

<sup>32</sup> Article 28.2 of the law of 19 January 1994 governing forests, wildlife and fisheries.

<sup>33</sup> M. Abanda Amanya, *Droit des industries extractives et développement durable au Cameroun*, op. cit, p. 281.

of Forests, Wildlife and Fisheries, which states that its "priority" objectives are to protect 30% of the national territory, to be allocated to forests or wildlife habitats. Protected areas also play a significant role in combating climate change<sup>34</sup>. This is why articles 24 and 25 of the 1994 forestry law make them inaccessible to any activity that could be detrimental to them. Unfortunately, paragraph 1 of article 126 of the Mining Code states that "protection zones may be established by the minister responsible for mines in conjunction with the relevant administrations, within which prospecting, research and the exploitation of mineral substances or quarries are prohibited". Leaving the decision as to whether to close or classify a site to the Minister for Mines seems problematic to us, as this is merely an option. Conservation imperatives are thus sacrificed on the altar of economic profitability. The result is a major risk of forest destruction, and hence of global warming. There is therefore an urgent need for the State to establish a coherent legal framework for land use that is conducive to climate stability, including in the context of industrial mining.

## 1.2. Levers specific to industrial mining

Two mechanisms can be used to protect the climate in the context of industrial mining. These are the system for allocating operating permits and the system of contractual obligations.

In Cameroon, any holder of an exploration licence who has provided proof of the existence of a deposit within its perimeter is automatically granted an operating licence<sup>35</sup>: this is the system of direct negotiations or "gré à gré". This is a measure designed to encourage initiative in the mining sector, but it has a particularly dangerous downside in terms of limiting the autonomy of will and the choice of co-contractor that it implies. The State finds itself obliged to give priority for the signature of the mining agreement to the most diligent operator, who is not necessarily the most likely to guarantee climatic stability. Yet the level of protection afforded to the right to enjoy a stable climate depends on the quality of the co-contractor. It would therefore be worth introducing a tendering mechanism as the best way of choosing a co-contractor, with a right of preference for the mining operator who was responsible for discovering the mine<sup>36</sup>. The threshold for taking climate issues into account could be one of the criteria used to assess the bids received.

Article 44 of the Mining Code leaves it up to the contracting parties, i.e. the State and the mining company, to freely determine the content of the mining agreement, particularly with regard to environmental protection. Because of its flexibility, this provision represents a tremendous opportunity to take climate issues into account. It gives the parties the opportunity to build a "private law" on climate, to go beyond the objectives set by international texts in terms of reducing greenhouse gases, to provide for energy information obligations, to integrate climate risk into commercial relations, to offer the climate a regime adapted to its status as a common good, to prohibit the operator from abandoning greenhouse gas emissions, to create a compensation fund, etc.

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<sup>34</sup> A protected area is a geographical zone defined and managed to achieve specific conservation and sustainable development objectives for one or more given resources.

<sup>35</sup> Article 46, paragraph 1 of the Mining Code.

<sup>36</sup> D. Kaufman, *Mining contracts: how to read and understand them*, Columbia Center for Sustainable Investment, 2012, p. 11.

climate damage, to strengthen the preventive function of civil liability and insurance, in short to invent a climate law for responsible mining.

By giving the contracting parties the power to legislate on climate issues, the mining agreement appears to be a vehicle for innovation<sup>37</sup>, a genuine environmental contract<sup>38</sup>. This normative power conferred by the legislator on the co-contracting parties may also help to overcome the obstacles associated with compensation for climate damage.

## 2. Going beyond current constraints

Mining can cause a great deal of damage to the climate. While criminal law can easily help to curb such damage, the same cannot be said of civil and administrative law, where the implementation of the climate liability of the State (2.1.) and of mine operators (2.2.) is still restrictive<sup>39</sup>.

### 2.1. Civil liability constraints for mine operators

There are many obstacles to implementing climate responsibility for mining operators. Firstly, identifying the mining operators responsible for climate damage poses difficulties, particularly in a sector where it was estimated that more than 15,000 people were involved in artisanal mining on a full-time basis in 2009<sup>40</sup>. Secondly, establishing the causal link appears complex, as it is not easy to distinguish mining-related climate damage from that caused by natural climate variability, such as solar or volcanic activity<sup>41</sup>.

Nevertheless, advances in scientific knowledge and the development of international expertise could help to untangle the web. Lastly, climate damage may consist of harm to property, persons or the environment<sup>42</sup>. However, the requirement in Cameroon's positive law<sup>43</sup> that the damage to be compensated must be personal in nature means that pure ecological damage cannot be compensated<sup>44</sup>. If climate issues are to be taken into account more effectively, Cameroon's legislator needs to enshrine the same principle as in the oil industry,

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<sup>37</sup> S. Fouedjio Nguetsa, "La Responsabilité Sociale et Environnementale en droit minier au Cameroun", in E. Gasparini, J.-P. Agresti (eds.), *Le droit et l'innovation sociale*, PUAM, 2022, p. 46.

<sup>38</sup> M. Hauterau-Boutonnet, *Le contrat et l'environnement : étude de droit comparé*, Bruylant, 2015, Droit(s) et développement durable, 330 p.

<sup>39</sup> The concept of climate liability reflects the current trend towards legal action to protect the climate. It takes shape at the confluence of three sources: firstly, the scientific demonstration of a link between human activities and the worsening of climate change; secondly, the correlative extension of the ethic of responsibility to climate issues; and thirdly, the existence of a duty to protect the safety of humanity and the environment: L. Neyret, "La reconnaissance de la responsabilité climatique", *Recueil Dalloz*, 2015, p. 2278.

<sup>40</sup> G. L. Ambomo, *La mise en œuvre des obligations environnementales et sociales dans les investissements chinois dans les secteurs minier et hydro-énergétique au Cameroun*, paper presented at the Ndjamena International Colloquium, 2019, p. 5.

<sup>41</sup> S. Maljean-Dubois, "La responsabilité internationale de l'État pour les dommages climatiques", in Ch. Cournil, L. Varison, *Les procès climatiques : du national à l'international*, op. cit. 2018.

<sup>42</sup> *Ibid.*

<sup>43</sup> Article 77 of the framework law on environmental management only recognises the principle of compensation for material damage and personal injury. Article 1382 of the Civil Code makes compensation conditional on damage caused to "others".

<sup>44</sup> Ecological damage is "direct or indirect harm to the environment", affecting nature independently of the repercussions on humans. C. Grare-Didier, "La responsabilité civile pour atteinte à l'environnement", in H. Capitant (ed.), *Le droit et l'environnement*, Dalloz, 2010, p. 155.



the environmental damage resulting from the operation of the solid mine and quarries<sup>45</sup>. In addition, the lawfulness of the activities of mine operators raises doubts as to whether a judge could compel them to reduce their greenhouse gas emissions, or compel them to compensate for climate damage, due to the risk of undermining the principle of the separation of powers<sup>46</sup>.

The distance and time between the place where the greenhouse gases are emitted and the place where the damage occurs, as well as difficulties in applying the law in space and jurisdiction, are also significant obstacles. Another obstacle to be overcome is the rigidity of the conditions relating to standing and interest in seeking compensation for environmental climate damage. Although the legislator offers grassroots communities and approved associations the right to take such action<sup>47</sup>, it is regrettable that this is subordinate to the action of public and semi-public bodies, which are not always inclined to act. In France, it is now accepted that approved environmental protection associations can act independently of public bodies<sup>48</sup>. In the interests of climate protection, such a development seems inevitable.

## 2.2. Constraints linked to the State's administrative responsibility

The aim of recognising climate liability is not only to compensate for damage, but also to prevent further damage and restore legality<sup>49</sup>. The aim is to induce the State to take effective and efficient measures to combat climate change<sup>50</sup>.

Unlike its French counterpart, which has the power to issue injunctions, Cameroon's administrative courts have no means of forcing the State to change its climate regulations<sup>51</sup>. It is forbidden to issue injunctions to the administration<sup>52</sup>.

Climate change therefore suggests a change in the role of the administrative judge. The latter must cease to be solely a judge of observations and analysis of past legal situations, and become a judge of projections, capable of enjoining the State to review its climate policy because of the obligation of climate vigilance that is incumbent upon it<sup>53</sup>. On this point, there is every reason to hope that the trend will be reversed, as the administrative courts, encouraged by a number of legal scholars, are becoming increasingly daring. It no longer hesitates to issue injunctions to

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<sup>45</sup> Article 85 of Act no. 2019/008 of 25 April 2019 on the Petroleum Code.

<sup>46</sup> M. Torre-Schaub, "Les procès climatiques à l'étranger", *RFDA*, 2019, p. 660.

<sup>47</sup> Article 8, paragraph 2 of the framework law on environmental management in Cameroon.

<sup>48</sup> *Ibid.*

<sup>49</sup> S. Maljean-Dubois, "La responsabilité internationale de l'État pour les dommages climatiques", in Ch. Courmil, L. Varison, *Les procès climatiques : du national à l'international*, *op. cit.*, p. 14.

<sup>50</sup> *Ibid.*

<sup>51</sup> Article L. 521-2 of the Code of Administrative Justice; F.-X. Fort, "L'office du juge administratif sous influence climatique", *RJE*, 2022, no. 4, p. 2 et seq.

<sup>52</sup> This prohibition arises first and foremost from the law. Indeed, section 126 (b) of Law no. 2016/007 of 12 July 2016 on the Criminal Code of Cameroon provides that: "Any magistrate who issues orders or defences to executive or administrative authorities shall be punished by imprisonment of between six months and five years". It also stems from the principle of the separation of powers: J. Chevallier "L'interdiction pour le juge administratif de faire acte d'administrateur", *AJDA*, 1972, p. 67.

<sup>53</sup> See the *Urgenda* cases in the Netherlands (District Court, The Hague, 24 June 2015, case C/09/456689/HA ZA 13- 1396.), and *L'affaire du siècle* in France (Ch. Courmil, "Les prémisses de révolutions juridiques? Récents contentieux climatiques européens", *RFDA*, 2021 p. 957.).



the administration<sup>54</sup> . This power of injunction, which is gradually emerging, must be consolidated if it is to become a powerful tool in the hands of an administrative judge who is increasingly emancipated and anxious to preserve the stability of the climate in the face of the State's culpable failure to act. It is at this price, and this price alone, that the extractive sector will be able to rise to the climate challenge.

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<sup>54</sup> This is the case in particular when it orders the court to pay a sum of money, to perform a negative obligation evidenced by the withdrawal of a decision granting an unlawful right, or a positive obligation in the context of career reconstitution or taxation litigation: C. Ibrahim Deguia, "Réflexion sur le pouvoir d'injonction dans le contentieux administratif au Cameroun", *International Multilingual Journal of Science and Technology*, volume 6, no. 2, February 2021.



***PUTTING CLIMATE JUSTICE INTO  
PRACTICE THROUGH LITIGATION IN  
AFRICA***



# REMEDIES FOR THE PROTECTION OF ENVIRONMENTAL RIGHTS IN THE MINING SECTOR IN AFRICA

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## **Summary**

Despite its profitability, the mining sector is responsible for climate change. Through its greenhouse gas emissions, it can therefore be the source of a violation of the right to the environment. Given that everyone has the right to live in a conserved environment, it is in everyone's interest to challenge situations or decisions that affect the exercise of that right, we might ask whether the right to the environment in the mining sector is justiciable. It is a question of gauging the degree to which climate justice is demanded in relation to the protection of the right to the environment.

**Keywords:** environmental law; mining; justiciability; access to justice; Africa.

## **Abstract**

*Despite its profitability, the mining sector is responsible for climate change. It can then, because of greenhouse gas emissions, be the source of a violation of the right to the environment. Starting from the fact that if everyone has the right to live in a conserved environment, everyone therefore has an interest in contesting situations or decisions that undermine the exercise of this right, one could then question the justiciability of the right to the environment in the mining sector. It is then a question of gauging the degree of demand for climate justice in the light of the protection of the right to the environment.*

**Keywords:** *Right to the Environment; Mining; Justiciability; Access to Justice; Africa.*

## Introduction

The profitable mining potential of Africa's subsoil is attracting investors and fanning the flames of interest in mining and mineral resources. Mining benefits both governments and private individuals. It contributes to the economic development of states and the improvement of people's socio-economic living conditions. It also increases the turnover of private companies<sup>1</sup>. Despite these positive spin-offs, it has to be said that mining activities can cause environmental damage through the use of chemicals and other mineral extraction methods.

It is therefore essential to combine the productive efficiency of the mining sector with the need to take account of environmental requirements and guarantee the quality of the environment, on which the right to the environment<sup>2</sup> depends. Indeed, by virtue of this right, the State must protect individuals against environmental damage caused by mining, including environmental disease, pollution and nuisance, harmful products and hazardous waste. It must also protect its citizens from the effects of climate change.

Given the climatic risks associated with mining, it is imperative to ensure that the right to the environment is respected both during mining operations and after they have ceased. In the event of a violation of this right by mining operators, victims have the right to apply to the state authorities for compensation for the damage they have suffered<sup>3</sup>. Hence the idea of analysing remedies to protect the right to a healthy environment in the mining sector in Africa. Such an analysis highlights not only the issue of climate justice - with regard to the mining sector's responsibility for global warming - but also that of the justiciability of the right to the environment.

Climate justice, a concept that has been brought into line with government discourse and is very often used by civil society<sup>4</sup>, "refers above all to procedures before the courts (in place or to be created at international level)"<sup>5</sup>. This strictly legal conception does not, however, hide the fact that climate justice is "an objective aimed at restoring equity between States, within States, between individuals and future generations and even nature", the content of which revolves around the principles of international environmental law and international human rights law<sup>6</sup>.

The justiciability of environmental rights in the mining sector makes it clear from the outset that the analysis only takes account of appeals that involve the courts. The relevance

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<sup>1</sup> M. Nyoth Hiol, "Le droit minier camerounais", in O. C. Ruppel and E. D. Kam Yogo, *Droit et politique de l'environnement au Cameroun. Afin de faire de l'Afrique l'arbre de la vie*, Yaoundé, Presses de l'UCAC, 2018, p. 417; E. Jounda, "Les compensations environnementales face au développement de l'industrie extractive au Cameroun", in O. C. Ruppel and E. D. Kam Yogo, *ibid*, p. 431.

<sup>2</sup> A. Garané and V. Zakané, *Droit de l'environnement burkinabè*, Ouagadougou, Presses africaines, 2008, p. 287.

<sup>3</sup> Article 5 of Burkina Faso's Environmental Code states that any person may "lodge a complaint with the competent administrative or judicial authorities in order to put a stop to nuisances caused by activities that disturb the peace or undermine public safety or health. The administration is obliged to respond to the request".

<sup>4</sup> A. Michelot, "La justice climatique et l'Accord de Paris sur le climat", *Revue juridique de l'environnement*, 2016/1, p. 71.

<sup>5</sup> P.-Y. Néron, "Penser la justice climatique", *Éthique publique*, volume 14, no. 1, 2012, <https://doi.org/10.4000/ethiquepublique.937>.

<sup>6</sup> A. Michelot, "La justice climatique et l'Accord de Paris sur le climat", *op. cit*, p. 78.

of such a choice lies, on the one hand, in the dialectic that exists between the right of access to justice, which finds its foundation in the right to the environment, and the right to the environment, which manifests itself, among other things, through the right of access to justice, and, on the other hand, in the absence of a jurisdictional monopoly in the handling of an action for violation of the right to the environment, insofar as such an action may be brought before the domestic, Community or international courts, depending on the case. From this point of view, it is worth mentioning the density of climate litigation throughout the world, which illustrates the importance attached to the courts in matters of climate justice. The *Sabin Center for Climate Change Law* at Columbia University has counted 1981 climate-related cases worldwide<sup>7</sup>. In Africa, however, there is little or no recourse to protect the right to the environment, despite the fact that it is enshrined in the constitution<sup>8</sup>. All these factors compromise the justiciability of this right.

With these observations in mind, it appears that the remedies for the protection of environmental rights in the mining sector are both haloed by an objective of climate justice (1) and are shrouded in a lack of justiciability of the right to the environment (2).

## 1. Remedies with a climate justice objective

Access to environmental justice is an essential right<sup>9</sup> and a central concept in the implementation of climate justice. From this point of view, remedies to protect the right to the environment enable climate justice to exercise its corrective (1.1) and distributive (1.2) functions.

### 1.1. Activating the corrective function of climate justice

Corrective justice is based on the premise that "sentences can be just if they attempt to re-establish an equality of fundamental rights between the victim and the perpetrator of an offence conceived as a violation of those same rights"<sup>10</sup>. The aim is to correct the existence of an injustice or the commission of a crime. In climate matters, the implementation of the liability of polluting mining operators (1.1.1) and the control of administrative action (1.1.2) constitute the operational substratum of the corrective function of climate justice.

#### 1.1.1. Implementing the liability of polluting mining operators

In view of the climate risks posed by mining, the right to take legal action is unquestionably obvious. On the one hand, citizens are the direct victims of the environmental damage caused by mining; on the other, they do not benefit directly from this exploitation. The historical responsibility of developed countries and companies - including mining companies - for the climate crisis is therefore undeniable. By way of illustration, 71% of greenhouse gas emissions are produced by 100 commercial companies worldwide<sup>11</sup>. It is worth noting that

<sup>7</sup> Sabin Center for Climate Law Change, <https://climate.law.columbia.edu/content/climate-change-litigation>.

<sup>8</sup> Article 8 of the Constitution of the Republic of Senegal; article 27 of the Constitution of the Republic of Côte d'Ivoire; article 29 of the Constitution of Burkina Faso.

<sup>9</sup> Article 14.1 of the International Covenant on Civil and Political Rights; article 7.1 of the African Charter on Human and Peoples' Rights; article 4 of the Constitution of 11 June 1991 of Burkina Faso.

<sup>10</sup> A. Poama, *Corrective justice: elements for a theory of punishment*. *Science politique*, Institut d'études politiques de Paris - Sciences Po, 2015.

<sup>11</sup> Interview with Charlotte Kreder, "Climate justice: a priority for the people of southern Africa", <https://ccfd-terresolidaire.org/justice-climatique-une-7112/>.



remember that more than 50% of global greenhouse gas emissions are caused by 10% of the world's richest people and that more than 50% of the world's poorest people are responsible for only 10% of global CO<sub>2</sub> emissions<sup>12</sup>. This situation creates a climate injustice that environmental law claims aim to correct. Given the scale of the damage caused by climate change to the environment and people's lives, it is imperative that mining operators be made to face up to their responsibilities. This is not only a violation of a human right, but also an obstruction of the exercise of a freedom. In an order handed down on 20 September 2022, the French Conseil d'Etat ruled that everyone's right to live in a balanced environment that respects their health is a "fundamental freedom"<sup>13</sup>. In the same vein, the French Constitutional Council considers that "the preservation of the environment must be pursued in the same way as the other fundamental interests of the Nation, and that choices designed to meet the needs of the present must not compromise the ability of future generations to meet their own needs"<sup>14</sup>.

Legal recourse is therefore a means of ensuring respect for the right to the environment. Estelle Brosset and Eve Truilhé-Marengo argue that: "Access to justice is the practical means of asserting everyone's right to respect for the provisions protecting the environment and is therefore an essential element in the application of those provisions"<sup>15</sup>. From this point of view, any person who believes that pollution caused by mining has caused him or her harm can take civil or criminal action against the alleged perpetrators. Taking a case to court illustrates the denunciation of injustice and the demand for climate justice, which are expressed through the civil or criminal liability of mining operators<sup>16</sup>. The aim of civil liability is to compensate for environmental damage. Liability may be for fault or without fault<sup>17</sup>. Criminal liability consists of punishing environmental offences committed by mining operators.

The appeals lodged with the civil and criminal courts thus promote climate justice through the repair of damage and the condemnation of offences. As a result, the environment is bursting into civil and criminal law<sup>18</sup>, with a view to controlling administrative action.

### 1.1.2. Monitoring administrative action in mining matters

Control of administrative action stems either from the application of the principle of legality in the environmental field, or from the application of administrative responsibility.

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<sup>12</sup> C. Larrère, "Qu'est-ce que la justice climatique?", in A. Michelot (ed.), *Justice climatique / Climate Justice*, 1<sup>ère</sup> édition, Brussels, Bruylant, 2016, p. 7.

<sup>13</sup> French Council of State, Order of 20 September 2022, no. 451129.

<sup>14</sup> French Constitutional Council, decision no. 2022-843 DC of 12 August 2022 relating to the law on emergency measures to protect purchasing power.

<sup>15</sup> E. Brosset and E. Truilhé-Marengo, "L'accès au juge dans le domaine de l'environnement : le hiatus du droit de l'Union européenne", *Revue des droits et libertés fondamentales*, 2018, chr. n° 07.

<sup>16</sup> C. Larrère, "Qu'est-ce que la justice climatique?", *op. cit.* p. 9.

<sup>17</sup> Article 1384, paragraph 1 of the Civil Code.

<sup>18</sup> C. Larrère, "Qu'est-ce que la justice climatique?", *op. cit.* p. 17.



The principle of legality enshrines the submission of administrative authorities to the law<sup>19</sup>. Under this premise, administrative acts that are likely to violate or that violate the right to the environment may be challenged before the administrative court. In such cases, the matter is referred to the administrative court either as a recours pour excès de pouvoir or as a recours en plein contentieux<sup>20</sup>. The aim of an action for ultra vires is to challenge a unilateral administrative act that is deemed to be illegal. From this point of view, the administration's decision is challenged on the grounds that it violates a superior rule of law. In the mining sector, activities are subject to administrative authorisations that are granted by means of decrees or orders. These decisions may be appealed on the grounds of ultra vires if they do not comply with the fundamental rules on environmental protection or if they violate the constitutionally recognised right to a healthy environment. A full remedy is available to obtain compensation for environmental damage caused by the administration - due to its negligence or abstention - at the same time as annulling the administrative act that caused the damage.

As for administrative liability, it involves compensation for damage caused by the administration<sup>21</sup>. In the specific case of mining, damage linked to climate change may be the result of a failure to monitor or control polluting mining activities<sup>22</sup>. The authorities have a duty to monitor the environment, including the mining environment. In this vein, it is responsible for ensuring that mining operators comply with the legal rules on environmental protection. It is responsible for monitoring mining sites and ensuring that mining activity does not cause dangerous pollution for the population. When environmental damage is caused by mining operations as a result of administrative failings, administrative liability may be incurred on the basis of either simple negligence or gross negligence<sup>23</sup>. It is then up to the State to ensure that mining operations do not jeopardise the right to a healthy environment<sup>24</sup>. It is from this perspective that the Court of Justice of the Economic Community of West African States has concluded that the State has an obligation to hold polluting companies accountable. The Court found that the Nigerian government was responsible for the violations committed by the oil companies. Above all, it emphasised that the government must hold the companies and others responsible to account<sup>25</sup>. The Hague District Court rightly emphasises the State's duty of care in climate matters<sup>26</sup>, which brings into orbit the distributive function of climate justice.

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<sup>19</sup> A. Garané and V. Zakané, *op.cit.*, p.715.

<sup>20</sup> B. Ehawa, "La protection de l'environnement par le juge administratif camerounais à travers les moyens classiques du contentieux de l'excès de pouvoir", *International Multilingual Journal of Science and Technology*, volume 6, August 2021, pp. 4017 et seq.

<sup>21</sup> Articles 19 et seq. of Act no. 011-2016/AN on the creation, composition, powers and operation of administrative courts and the procedure applicable before them (Burkina Faso).

<sup>22</sup> A. Garané and V. Zakané, *op. cit.* p. 718.

<sup>23</sup> A. Garané and V. Zakané, *op. cit.*, p.718.

<sup>24</sup> G. Cancalon and T. Muller, "L'office du juge administratif en matière de justice climatique", *Journal de droit de la santé et de l'assurance maladie*, 2022, 31, pp. 182 et seq.

<sup>25</sup> ECOWAS Court of Justice, 14 December 2012, SERAP v State of Nigeria.

<sup>26</sup> District Court of The Hague, 24 June 2015, *Urgenda Foundation v. State of the Netherlands*.

## 1.2. Fertilising the distributive function of climate justice

Distributive justice emphasises the proportional recognition and reward of individual merits<sup>27</sup>. Thus, in the name of everyone's right not to suffer the effects of climate change - by virtue of the right to the environment - operators have an obligation not to emit greenhouse gases that are outside the norm. In order to achieve this balance, and with a view to avoiding environmental danger or creating the right conditions for it to occur, it is up to the State to regulate mining activities (1.2.1) and to ensure that greenhouse gas emissions are limited (1.2.2).

### 1.2.1. Environmental regulations governing mining activities

Implementing the principle of prevention is the golden rule of climate justice. States must therefore adopt a code of conduct for mining, industrial and economic activities. They must adopt "healthy" products and processes, regulate polluting activities and prevent environmental damage. In the mining sector, state authorities must ensure that mining activities are conducted in such a way as to ensure the preservation and sustainable management of the environment. Mining legislation and regulations must therefore take into account the protection of the mining environment.

The aim is to ensure that mining sites are built and operated in such a way as to avoid atmospheric pollution and odours that inconvenience the population, compromise public health and safety or harm agricultural and livestock production or the conservation of sites and monuments.

To this end, mining laws impose environmental obligations. Mining operators are subject to a general obligation to preserve the environment<sup>28</sup>. They are also subject to preventive and remedial obligations. They must carry out an environmental impact assessment before obtaining a mining permit<sup>29</sup>. At the end of mining operations, they are obliged to rehabilitate mining sites by restoring the site to its original state, i.e. by decontaminating the site, restoring arable land and regenerating the vegetation cover, or preparing the site for another use. To ensure that this obligation is fulfilled, a fund for the rehabilitation and closure of mining sites has been set up<sup>30</sup>.

The legal system put in place to protect the mining environment is ultimately intended to protect human beings through their living environment. The absence of such a system therefore constitutes a violation of the right to a healthy environment, which may be the subject of a legal remedy. This is why the French administrative court condemned the French state for climate inaction<sup>31</sup>. It is also why, in the Urgenda case, the Dutch judge enshrined the obligation to protect citizens and nature from global warming and polluting activities in the name of solidarity between Dutch citizens with the environment.

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<sup>27</sup> M. Forsé and M. Parodi, "Justice distributive: La hiérarchie des principes selon les Européens", *Revue de l'OFCE*, 2006, p. 220.

<sup>28</sup> Article 135 paragraph 1<sup>er</sup> of Law no. 2016-17 of 14 December 2016 on the Mining Code of Cameroon; article 139 of Law no. 036-2015/CNT of 26 June 2015 on the Mining Code of Burkina Faso.

<sup>29</sup> Article 102 of Law No. 2016-32 of 8 November 2016 on the Senegalese Mining Code; Article 135-2 of Law No. 2016-17 of 14 December 2016 on the Cameroonian Mining Code.

<sup>30</sup> Articles 27 and 28 of Act no. 036-2015/CNT of 26 June 2015 on the Mining Code of Burkina Faso.

<sup>31</sup> Tribunal administratif de Paris, 14 December 2021, l'Affaire du siècle.

the citizens of the world and all living things<sup>32</sup>. The Pakistani judge sounded the same refrain, arguing that the delay and lethargy of the State in implementing the national policy to combat climate change violates the fundamental rights of citizens, including the right to the environment<sup>33</sup>. The State must therefore ensure that its nationally determined contribution is implemented. All of which means that it must ensure that greenhouse gas emissions are limited.

### 1.2.2. Limiting gas emissions

Climate justice reflects the idea that people should not be the victims of the effects of climate change caused by polluters. Controlling, reducing and preventing greenhouse gas emissions and adapting to climate change must therefore be at the heart of climate action. To achieve this, we need to combat the emission of polluting substances into the atmosphere by issuing anti-pollution standards, banning or regulating the emission into the atmosphere of smoke, soot, dust or toxic, corrosive, odorous or radioactive gases. All of which entail setting discharge standards with which mining companies must comply<sup>34</sup>.

Failing this, an action may be brought before the courts for breach of fundamental rights, as was the case in the *Saul Ananis Luciano Lliuya and Urgenda* cases. In the first case, brought before the High Regional Court of Hamm, Germany, Mr Lliuya, a Peruvian citizen, accused RWE of being responsible for the greenhouse gas emissions threatening his property as a result of global warming and melting ice<sup>35</sup>. In the second case, the judge ordered the State to increase its greenhouse gas emission reduction targets from 17% to 25% by 2020 compared to 1990<sup>36</sup>. It would seem, then, that violations of environmental rights in the mining sector can be the subject of protective proceedings under the banner of climate justice. However, these actions face obstacles linked to the limited justiciability of environmental rights.

## 2. Appeals tainted by the lack of justiciability of environmental rights

Although remedies for the protection of environmental rights in the mining sector contribute to the implementation of climate justice, it would appear that their effectiveness is hampered by the weak imperative of sanctions (2.1.) and the inaction of the judge (2.2).

### 2.1. The weak imperative of sanctions

Any violation of the right to the environment must be penalised. Penalties are the normal and traditional way of enforcing the law. It should therefore first of all

<sup>32</sup> District Court of The Hague, 24 June 2015, *Urgenda Foundation v. State of the Netherlands*.

<sup>33</sup> Lahore High Court, *Leghari v Federation of Pakistan*, 4 and 14 September 2015, Case No 25501/2015.

<sup>34</sup> Article 47 of Law no. 2008-005 of 30 May 2008, Togo's framework law on the environment: "Specific quality standards may be laid down to protect regions that are highly exposed to pollution or to ensure the preservation of particularly fragile natural environments"; Decree no. 2001/185/PRES/PM/MEE of 7 May 2001, setting standards for the discharge of pollutants into the air, water and soil in Burkina Faso.

<sup>35</sup> Order of the Regional Court of Hamm, 7/02/2018.

<sup>36</sup> *Urgenda Foundation v. State of the Netherlands*, *op. cit.*; M. Torre-Schaub, "L'affirmation d'une justice climatique au prétoire (quelques propos sur le jugement de la Cour du district de La Haye du 24 juin 2015)", *Revue québécoise de droit international*, 2016, pp. 161 et seq.



a preventive function, in that its mere existence can dissuade citizens from violating the right to the environment. It should also have a repressive function, in that it makes it possible to punish acts that violate the right to a healthy environment. However, the inadequacy of sanctions (2.1.1) and the privileging of transactions (2.1.2) illustrate the weak imperative of sanctions for violations of the right to the environment.

### **2.1.1. Unsuitable penalties**

Penalties for violations of environmental law caused by mining fall short of the damage suffered. They are disproportionate in that, on the one hand, they are not in line with the damage suffered by the populations and, on the other hand, they are concealed when damage occurs.

Firstly, most environmental damage that constitutes a breach of environmental law goes unpunished because of administrative tolerance and the inaction of the courts<sup>37</sup>. In fact, there is little or no response from the environmental authorities to environmental violations caused by mining companies. When they cause environmental damage, mining companies are hardly ever ordered to close down or pay a fine. Nor are the operators concerned by legal action when they commit serious environmental offences<sup>38</sup>.

Secondly, penalties are not always dissuasive. The commission of environmental offences therefore does not frighten mining companies, given the low level of effectiveness. As a result, they are not necessarily inclined to adopt the required environmental measures, which are often more onerous than the penalties provided for in laws and regulations. For example, Burkina Faso's Mining Code provides for a maximum penalty of a fine of between ten million and one hundred million CFA francs and a prison sentence of between five and ten years against those who use explosives or dangerous substances in artisanal mining activities<sup>39</sup>. Yet these dangerous substances can cause irreversible environmental damage and violate the right to a healthy environment. The inadequacy of penalties means that citizens whose rights have been infringed have no choice but to take their case to court. The authorities, for their part, may resort to settlements in the event of breaches of environmental law.

### **2.1.2. The privilege of transactions**

From a legislative point of view, environmental legislators provide for settlements as a means of resolving environmental disputes. As a result, the authorities frequently resort to this technique. As part of the implementation of environmental law, the environmental authorities have powers to prevent, regulate and punish environmental damage. Specifically with regard to enforcement, the authorities have the power to come to an agreement with those responsible for the damage.

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<sup>37</sup> A. Garané and V. Zakané, *op. cit.* p. 739.

<sup>38</sup> H. Sanou, "Pollution au Burkina Faso : l'or qui sauve ou l'or qui tue", 15 November 2016, <https://www.nouvelobs.com/rue89/rue89-planete/20110812.RUE3760/pollution-au-burkina-faso-l-or-qui-sauve-ou-l-or-qui-tue.html>.

<sup>39</sup> Article 193 of Act no. 036-2015/CNT of 26 June 2015 on the Mining Code in Burkina Faso.

ecological<sup>40</sup>. A settlement is an agreement between the administration or its authorised representatives and the perpetrator of ecological damage, whereby the latter undertakes to pay, within an agreed period, a sum set by the environmental administration official who apprehended the offender, representing compensation for the damage. Its purpose is to take the place of criminal proceedings in order to find a negotiated solution to the offence, and it can take place before the criminal trial, during it, or after a court decision. Its purpose is therefore either to prevent the criminal proceedings from being initiated, to interrupt the criminal proceedings, or to frustrate the judicial decision by preventing its enforcement<sup>41</sup>. It is therefore easy to understand how difficult it is to reconcile the use of settlements with environmental justice. In view of the climatic impact of mining, settlements appear to be a double-edged sword. While it does ensure swift punishment for breaches of environmental legislation, it can obscure climate justice if it is seen as an incentive for incivism, as long as the offender has the financial capacity to pay. In this context, despite the legal framework within which it operates, the plea bargain is incompatible with modern environmental protection requirements, and in particular with the public nature of environmental penalties, which is an essential element in the establishment of environmental morality and justice. Ultimately, it represents a brake on environmental and even climate justice, and an exercise of judicial power by the executive. All these factors are at the root of the low level of litigation in environmental matters, and therefore of the inaction of the courts.

## 2.2. The judge's inaction

The judge's inaction is justified by the lack of confidence in the justice system (2.2.1) and the judge's lack of specialisation (2.2.2).

### 2.2.1. Lack of confidence

Litigants' trust in the justice system, the difficulty of accessing courts and unfamiliarity with procedures, which are sometimes long and costly<sup>42</sup>, are all reasons that hamper the implementation of environmental associations' right of access to justice. The courts are not always close to the litigants, who in some places have to travel several kilometres to gain access. Similarly, citizens are convinced that justice belongs to the strongest or simply to the richest. This makes it difficult to get to court. The size of mining companies is so imposing that litigants consider legal recourse to be pointless. According to Simon Charbonneau, "We need to remember something that is all too often forgotten by lawyers: among the various functions of the law, there is that of protecting the weak from the strong, the governed from the governors, and employees from their bosses. In other words, the law has no raison d'être unless it promotes justice"<sup>43</sup>.

Furthermore, the lack of knowledge of the subject of the action means that the judge cannot be trusted. Environmental law is esoteric. Litigation involving

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<sup>40</sup> Articles 148 et seq. of the Framework Law on the Environment in Togo; article L-103 of the Environmental Code of Senegal and articles 116 et seq. of the Environmental Code of Burkina Faso.

<sup>41</sup> A. Garané and V. Zakané, *Droit de l'environnement burkinabè*, op. cit., pp. 640 et seq.

<sup>42</sup> D. Sy, "La condition du juge en Afrique : L'exemple du Sénégal", *Revue Afrilex*, 2003, 3, <http://www.afrilex.ubordeaux4.fr/spip.php?article60>.

<sup>43</sup> S. Charbonneau, "Justice environnementale et contentieux associatif", in A. Michelot (ed.), *Équité et environnement*, 1<sup>ère</sup> édition, Bruxelles, Larcier, 2012, p. 307.



Environmental law is therefore shrouded in complexity due to the technical nature of its rules. The need for a high level of knowledge of these rules requires recourse to experts who are not always available, either because they are rare or because they are not competent. For example, a claim relating to the pollution and nuisance caused by a listed establishment requires a greater knowledge of the impacts that the activity creates and of the relevant legal rules. People wishing to prevent or stop the activity or equipment in question by taking legal action must engage the services of a lawyer, who in most cases is not a specialist in environmental law. The substantive aspects of environmental law cannot therefore be dealt with in this way.

### 2.2.2. Non-specialisation of the judge

The non-specialisation of judges is a question that should be put into perspective. In English-speaking Africa, some countries have specialised environmental courts, with judges specialising in environmental law<sup>44</sup>. Non-specialisation would therefore particularly concern French-speaking countries.

In these countries, judges do not often have the opportunity to rule on environmental issues and hardly ever take up disputes in this area. When they do have the opportunity to rule on environmental offences, they generally apply light penalties. This lack of judicial sanction can only encourage environmentally damaging behaviour. This situation can be explained by the lack of specific training in environmental law among judges. They are not always familiar with the rules of environmental law and sometimes find it difficult to grasp the seriousness of environmental offences and to dispel the perception that environmental elements are impersonal property as long as their destruction does not affect the life or health of others<sup>45</sup>.

An analysis of appeals for protection of environmental rights in the mining sector in Africa shows that the judge is invited to the climate justice table. They are even

The issue of the environment being "at the centre of the debate"<sup>46</sup> raises the question of the effectiveness of the right to a healthy environment. To achieve this, sustained action by the State is essential. We can therefore conclude with the words of Alexandre Kiss: "The right of every person to have his or her case heard fairly and publicly presupposes the existence of independent and impartial courts, and therefore an adequate judicial system (...). In our view, it can therefore be said that today, more often than not, the rights guaranteed to every human being require not only legislative rules detailing them and providing for their implementation, but also appropriate procedures and institutions to ensure their effective application"<sup>47</sup>.

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<sup>44</sup> Article 162 (2) of the Constitution of Kenya.

<sup>45</sup> A. Garané and V. Zakané, *op. cit.* p. 692.

<sup>46</sup> C. Lepage, "Climate justice in Europe: the growing role of judges", *European Law Review*, 2021, p. 149.

<sup>47</sup> A. Kiss, "Definition and legal nature of a human right to the environment", in P. Kromarek, *Environnement et droits de l'homme*, Paris, UNESCO, 1987, pp. 14-15.

**URGENT LITIGATION IN THE FIELD OF CORPORATE CLIMATE RESPONSIBILITY: AN ANALYSIS IN THE LIGHT OF THE JUDGMENTS HANDED DOWN IN THE *TILENGA & EACOP* CASE CONCERNING TOTALENERGIES' ACTIVITIES IN UGANDA AND TANZANIA**

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**Summary**

The courtroom is becoming the place where citizens, associations and victims of climate change are demanding that the State and companies that emit greenhouse gases be held responsible, or at least change their behaviour in the name of duty of care. This is the background to the application to the interim relief judge of the Paris court to suspend TotalEnergies' Tilenga and EACOP projects until the due diligence measures required by law are complied with and effectively implemented. The nature of the litigation and the complexity of the subject matter limit the emergency judge's ability to assess the fairness and reasonableness of the measures adopted by the defendant, especially as the content of his decision-making powers does not favour the climate cause. Priority is therefore given to education and prudence, which would appear to be prohibitive in view of the climate issues at stake.

**Keywords:** urgency litigation; urgency judge; climate litigation; climate issue.

**Abstract**

*The courtroom becomes the place where citizens, associations, and victims of climate change demand the commitment of the responsibility of the State and companies emitting greenhouse gases, or at least, a change of behavior in the name of the duty of care. It is in this wake that the judge in chambers of the Paris judicial court was seized for requests for the suspension of the Tilenga and EACOP projects of TotalEnergies until the due diligence measures required by law and their effective implementation are respected. The nature of the dispute and the complexity of the subject matter of the dispute limit the ability of the emergency judge to assess the fair and reasonable nature of the measures adopted by the defendant, more so since the content of his decision-making powers do not affect for the climate cause. Priority is then given to pedagogy and caution, which seems prohibitive regarding climate issues.*

**Keywords:** *Emergency Litigation; Emergency Judge; Climate Litigation; Climate Issue.*

## Introduction

The manifest impacts of climate change justify climate being recognised as a subject of rights that can be invoked before national courts. In this sense, the words of the judge in the *Leghari* case resonate strongly: "Existing environmental jurisprudence must be shaped to meet the needs of something more urgent and overwhelming, climate change. From environmental justice, which has so far focused on ecosystems and biodiversity, we must move to climate justice"<sup>1</sup>. This is an interesting assertion, given that climate change is bringing into the courts disputes linked to this global phenomenon with local repercussions. With negative impacts on human rights and living conditions<sup>2</sup>, climate change plays an important role in the litigation strategy for climate justice<sup>3</sup>. There is a growing need for justice and equity in the face of this global and irreversible threat<sup>4</sup>. A protean phenomenon, climate litigation is not confined to legal action against the State, but is increasingly taking the form of initiatives against companies by litigants demanding, if not the implementation of corporate responsibility, at least greater consistency between their activities and their environmental and social obligations.

As for urgency, it refers to "the nature of a state of affairs which, if it is not remedied without delay, is likely to cause irreparable harm, although there is not necessarily imminent peril"<sup>5</sup>. Urgency in litigation arises when delay in rendering a judicial decision would be seriously prejudicial to the interests of a party<sup>6</sup>. Urgency in litigation is thus relevant to the climate issue in terms of the need to act quickly in the face of a risk of irreparable harm.

It was against the backdrop of the dilemma between urgency and climate responsibility that the interim relief judge of the Paris judicial court handed down two rulings on Tuesday 28 February 2023, in cases based on the law on the duty of vigilance<sup>7</sup>. The case was referred to him concerning the risks of human rights and environmental abuses in Uganda and Tanzania linked to oil projects.

"Tilenga"<sup>8</sup> and "EACOP"<sup>9</sup> are subsidiaries of TotalEnergies. These projects involve the drilling and operation of 400 wells, most of which are located in the Parc National de

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<sup>1</sup> Lahore High Court Green Bench, 4 September 2015, *Asghar Leghari v. Federation of Pakistan*, Req. No.WP.No.25501/2015, note 20, p. 6.

<sup>2</sup> D. Owona, "Droits de l'Homme et justice climatique en Afrique", *Annuaire africain des droits de l'homme*, vol. 3, 2019, p. 162.

<sup>3</sup> C. Cournil and C. Perruso, "Reflections on the 'humanisation' of climate change and the 'air-conditioning' of human rights. Emergence and relevance", *La Revue des droits de l'homme*, 14/2018, p. 9.

<sup>4</sup> M. Torre-Schaub, "L'affirmation d'une justice climatique au prétoire", *Revue québécoise de droit international*, vol. 29-1, 2016, pp. 161-183.

<sup>5</sup> G. Cornu, *Vocabulaire juridique*, 12<sup>e</sup> updated edition, "Quadrige", Paris, PUF, p. 2218.

<sup>6</sup> On the concept of urgency: Ph. Jestaz, *L'urgence et les principes classiques du droit civil*, Paris, LGDJ, 1968, spec. n° 326.

<sup>7</sup> TJ Paris, 28 February 2023, SURVIE, CRED, NAVODA c/ *TotalEnergies SE*, n° 22/53943; TJ Paris, 28 February 2023, Amis de la Terre France, NAPE, AFIEGO c/ *TotalEnergies SE*, n° 22/ 53942.

<sup>8</sup> Petroleum development project, crude processing plant, buried pipelines and infrastructure in the Buliisa and Nwoya districts of Uganda, carried out by TotalEnergies EP Uganda in collaboration with the Chinese company CNOOC.

<sup>9</sup> Project for the construction of a 1,147-kilometre underground pipeline to transport hydrocarbons, terminating in Uganda and Tanzania, by EACOP Ltd, 62%-owned by TotalEnergies Holdings EACOP SAS.



*Murchison Falls*, as well as the construction of the world's largest heated oil pipeline. According to the Swedish Environmental Institute, the exploitation of wells within the national park has an estimated carbon footprint of 33 million tonnes of CO<sub>2</sub> per year, in addition to the damage and risk of damage to human rights, freshwater resources and biodiversity. On the basis of these findings, human rights and environmental associations<sup>10</sup> brought an interim injunction against TotalEnergies to contest the impacts of these projects, alleging that the company had breached its duty of care. The emergency judge of the Paris judicial court declared these claims inadmissible. Based on this example, how does emergency litigation deal with the climate liability of companies, when we know that globality, transgenerationality, scientific uncertainty and evidentiary difficulties<sup>11</sup> are all challenges that mark out the judicialization of the climate? While this litigation appears ineffective in view of the shortcomings relating to the judge's jurisdiction (1), it remains a matter of education and caution (2).

## **1. Limited litigation due to shortcomings in the jurisdiction of the urgency judge**

Courts dealing with urgent matters, in particular summary proceedings, give an immediate decision, which implies the existence of a special procedure that is characterised by its speed<sup>12</sup>. This being the case, the related litigation demonstrates its limits both in terms of the shortcomings inherent in its nature and the subject matter of the dispute (1.1.) and its functional limits (1.2.).

### **1.1. Inadequacies due to the nature of the litigation and the subject matter of the dispute**

One of the special features of urgency proceedings is that there are no hearings on the merits (1.1.1.), which makes the task even more complex given the technical nature of the climate issue (1.1.2.).

#### **1.1.1. The absence of substantive debates**

The summary procedure is an emergency judicial procedure, in which all parties are heard<sup>13</sup>. It makes it possible to avoid the relative slowness of ordinary litigation, whenever a case does not raise any difficulties or requires a rapid solution. Under article 808 of the French Code of Civil Procedure, recourse to the interim relief judge is valid only if two conditions are met: urgency and absence of serious dispute. This second condition is primarily a negative concept: a serious dispute is one that only the judge hearing the case on the merits can resolve. In positive terms, the absence of a serious dispute refers to what cannot reasonably be doubted in the mind of the judge<sup>14</sup>. Although the procedure is adversarial, it does not imply the existence of debates on the merits of the dispute. However, it is up to the plaintiff to prove that his claim is well-founded. If the defendant establishes that his opponent's claim is seriously contested, the summary proceedings judge cannot rule on it.

In their writ of summons, the associations asked the court, among other things, to order TotalEnergies to bring its due diligence plan into line with the law, by including in it

<sup>10</sup> Friends of the Earth (France), Survie, AFIEGÔ, CRED, NAPE/Friends of the Earth Uganda and NAVODA.

<sup>11</sup> M. Torre-Schaub, "La gouvernance du climat : vieilles notions pour nouveaux enjeux", *Cahiers de droit, sciences et techniques*, no. 2, 2009, pp. 140-163.

<sup>12</sup> J. Héron, T. Le Bars, *Droit judiciaire privé*, 6<sup>e</sup> édition, Paris, LGDJ, 2015, § 396.

<sup>13</sup> G. Cornu, *Vocabulaire juridique*, op. cit. p. 1845.

<sup>14</sup> J. Héron, T. Le Bars, *Droit judiciaire privé*, op.cit, § 407.

all the risks of serious harm associated with the "Tilenga" and "EACOP" projects and the appropriate vigilance measures to be developed to deal with these risks. The interim relief judge at the Paris Court of First Instance ruled that the case was too complex to be dealt with under a n emergency procedure. As a result, he did not rule on the merits, conceding that the case should "be the subject of an in-depth examination of the elements of the case exceeding the powers of the interim relief judge"<sup>15</sup>.

### 1.1.2. The complexity of the climate issue

Urgency implies a concrete assessment of the interests involved. The urgency judge should have a good grasp of the concept of "climate emergency" in order to make trade-offs in the interests of climate justice. In the absence of a generic definition, climate emergency is based on a certain amount of ecological knowledge about climate change that is difficult for a legal specialist to grasp. Climate change refers to variations in the state of the climate that can be detected by changes in the average and/or variability of its properties<sup>16</sup>.

According to the Paris Climate Agreement, the response to the climate threat involves keeping the average temperature well below 2° C compared with pre-industrial levels while pursuing the objective of 1.5 C<sup>oo</sup>, as well as strengthening the capacity to adapt to its harmful effects while promoting resilience and development with low greenhouse gas emissions. On the basis of these reference data, the climate emergency would imply an increase in greenhouse gas concentrations in the atmosphere, which would be explained primarily by the use of fossil fuels and secondarily by the balance of emissions due to changes in land use.

As we can see, the climate issue requires good control of the quantities of greenhouse gases released and removed from the atmosphere, comparing them with the capacity of the natural cycle to capture them. In this area, the link between the fact and the damage remains immaterial and intangible. The link between a localised source of emissions and locally identified damage is therefore difficult to demonstrate. Similarly, the non-immediacy of the effects of global warming, coupled with their uncertainties, make it difficult to determine material and legal causality.

In the "Tilenga" and "EACOP" cases, in order to justify the merits of the summary proceedings, the plaintiffs pointed to the risks of environmental damage, in particular that the projects in question would be the source of massive greenhouse gas emissions contributing to climate disruption<sup>17</sup>. Accordingly, the monitoring plans successively adopted by the defendant company were insufficient to prevent or mitigate the risks of serious damage to the climate system. The urgency judge did not elaborate sufficiently on these risks. For the latter, it is a question of assessing the respective importance of the interest of the party to whom the delay would be prejudicial and the interest of the opposing party, which could be compromised by too rapid an examination. As urgency is a condition of the interim relief judge's material jurisdiction, his assessment is left to the judge within very broad limits.

<sup>15</sup> TJ Paris, 28 Feb. 2023, *Amis de la Terre France, NAPE, AFIEGO C/ TotalEnergies SE*, n° 22/ 53942, p. 22.

<sup>16</sup> J. M. Llwod *et al.*, (eds.), *Climate Change 2014, Mitigating climate change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge and New York, Cambridge University Press, 2014, p. 129.

<sup>17</sup> TJ Paris, 28 February 2023, *SURVIE, CRED, NAVODA c/ TotalEnergies SE*, n° 22/53943, p.10.



## 1.2. Inadequacies due to the functional limits of the judge's decision-making power

The interim relief judge is set up to order "measures" (1.2.1.) of a provisional nature (1.2.2.).

### 1.2.1. The power to order "measures" without stating the law

Under article 484 of the French Code of Civil Procedure, the interim relief judge is empowered to order "measures". In accordance with article 809 of the Code, he may prescribe the necessary precautionary measures. In his decision, the trial judge rules on the law and then makes the order. Firstly, he finds that the facts he has established in his decision correspond to a specific rule of law; secondly, he orders that the legal effect of that rule be given effect within the limits of the claims brought before him. The interim relief judge does not have to develop this reasoning in its entirety. In fact, he is prohibited from stating the law<sup>18</sup>.

An interim injunction can only be used to obtain an urgent and/or indisputable measure from the court. The emergency judge will then have to anticipate the decision to be taken by the court hearing the case on the merits. In addition, the measures ordered by the interim relief judge are often not derived from the legal effect of the substantive rule, but rather form part of a pool of general measures referred to as interim measures<sup>19</sup>. In our case, he states in substance: "The interim relief judge is responsible for providing an urgent response to a dispute by ordering interim measures, in order to preserve the rights of the parties before they are assessed by the court hearing the case on the merits"<sup>20</sup>. Be that as it may, the interim relief judge may order, by way of provisional measures, just about anything that is asked of him without having to interpret the substantive rule of law.

### 1.2.2. The power to order "interim measures"

Under the terms of article 484 of the Code of Civil Procedure, an interim order is a provisional decision made in cases where the law confers on the judge, who is not seised of the main case, the power to order the necessary measures immediately. Whatever measure the interim relief judge takes, his decision is always provisional. Whether they are measures derived from the legal effect of the substantive rule or simple interim measures, they are ordered only to govern the time that will elapse until the decision of the court hearing the main action. As the interim relief judge himself emphasised in interpreting his powers, the provisional nature of the interim relief order does not concern the substance of the dispute<sup>21</sup>. In his view: "Measures taken in summary proceedings are provisional because they may be modified or withdrawn by a court hearing the case on the merits, which is never bound by the summary proceedings decision, in the event of new circumstances"<sup>22</sup>. The judge's decision is not binding on the court hearing the case on the merits because, under article 488 of the Code of Civil Procedure, an interim order does not have the force of *res judicata* in the main proceedings. The trial judge is therefore not bound by any assessments made by the interim relief judge.

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<sup>18</sup> J. Héron, T. Le Bars, *Droit judiciaire privé, op.cit.*, §. 409.

<sup>19</sup> *Ibid.*

<sup>20</sup> TJ Paris, 28 February 2023, *Amis de la Terre France, NAPE, AFIEGO C/ TotalEnergies SE*, n° 22/53942, p. 20; TJ Paris, 28 February 2023, *SURVIE, CRED, NAVODA c/ TotalEnergies SE*, n° 22/53943, p. 20.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

## 2. Litigation that favours education and caution on the climate issue

If we base ourselves on the models of the judge defined by Ost, the environmental judge has gone from being a transcribing judge to a determining judge, making it possible to lay the foundations of a law that is still relatively new, and to make it more effective<sup>23</sup>. It is in this sense that, even in the context of an emergency procedure, the judge prefers to be educational (2.1.) and cautious (2.2.).

### 2.1. The educational role of the urgency judge

Even though he is certainly working under the pressure of urgency, the interim relief judge carries out an analysis of the facts and law that is as thorough, if not sometimes more so, than that of the judge hearing the case on the merits, although he feels obliged, from a very formal point of view, to specify that the analysis thus carried out is only *prima facie*<sup>24</sup>. In the Tilenga & EACOP case, the court was instructive both as regards the duty of care (2.1.1.) and as regards imminent harm (2.1.2.).

#### 2.1.1. The judge explains the content of the duty of care

Climate vigilance is based on the principle of prevention. This means incorporating environmental requirements from the design phase of a project right through to its execution<sup>25</sup>. This principle means monitoring the environment to identify any deterioration or threat and, by the same token, taking steps to counter it<sup>26</sup>.

In the Tilenga & EACOP case, the duty of care is based on Law no. 2017-399 of 27 March 2017, which introduces a duty of care in respect of parent companies with an extended scope that includes not only the activities of the parent company, but also those of its subsidiaries and those of its subcontractors and suppliers with which it has an established commercial relationship. In this regard, the judge recalls the content of the principle laid down by the law, which, in his view, gives concrete form to the obligation placed on these companies to adopt a due diligence plan comprising several categories of measures. For the judge, the content of these measures remains general, as the law does not refer to any guiding principle or any other international standard, nor does it include a list of due diligence obligations imposed on the companies concerned<sup>27</sup>.

For example, the judge noted the absence of a *modus operandi*, a master plan, monitoring indicators and measurement tools to govern the preparation, implementation and evaluation by the company of general due diligence measures<sup>28</sup>. The absence of an independent monitoring body or performance indicators makes it almost impossible to evaluate the due diligence plan adopted by the company *ex ante*, or even to verify the reality of its implementation *ex post*.

<sup>23</sup> F. Ost, "Jupiter, Hercule, Hermès: trois modèles du juge", in P. Bouretz (ed.), *La force du droit*, Paris, Ed. Esprit, coll. Philosophie, 2001, pp. 241-272.

<sup>24</sup> J. Englebert, "Le référé judiciaire: principes et questions de procédure", in J. Englebert, H. Boularbah (eds.), *Le référé judiciaire*, Brussels, Éditions du Jeune Barreau de Bruxelles, 2003, p. 47.

<sup>25</sup> L. Boisson de Chazournes, S. Maljean-Dubois, "Principes du droit international de l'environnement", *Juris-Classeur Environnement et Développement Durable*, vol. Fasc. 2011, p. 14.

<sup>26</sup> The ICJ has had occasion to affirm the importance of vigilance in view of the often irreversible nature of the damage caused to the environment and the limits inherent in the very mechanisms for remedying this type of damage: *Gabcikovo-Nagymaros Project*, Hungary v Slovakia, ICJ Reports, 1997, § 140. <sup>27</sup> TJ Paris, 28 February 2023, *Amis de la Terre France, NAPE, AFIEGO C/ TotalEnergies SE*, n° 22/ 53942, pp. 17- 18; TJ Paris, 28 February 2023, *SURVIE, CRED, NAVODA c/ TotalEnergies SE*, n° 22/53943, p. 18.

<sup>28</sup> *Ibid.*

execution. As a result, sole control is devolved to the judge, who will have to rely on the imprecise, vague and flexible concept of the reasonableness of the due diligence measures provided for in the plan<sup>29</sup>.

### 2.1.2. The judge educates on the question of imminent harm

The non-immediacy of the effects of climate change, coupled with their uncertainties, make it difficult to establish the material and legal causality of the damage. Climate damage is essentially hypothetical and imminent in that "the time lag between the cause and the injury can be enormous, which reduces the chances of linking one to the other"<sup>30</sup>. For the judge, imminent damage is damage "which has not yet occurred, but which will surely occur if the present situation is to continue, and a manifestly unlawful disturbance results from any disturbance resulting from an act which directly or indirectly constitutes a clear breach of the rule of law"<sup>31</sup>. It also recognises its power to prescribe precautionary measures to prevent this type of damage, and that the mere fact that damage is imminent is sufficient to establish urgency in order to limit its effects. However, it would like to point out that there is a clear difference between imminent damage and damage to the environment.

This "purely eventual" nature cannot be used as a basis for intervention<sup>32</sup>. That it is difficult to support without proof the imminence of damage, in the absence of demonstration of certainty or even of a risk of realisation.

In addition to this educational approach, the judge is careful in his reasoning.

### 2.2. The delicate prudence of the urgency judge

The cautious attitude adopted by the judge can be described as both ostentatious (2.2.1.) and redhibitory (2.2.2.).

#### 2.2.1. Ostentatious caution on climate issues

Some argue that in order to decide the dispute quickly and ensure that the summary proceedings remain effective, the judge cannot go into the matter in detail and can only rule on the basis of obvious rights that do not require a detailed examination of the case. While the judge acknowledged in *Tilenga & EACOP* that he could draw the consequences of a clear act, he considered that he could not interpret an act without exceeding his powers<sup>33</sup>. As a result, it considers that it is not its prerogative to assess the reasonableness of the measures adopted by the due diligence plan when this assessment requires an in-depth examination of the case<sup>34</sup>. Accordingly, it is for the trial court alone to "determine whether the complaints against TotalEnergies have been substantiated or whether TotalEnergies has provided proof of compliance with its due diligence obligations in light of the information contained in TotalEnergies' due diligence plan for 2021, and

<sup>29</sup> *Ibid.*

<sup>30</sup> M. Torre-Schaub, "Le rôle des incertitudes dans la prise de décisions aux États-Unis. Le réchauffement climatique au prétoire", *International Journal of Comparative Law*, vol. 59, no. 3, 2007, p. 708.

<sup>31</sup> TJ Paris, 28 February 2023, *Amis de la Terre France, NAPE, AFIEGO C/ TotalEnergies SE*, n° 22/53942, p. 20; TJ Paris, 28 February 2023, *SURVIE, CRED, NAVODA c/ TotalEnergies SE*, n° 22/53943, p. 21.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, decision no.° 22/53942, p. 21; decision no.° 22/53943, p. 21.

<sup>34</sup> Nevertheless, the court recognises its power to issue an injunction when the company subject to the duty of care has not drawn up a due diligence plan, or when the summary nature of the headings means that there is no plan, or when a manifest illegality is characterised with the obviousness required in summary proceedings.

carry out an audit of the tools provided for and implemented as part of the disputed due diligence plan, assessing their effectiveness and efficiency in the light of the monumental goals relating to the human rights to be preserved and the environment to be protected that fall within the scope of the due diligence regulations, it being noted that, as things stand, no unlawful act has been identified with the obviousness required for summary proceedings or in a manifest manner"<sup>35</sup>.

The interim relief judge also declared inadmissible, in the absence of prior formal notice, the applicants' requests that TotalEnergies SE be enjoined from fulfilling its due diligence obligations and from suspending work on the 'Tilenga' and 'EACOP' projects, without it being necessary to examine the other pleas.

### 2.2.2. But caution is not an option when it comes to climate change

Under the terms of article 835, paragraph 1<sup>er</sup> of the Code of Civil Procedure, the interim relief judge may prescribe any protective measures required to prevent imminent damage. The jurisdiction of the urgency judge is framed by a given situation that creates a need to act, and hence what needs to be done to remedy that situation by means of an urgent measure<sup>36</sup>. Failure to comply with the duty of care may result in an injunction being issued against the parent company, or even in the parent company being held civilly liable under articles 1240 and 1241 of the French Civil Code<sup>37</sup>. The climate duty of care combined with article 1252 of the Civil Code enables the judge to stop or prevent ecological damage.

Law 2017-399 on the duty of vigilance, which imposes a duty to identify and prevent risks of serious harm to human rights and the environment, takes into account the risk factor relating to damage<sup>38</sup>. This factor appears abundantly in climate case law. Already in *Milieudéfensie et al v Shell*, the litigation against the Anglo-Dutch company was not aimed at engaging its liability, but at preventing climatic risks<sup>39</sup>. The aim was to prevent serious and irreversible damage to human rights and the environment<sup>40</sup>. Case law has taken up the reasoning developed by the judge in *Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment)* on the *duty of care*. This principle incorporates the foreseeability of climate damage into the assessment of the fairness and reasonableness of measures<sup>41</sup>.

Given the scale of the Tilenga & EACOP project, viewed through the prism of the theory of obvious right and the precautionary principle, it seems simplistic to focus on the failure to give prior notice. Indeed, what is self-evident is that which is obvious to the mind, with such clarity, a

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<sup>35</sup> TJ Paris, 28 February 2023, *Amis de la Terre France, NAPE, AFIEGO C/ TotalEnergies SE*, n° 22/ 53942, p. 23; TJ Paris, 28 February 2023, *SURVIE, CRED, NAVODA c/ TotalEnergies SE*, n° 22/53943, p. 24.

<sup>36</sup> G. Cornu, *Vocabulaire juridique*, op. cit. p. 2219.

<sup>37</sup> General duty of care and diligence: Article L225-102-5 of the French Commercial Code.

<sup>38</sup> Article L225-102-4 of the French Commercial Code.

<sup>39</sup> L. Canali, "les contentieux climatiques contre les entreprises : bilan et perspectives", in C. Cournil and L. Varison (eds.), *Les procès climatiques entre le national et l'international*, Paris, Pedone, 2018.

<sup>40</sup> L. Duthoit, "Milieudéfensie et autres c. Shell (2019)", in C. Cournil (ed.), *Les grandes affaires climatiques*, Confluence des droits, Aix-en-Provence: Droits international, comparé et européen, 2020, p. 538, <http://dice.univ-amu.fr/en/dice/publications/confluence-droits>.

<sup>41</sup> B. Parance, E. Groulx, V. Chatelin, "Devoir de vigilance - Regards croisés sur le devoir de vigilance et le duty of care", *Journal du droit international*, no. 1, January 2018, doct. 2, pp. 9-10.

such that it carries within itself the proof of its existence or of its validity<sup>42</sup>. The precautionary principle, for its part, expresses the idea of surrounding the operation to be undertaken with sufficient guarantees, i.e. an obligation to abstain, i.e. an obligation not to do<sup>43</sup>. This means not waiting until the situation is urgent before taking action, and acting with prudence and wisdom in the face of uncertainty. The obvious and the precautionary principle would have been a loophole enabling the judge to assess the reasonableness of the measures adopted in TotalEnergies' vigilance plan, or, in the face of climate risks, to adopt precautionary measures.

There is in fact a broad scientific consensus on the anthropogenic origin of climate change. The reasoning that would have prevailed here would have been that of the applicant NGOs in *Greenpeace Nordic Association and Nature & Youth v. Ministry of Petroleum and Energy*, according to which the permits would give access to untapped fossil fuel deposits in a way that would run counter to the climate change mitigation efforts required to keep the rise in global temperatures below 1.5°C or even 2°C compared with the pre-industrial era<sup>44</sup>. Exceeding the 1.5°C threshold could therefore lead to a tipping *point*<sup>45</sup>. The mere existence of a serious and irreversible climate risk would have required the judge not to take a restrictive approach to his role.

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<sup>42</sup> G. Cornu, *Vocabulaire juridique*, *op. cit.* p. 923.

<sup>43</sup> M. Kamto, "Les nouveaux principes du droit international de l'environnement", *Revue juridique de l'environnement*, no. 1, 1993, p. 16.

<sup>44</sup> UNEP, *The state of climate litigation. Global Review*, Nairobi, 2017, p. 20.

<sup>45</sup> P. Mougeolle, "Notre affaire à tous et autres c. Total (2020)", in C. Cournil (ed.), *Les grandes affaires climatiques*, *op. cit.* p. 552.





# THE SYSTEM OF PENALTIES FOR OFFENCES RELATED TO EXTRACTIVE ACTIVITIES AND CLIMATE JUSTICE

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## **Summary**

Africa is marked by nearly 80 major socio-environmental conflicts linked to the extraction of mineral resources, with persistent adverse effects on the climate. Faced with the expansion of extractive activities and the corresponding increase in the threat to the climate, environmental law and jurisprudence need to find new sanction mechanisms that are better adapted to the specific and urgent challenges posed by climate change. The current system for punishing offences related to extractive activities seems inadequate and unsuitable for the efficient management of environmental damage. What already exists is not enough. Innovation is needed, in the form of new penalties and new methods of remedying serious environmental damage in order to ensure climate justice.

**Key words:** sanctions; repression; environment; climate justice; extractive activity.

## **Abstract**

*Africa is marked by nearly 80 major socio-environmental conflicts related to the extraction of mineral resources with persistent adverse effects on the climate. This expansion of extractive activities requires a re-specification of the response to it by existing environmental jurisprudence, to adapt it to the new challenges of something more pressing and overwhelming, climate change. The current system of penalties for crime linked to extractive activities is insufficient and unsuited to taking environmental damage into account. What already exists is not enough. Innovation is needed in the form of both new sanctions and new methods of redressing serious environmental damage to ensure climate justice.*

**Keywords :** Sanctions; Repression; Environment; Climate Justice; Extractive Activity.

## Introduction

The Global Atlas of Environmental Justice, carried out between 2011 and 2015, reveals that Africa is marked by almost 80 major socio-environmental conflicts linked to the extraction of mineral resources. While this mapping highlights the impact of the mining industry on the continent, it also shows that some of the pollution generated by the extractive industries has persistent adverse effects on the climate<sup>1</sup>. The Heede report<sup>2</sup> shows that the extractive industries are the world's leading source of greenhouse gas emissions. At the top of the list are multinationals in the oil, gas and cement sectors<sup>3</sup>.

As the harmful effects of extractive activities in Africa worsen, it is essential to specify the response to be provided by environmental law, better adapted to the new, more urgent and more overwhelming challenges<sup>4</sup>: climate change<sup>5</sup>. From environmental justice, which until now has focused on ecosystems and biodiversity, we should move on to climate justice, as the Pakistani judge stated in the Leghari case<sup>6</sup>.

Climate justice is a concept that has emerged from the demands of civil society, focusing on ethical considerations relating to fairness, equality, responsibility and the protection of subjective rights undermined by climate change. Depending on how it is understood<sup>7</sup>, two main trends are emerging: distributive justice<sup>8</sup> to which Western countries refer<sup>9</sup> and corrective justice<sup>10</sup> defended by Southern countries. The latter

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<sup>1</sup> More and more scientific studies are highlighting the role played by human activities in exacerbating climate change. Many of them denounce the predominant role played by multinationals in destabilising the climate: D. Owona "Droits de l'homme et justice climatique en Afrique", *Annuaire africain des droits de l'homme*, 3/2019, pp. 157-178.

<sup>2</sup> This report quantifies and tracks the overall share of carbon dioxide and methane emitted by the major oil extraction groups: R. Heede, *Carbon Majors - Accounting for carbon and methane emissions 1854-2010*, Methods & Results Report, 2014, 104 p.

<sup>3</sup> P. Griffin, *The Carbon Majors Database, CDP Carbon Majors Reports 2017*, CDP report, 2017, 16 p.

<sup>4</sup> The IPCC states that climate change will lead to a depletion of renewable surface and groundwater resources in most arid subtropical regions, exacerbating intersectoral competition over water resources, *IPCC Climate Change 2014. Synthesis Report*, 2014, p.13.

<sup>5</sup> Climate Change is defined in Article 1(2) of the United Nations Framework Convention on Climate Change as a change that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.

<sup>6</sup> *Lahore High Court, Asghar Leghari v Pakistan*, 25 January 2018.

<sup>7</sup> The concept is not yet universally accepted. Indeed, several currents are emerging: A. Michelot "Definition(s) et perspectives de justice climatique" in A. Michelot (ed.) *Justice climatique/Climate justice: enjeux et perspectives/ Challenges and perspectives*, 2016, pp. 21-23.

<sup>8</sup> This justice aims to share responsibility for climate change in proportion to the level of greenhouse gas (GHG) emissions. It is based on the principle of common but differentiated responsibilities affirmed by the Rio Declaration on Environment and Development and set out in Article 3 of the United Nations Framework Convention on Climate Change, which was adopted on 9 May 1992 and came into force on 21 March 1994.

<sup>9</sup> C. Larrère, "Qu'est-ce que la justice climatique?", in A. Michelot (ed.), *op.cit.*, p. 6.

<sup>10</sup> This justice is based on three essential ideas: the historical responsibility of Western countries for climate change, their ecological or climate debt to developing countries, and the debt of developing countries to developing countries. It is the "global commons" provided by the earth. It is a powerful argument in climate negotiations: C. Larrère, *ibid.*, p. 9.

aims to tame the inequalities generated by climate change, which are seriously affecting the extremely poor and vulnerable populations<sup>11</sup> of Africa<sup>12</sup>. But these different approaches to climate justice are being challenged<sup>13</sup> by ecologists, who see it as a concept that must create a link between the social and the environmental, given the diversity of cultures<sup>14</sup>. Environmental justice, socio-environmental justice, ecological justice, climate justice, spatial justice: the terms associated with the values of justice expressed around environmental issues<sup>15</sup> have multiplied and express more or less the same reality. These different concepts emphasise the justiciability<sup>16</sup> of climate rights and, over and above ethical considerations, question the way in which justice sanctions the causes and effects of climate change.

A sanction is defined as a repressive measure taken by an authority with a view to inflicting a penalty or reward on the perpetrator of an act<sup>17</sup>. Climate litigation mainly involves multinational companies<sup>18</sup>, in this case those involved in extractive activities. The law provides for a variety of sanctions against these companies. On the basis of this observation, several categories of sanctions can be identified, including repressive and civil sanctions.

However, the existence of a number of shortcomings in terms of legislation, institutions, human resources and funding, combined with the determination of African governments to attract foreign investment, considerably weaken the level of sanctions imposed on multinationals that cause environmental damage. An analysis of the chain of repression for offences related to extractive activities reveals numerous shortcomings at various levels, which justify the lack of dissuasive impact of the sanctions actually imposed on the behaviour of those responsible for environmental damage. In addition to these shortcomings, there are the difficulties associated with mastering climate justice. Indeed, in the absence of a reliable content, actions in favour of climate justice refer to environmental justice<sup>19</sup>. This is because climate justice means overcoming the constraints of traditional justice<sup>20</sup> to confront

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<sup>11</sup> *Ibid.*

<sup>12</sup> O. Ruppel, "International climate change law and policy from an African perspective", in O. Ruppel and E. Kam Yogo (eds.), *Droit et politique de l'environnement au Cameroun. Afin de faire de l'Afrique l'arbre de vie*, Yaoundé, 2018, p. 493.

<sup>13</sup> These currents criticise distributive justice for considering nature as a resource or a set of goods that are appropriated or shared, and corrective justice for not making any room for nature but rather for confrontations between the states of the North and South.

<sup>14</sup> C. Larrère, *op. cit.* p. 18.

<sup>15</sup> Some criminologists distinguish between "environmental" justice, where the victim is "human", and "social" justice, where the victim is "human".

"Ecological" where the victim is a "specific ecosystem": N. South and R. White, "The emergence and future of environmental criminology", *Criminology*, vol. 49, 2/2016, p. 35.

<sup>16</sup> L. Cadet, "Pour une théorie générale du procès", *Ritsumeikan Law Review*, 28/2001, p. 139.

<sup>17</sup> These are the legal consequences of failure to comply with a rule of law, a custom or an established order. In the case of misconduct, a sanction refers to the punishment, reprimand or penalty incurred as a result of the misconduct.

<sup>18</sup> L. Canali, "Les contentieux climatiques contre les entreprises : bilan et perspectives", in C. Cournil and L. Varison (eds.), *Les procès climatiques : Entre le national et l'international*, Paris, Pedone, 2018, p. 67.

<sup>19</sup> They involve sanctioning various violations of the right to water, land, life, health, human rights or any threat to the physical integrity and livelihoods of the most vulnerable members of society, in particular isolated indigenous and local communities, women and other vulnerable social groups, etc.

<sup>20</sup> The legal mastery of the concept of climate justice requires overcoming numerous difficulties linked to different levels of governance, different areas of law and different sectors of the economy.



the trial to extraterritoriality, globality, transgenerationality, scientific uncertainty and evidentiary difficulties<sup>21</sup>.

We could simply deduce that the law is incapable of punishing delinquency linked to extractive activities and guaranteeing climate justice. Such a conclusion would be too hasty to be perfectly fair. Nevertheless, this line of reasoning is interesting, because it reveals, to a certain degree, the need for a better understanding of climate justice, particularly the role of legal institutions in punishing/reparing environmental damage. It also raises questions about the role and *raison d'être* of penalties in this area. Does it succeed in giving concrete expression to the purpose of environmental law in climate matters and in promoting the achievement of a 'good ecological status' or a 'balanced environment that respects health'? In other words, given the universality of climate disruption, could the international community not, at international level, define a specific system of sanctions applicable to the extractive industries in order to guarantee climate justice?

The purpose of this study is to examine whether or not the system of offences relating to extractive activities contributes to the achievement of climate justice. This examination, which shows in turn the ineffectiveness of repressive sanctions (1) and the unsuitability of civil sanctions (2) enacted in this area, makes it necessary to look for new avenues of sanctions likely to better guarantee effective compliance with environmental obligations in the field of extractive activities.

## 1. The inadequacy of sanctions in achieving climate justice

From the point of view of law enforcement, the purpose of penalties<sup>22</sup> is not only to check the degree of influence exerted by the legal standard on the behaviour of multinationals that cause damage to the environment and ecosystems, but also to ensure compliance with a primary legal standard<sup>23</sup> by deterring future damage. From this point of view, sanctions have a preventive function with regard to environmental damage, "either a priori, through the intimidating effect they produce, or a posteriori, by reducing the possibility of their recurrence"<sup>24</sup>. Civil penalties, for their part, are governed by the principle of full reparation for damage and aim to restore the victim to the situation *before* the damage occurred. However, the ineffectiveness of some and the unsuitability of others mean that climate justice cannot be guaranteed.

### 1.1. The ineffectiveness of punitive sanctions in achieving climate justice

In the domestic legal order, the suppression of delinquency linked to extractive activities is generally ensured by two processes. On the one hand, repression "carried out by the administration"<sup>25</sup> is reflected in the sanctions adopted by the administrative authorities, and on the other hand, criminal repression is used to punish non-compliance with various standards. The

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<sup>21</sup> C. Hilson, "Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)", in F. Fracchia and M. Occhiena (eds.), *Climate Change: la risposta del diritto*, Editoriale Scientifica, 2010, p. 421. <sup>22</sup> J. Bétaille, *Les conditions juridiques de l'effectivité de la norme en droit public interne : illustrations en droit de l'urbanisme et en droit de l'environnement*, doctoral thesis in law, University of Limoges, 2012, no. 15 et seq. <sup>23</sup> In a broader sense, it is "any means intended to ensure the effective observance and enforcement of a right or obligation": G. Cornu, *Vocabulaire juridique*, 8 ed, Paris, PUF, 2007, p. 845.

<sup>24</sup> J. Mourgeon, *La répression administrative*, doctoral thesis in law, Paris, LGDJ, 1967, p. 21.

<sup>25</sup> *Ibid.*

he coexistence of two methods of repression providing both criminal and administrative sanctions for offences related to extractive activities raises many questions about the effectiveness of the system put in place to ensure climate justice. In practical terms, it is clear that these types of penalty, far from complementing each other<sup>26</sup>, are not coordinated in any way as far as the environment is concerned. The result is a "dilution that borders on a vacuum of sanctions linked to the inertia of sanctioning bodies relying on each other to intervene"<sup>27</sup>. The combination of these two systems of repression partly explains the inanity of organised repression in this area and its inability to promote climate justice by effectively anticipating the environmental damage caused by extractive activities.

### 1.1.1. The preponderance of administrative sanctions

In most African countries, penalties for environmental damage caused by the extractive industries are essentially administrative. The existence of administrative sanctions in this area can be explained by the fact that these activities are governed by special administrative policies that are potentially coercive<sup>28</sup>. They enable the administrative authority to back up its orders with threats and effective sanctions in the event of non-compliance<sup>29</sup>. Thus, in the event of non-compliance with the operating conditions of an extractive activity duly noted by environmental inspectors, the person responsible may be given formal notice to comply within a specified period<sup>30</sup>. If the operator fails to comply with this injunction, the authorities may choose to impose various sanctions. First of all, the operator may be required to deposit a sum equivalent to the amount of the work to be carried out<sup>31</sup> with a public accountant. The authorities may also, at the operator's expense, order the execution of the prescribed measures<sup>32</sup>. It may also order the suspension of the targeted activity until the conditions imposed have been met, and take the necessary interim measures<sup>33</sup>. Lastly, the authorities may withdraw operating licences or permits, or temporarily or permanently close down the multinationals responsible for the damage<sup>34</sup>.

On a purely theoretical level, this administrative system has a number of advantages over criminal sanctions. In fact, many authors see administrative sanctions as a remnant of the privilege of the preliminary<sup>35</sup> effective and rapid, dispensing with the need for prior judicial intervention and requiring few resources to implement. In this respect, it has a number of advantages, including its procedural simplicity, its ability to deal with mass and technical disputes, its social acceptability, its

<sup>26</sup> J.-H. Robert, "Droit pénal et environnement", *AJDA*, 1994, p. 583; J. Bétaille, *op. cit.*

<sup>27</sup> L. Neyret, "Les sanctions à l'épreuve des enjeux environnementaux", in M. Mekki (ed.), *Les notions fondamentales de droit privé à l'épreuve des questions environnementales*, Bruylant, 2018, p. 181.

<sup>28</sup> L. Fonbaustier, "L'efficacité de la police administrative en matière environnementale", in O. Boskovic (ed.), *L'efficacité du droit de l'environnement*, Dalloz, coll. Thèmes et commentaires, 2010, p. 109.

<sup>29</sup> *Ibid.*

<sup>30</sup> Article 154 of Law no. 77/15 of 6 December 1977 regulating explosive substances and detonations in Cameroon.

<sup>31</sup> V. Jaworski, "Chronique de droit pénal de l'environnement (septembre 2014 à décembre 2015)", *Revue juridique de l'environnement*, 2/2016, pp. 362-375.

<sup>32</sup> Article 48, paragraph 1 of law no. 96/12 of 5 August 1996 on the framework law for environmental management.

<sup>33</sup> Article 48, paragraph 2, *ibid.*

<sup>34</sup> Article 14 of law no. 95/08 of 30 January 1995 on radiation protection.

<sup>35</sup> E. Rosenfeld, J. Veil, "Sanctions administratives, sanctions pénales", *Pouvoirs*, no. 128, 2008, p. 61; J.-M. Sauvé, "Les sanctions administratives en droit public français. État des lieux, problèmes et perspectives", *AJDA*, Oct. 2001, special issue, p. 16; J. Bétaille, *op. cit.* pp. 77 et seq.

adaptation<sup>36</sup> and its automaticity. It seems interesting, because the administrative authority is obliged to give formal notice to the multinational company responsible for the infringement, to regularise the situation, and then to impose one or other of the aforementioned sanctions if it does not comply.

The authorities thus have extensive powers to punish offences related to extractive activities. However, it seems difficult to make a positive assessment of the impact of these sanctions on climate justice. In fact, the effectiveness of administrative sanctions depends on the existence upstream of a regular control system and the availability of adequate human, financial and material resources for the surveillance, detection and prevention of possible cases of delinquency. The lack of such a system, combined with the leniency of the authorities, considerably weakens the role of administrative sanctions. The result is a drop in the number of offences recorded and, despite the many instances of environmental damage, the majority of offences go undetected or, if they are detected, are almost never punished<sup>37</sup>. In addition, it has been shown that the repressive chain is altered by the fact that, although recorded, many offences have no chance of being prosecuted insofar as not all reports are systematically forwarded to the public prosecutor.

### 1.1.2. The pusillanimity of accessory criminal penalties

When environmental damage is punished by means of an administrative police force that is subject to criminal penalties, criminal law, the "police force of administrative law", acts in an ancillary capacity<sup>38</sup>, with no autonomy in relation to the administrative standard<sup>39</sup>. Penal sanctions are aimed at various categories of breaches and target non-compliance with administrative requirements, damage to the quality of the environment or damage to the protection of nature and living species. These penalties consist mainly of fines, with custodial sentences being very rare<sup>40</sup>.

Contraventional fines are generally set at very low rates, although they can be accumulated<sup>41</sup> to reach amounts high enough to act as a deterrent. Exceptionally, when a multinational company is the cause of maritime pollution, the operator or owner may be required to pay all or part of the fine, regardless of whether the latter has committed an offence<sup>42</sup>. However, the small number of penalties actually imposed and the almost universal use of fines are likely to dilute the deterrent effect of criminal penalties for environmental crime. Punishment remains a curiosity, an intruder whose effectiveness is readily mocked<sup>43</sup>. So, notwithstanding the increase in environmental damage caused by the extractive industries, this damage is greatly underestimated, rarely incriminated and rarely prosecuted.

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<sup>36</sup> A. Van Lang, "Droit répressif de l'environnement : perspectives en droit administratif", *Revue juridique de l'environnement*, 2014/HS01, pp. 33-46.

<sup>37</sup> S. Barone, "Environmental impunity. L'État entre gestion différentielle des illégalismes et désinvestissement global", *Champ pénal*, XV/2018, no. 2.

<sup>38</sup> J.-H. Robert, M. Rémond-Gouilloud, *Droit pénal de l'environnement*, Masson, 1983, p. 33 et seq.

<sup>39</sup> Ibid; J.-H. Robert, "Droit pénal de l'environnement et droit pénal général", *Problèmes actuels de science criminelle*, 4/1991; P. Mistretta, *La responsabilité pénale du délinquant écologique*, doctoral thesis in law, Lyon III, 1998, p. 260 et seq.

<sup>40</sup> Article 4 of Law no. 89/27 of 29 December 1989 on hazardous and toxic waste, which provides for the death penalty.

<sup>41</sup> Exception made to the principle that penalties of the same nature should not be imposed concurrently.

<sup>42</sup> Cass. crim. 14 May 2008, no. 07-84927, *RJE*, 2009, p. 552, obs. V. Jaworski.

<sup>43</sup> T. Fossier, "La répression des infractions au droit de l'environnement", *AJ pénal*, déc. 2017, p. 525.

with few sanctions<sup>44</sup> . Hardly any of them result in prosecutions with criminal penalties.

Furthermore, the almost automatic use of plea bargaining as the preferred method of sanction raises questions about the incompatibility between deterrence and reparation. In effect, the settlement paralyses the deterrent effect of the criminal sanction. Frequently envisaged, it prevents the punitive system from functioning properly. The more regularly the system operates, the greater its deterrent effect<sup>45</sup> . Insofar as "the certainty of a punishment, even a moderate one, will always make more of an impression than the fear of a more terrible one, a fear that always tempers the hope of impunity<sup>46</sup> ". However, the delinquency linked to extractive activities is on the increase and constitutes a violation of the ecological commitments owed to society and individuals, the fulfilment of which can only be ensured by criminal sanctions<sup>47</sup> . But the vanity of the penalties applied in this area contrasts with the challenges of climate justice and calls for the advent of a new paradigm in the punishment of environmental offences. The same impression can be gained from civil penalties.

## 1.2. The shortcomings of civil penalties in achieving climate justice

The existence of civil penalties in ecological matters makes it possible, under the rules of common law and environmental law, to respond to the individual and environmental damage suffered as a result of extractive activities. However, as this equivalent remedy of a pecuniary nature does little to meet ecological requirements, environmental legislation provides for compensation in kind through the right to the environment.

### 1.2.1. The unsuitability of damages for environmental damage

The civil penalties for offences related to extractive activities are compensation by equivalent, restoration of damaged sites or compensation in kind. These penalties are primarily designed to repair individual environmental damage and are not intended to prevent environmental damage or punish multinationals. They allow the victim of environmental damage to be awarded compensation, sometimes in derisory amounts, to make good the harm suffered. It is therefore a remedial sanction that is ill-suited to environmental damage.

In the extractive industries, the most commonly used civil penalty is the award of damages to compensate for individual losses. This solution, which is favourable to multinationals, allows them to continue their harmful activities without any additional measures being imposed on them, forcing them to reduce the harmful impact of their activities on the environment. The civil penalty system applied in environmental matters appears to be a "right to pollute versus compensation<sup>48</sup> ", with the monetisation of damage making it impossible to act in the interests of climate justice.

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<sup>44</sup> P. Rossi, *Traité de droit pénal*, Paris, Guillaumin, 1863, p. 249.

<sup>45</sup> M. Cusson, *Pourquoi punir?* Dalloz, 1987, p. 119.

<sup>46</sup> C. Beccaria, *Traité des délits et des peines*, translation by P. J. S. Dufey, Dalibon-Ladvoat, 1821, § XX, p. 96.

<sup>47</sup> P. Rossi, *op. cit.* p. 249.

<sup>48</sup> Situation denounced by the doctrine: G. Martin, *De la responsabilité civile pour fait de pollution au droit à l'environnement*, PPS, 1978, n° 93 ; P. Girod, *La réparation du dommage écologique*, LGDJ, 1974, p. 156 et seq. ; F. Caballero, *Essai sur la notion juridique de nuisance*, LGDJ, 1981, numéros 230 et 231.



However, this categorical position of the doctrine should be qualified. Indeed, reparation by equivalent of environmental damage through the award of damages could have a positive impact on climate justice if the amounts awarded were high enough. However, ordering multinationals to pay derisory sums in no way diminishes their financial capacity and, on the contrary, helps to minimise their responsibility<sup>49</sup> in climate matters.

Furthermore, the sanction of personal injury compromises the introduction of actions for compensation for environmental damage by individuals. This requirement, which is dear to the law of civil liability, is an obstacle to the effective application of civil penalties for environmental damage. This requirement automatically excludes from the ambit of sanctions damage to the property of third parties and damage suffered by unappropriated things, *res communis* (water, air, soil) and *res nullius* belonging to no-one. Extractive activities are usually carried out in areas that are quite far from populated localities. It is more common to see massive damage to property that cannot be appropriated. This situation is all the more distressing in that when compensation by equivalent is not linked to the idea of restoration, it seems difficult to determine exactly how much money is owed to the victim to compensate for environmental damage.

### 1.2.2. Difficulties in applying reparation in kind

Environmental law provides for compensation in kind for environmental damage caused by extractive activities. This consists of ordering the multinational to pay for the restoration of sites degraded by its activity. Where restoration is impossible, the perpetrator may be ordered to contribute to the financing of ecological projects<sup>50</sup>. The difficulty with this penalty lies first and foremost in the monetary evaluation of the actual cost of repairing the ecological damage, as environmental damage affects resources that are difficult to quantify. What lump-sum value could be assigned to the degraded flora and all the animal species whose habitat is affected by the extractive activity? It also lies in the fact that the law does not impose any obligation on the victim of individual environmental damage to allocate the sums received to the restoration of damaged sites. In this way, the compensation by equivalent, which is commonly applied and detached from any idea of restoring degraded sites, contributes to the weakening of the preventive role of penalties in terms of climate justice.

Thus, only monetary compensation paid to restore the site affected by the extractive activity, and especially when the judge sets the amount of compensation at the level required, could perfectly contribute to improving climate justice. Unfortunately, when faced with the new issues raised by changes in society<sup>51</sup>, judges generally focus on individual environmental damage, for which the amount of compensation can easily be calculated. When it comes to ecological damage, however, all the inherent limitations of civil penalties come into sharp focus. Indeed, it is very

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<sup>49</sup> Insofar as it is easier for them to pay minimal reparations than to set up preventive measures to avoid, at best, the occurrence of ecological damage. This shows the inadequacy of the role played by civil sanctions, which, given the ineffectiveness of punitive sanctions, can also help to prevent environmental damage linked to extractive activities.

<sup>50</sup> Article 4 of decree no. 2008/064 of 4 February 2008 setting out the management procedures for the national environment and sustainable development fund.

<sup>51</sup> G. Viney, *L'espoir d'une recodification du droit de la responsabilité civile*, Dalloz, 2016, p. 1378.



It is difficult to establish the link between the damage caused by extractive activity and the ecological repercussions that may result. This difficulty is all the more acute in certain cases where the damaging consequences do not appear until much later, as in the case of climate change. It is difficult to reconcile the diffuse nature of the damage in time and space with the need to compensate for certain damage.

In view of all these obstacles, it is clear that in order to achieve effective climate justice, it is advisable to identify new sanctions for offences related to extractive activity.

## **2. The need to redefine new, more effective sanctions for climate justice**

The resurgence of extreme weather events, with their damaging effects on infrastructure, health and people's lives, means that the environmental response must be adapted. The safety of the planet requires a new alliance between environmental protection and the protection of humanity<sup>52</sup>. In a context of ecological urgency, the recognition of "the legal existence of a common environment<sup>53</sup>" means that repressive sanctions must be adapted to certain circumstances. In addition, recourse to environmental law in civil matters could be an effective means of restoring upset balances.

### **2.1. The need to tailor penalties to the reality of environmental damage**

To achieve climate justice, punitive sanctions should be defined according to the environmental risk associated with extractive activities and the reality of existing links between multinationals and their branches.

#### **2.1.1. The need to sanction the risk associated with extractive activities**

Extractive activities are at the root of ecological and humanitarian disasters in many African countries, generating climatic consequences beyond the limits of individual States, and disrupting natural life and development processes in their entirety over decades. They are also at the root of organised environmental crime or ecomafias<sup>54</sup> and illegal trafficking of all kinds<sup>55</sup> which, in practice, create vulnerability and an unacceptable threat to the safety of the planet<sup>56</sup>.

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<sup>52</sup> E. Fronza and N. Guillou, "Towards a definition of the international crime of ecocide", in L. Neyret (ed.) *Des écocrimes à l'écocide - Le droit pénal au secours de l'environnement*, Bruylant, 2015, p.135.

<sup>53</sup> L. Weiss, "La mondialisation du concept de droits environnementaux et ses retombées en droit français. Recherche d'une singularité juridique", in A. Tunc (ed) *Mondialisation et globalisation des concepts juridiques : l'exemple du droit de l'environnement*, Bibliothèque de l'Institut de recherche juridique de la Sorbonne, tome 22/2010, p. 39.

<sup>54</sup> V. I. Rodopoulos, "Les activités criminelles organisées en matière environnementale: quelques réflexions en vue d'une réponse pénale internationale", in L. Neyret (ed), *op. cit.*, pp. 165-182.

<sup>55</sup> Trafficking in protected species, toxic waste, illegal mining of precious metals and other natural resources.

<sup>56</sup> This is essentially the case in cases of pollution with a deferred effect, chronic lawful pollution emitted in small quantities but which over time or in their geographical extent are likely to cause serious damage to the environment, or cases of exposure to pollutants that pose serious risks to the natural environment and human health but which cannot result in criminal convictions due to a lack of proof of the causal link between the pollutant and the damage.



The threat inherent in these extractive activities calls for particularly dangerous behaviour and the use of certain destructive processes to be sanctioned, without waiting for the damage that might result. This means punishing the environmental risks associated with extractive activities, i.e. taking into account the occurrence and seriousness of potential damage<sup>57</sup>. The aim is to criminalise the subjective endangerment<sup>58</sup>, decided in full knowledge of the facts, which would be the result of a recursive and organised business strategy or a criminal organisation, materialised by the violation, in the exercise of their activity, of the obligations of prudence or safety provided for by the law or regulations. And where such breaches cannot be identified, situations of non-compliance with a general duty of ecological vigilance could serve as an objective basis for sanctions.

The appropriateness of anticipatory sanctions lies in taking account of the most serious risks, the very ones that are causing unacceptable disruption to the climate. The preventive sanctioning of ecologically endangering situations would make it possible to anticipate behaviours that would make it easier to go beyond the limits of sectoral sanctions and define all-encompassing incriminations that would punish more severely behaviours that impact the safety of the planet and that of the whole of humanity<sup>59</sup>.

Furthermore, crime linked to extractive activities is mainly collective<sup>60</sup>, also known as "corporate crime", and is caused by legal trading companies whose main aim is legitimate. In this respect, multinationals take advantage of the porous nature of sanctions to reap considerable economic profits at the expense of ecosystems<sup>61</sup>. In this way, they develop a veritable "culture of impunity" that enables them to derive advantages or benefits that outweigh the disadvantages of repression. Only by adjusting the penalties in proportion to the benefits derived from the breaches that led to the environmental damage, or to the annual turnover<sup>62</sup>, would it be possible to effectively prevent future damage<sup>63</sup> and ensure climate justice<sup>64</sup>. This solution would encourage the establishment of a close link between the breaches observed and the lucrative activities of the multinationals. The principle of the proportionality of penalties<sup>65</sup> could easily increase the deterrence that is essential to penalties, given that their objective is to prevent irreversible damage to the environment. The aim is therefore to influence the will of the decision-maker, whatever his or her means, to encourage him or her to take preventive action in favour of climate justice.

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<sup>57</sup> On these issues relating to the duty of care of multinational companies: B. Parance and E. Groulx, "Regards croisés sur le devoir de vigilance et le duty of care", *Journal du droit international*, No. 1, January 2018, p. 21.

<sup>58</sup> This differs from what might be called objective, occasional endangerment, which is the result of conscious irresponsibility and applies to "casual delinquency".

<sup>59</sup> V. Lassere, *Le risque*, Dalloz, 2011, chronicle, p. 1632.

<sup>60</sup> J. Tricot "Ecocrimes et écocide: quels responsables?", in L. Neyret (ed.), *op. cit.*, pp. 141-163.

<sup>61</sup> "Reconnaitre l'écocide au même rang que les crimes contre l'humanité", *Libération*, 10 December 2019.

<sup>62</sup> S. Ferey, F. G'Sell, "Pour une prise en compte des parts de marché dans la détermination de la contribution à la dette de réparation", *Recueil Dalloz*, 2013, p. 2709.

<sup>63</sup> J. Mourgeon, *La répression administrative*, *op. cit.* p. 162.

<sup>64</sup> A fine capped at a fixed amount will have no deterrent effect on multinationals with large amounts of capital.

<sup>65</sup> This principle has already been validated in consumer law by the French Constitutional Council: C. const., 13 March 2014, recital 86.

### 2.1.2. Parent companies must be punished

The most serious environmental offences are committed by multinationals headquartered in the West but operating in African countries, generally through subsidiaries with separate and independent legal status. This relocation also leads to a dilution of responsibility, since it is precisely the attraction of local legislation deemed more accommodating, particularly from an environmental point of view, that motivates multinationals to set up operations. Sometimes, this relocation of responsibility is organised by means of shell companies headquartered in "legal havens"<sup>66</sup>.

Bringing a multinational to account for environmental damage committed abroad would therefore appear to be an arduous task. It is not easy to establish the decision-making role of a parent company in relation to its subsidiaries, and even if this were to be done, prosecution would come up against the principle of reciprocal incrimination<sup>67</sup>. Through complex arrangements and mechanisms, they often manage to avoid civil or criminal penalties by cleverly handing over operational control of their subsidiaries to local managers, while retaining control of global strategy<sup>68</sup>.

The best way of guaranteeing that parent companies have an interest in ensuring that their subsidiaries comply with environmental provisions remains the sanctioning of parent companies. Such a sanction could be based on non-compliance with the duty of care referred to above. In fact, by specifically considering parent companies as principals to their subsidiaries and commercial partners (subcontractors and suppliers), the penalty for failure to comply with the duty of care could correspond to the penalty for the risk associated with extractive activities and the inadequacy of preventive measures. It would make it possible to strengthen the effectiveness of the repression of delinquency linked to extractive activities and to improve climate justice. African legislators should systematically include this provision in environmental legislation, specifying the conditions under which a legal entity may assume criminal sanctions for acts committed by other legal entities under its authority. This solution could be an essential prerequisite for abolishing the requirement of reciprocal incrimination for the most serious environmental offences, and would certainly dissuade certain unscrupulous companies from exploiting the loopholes in existing penalty systems.

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<sup>66</sup> Oil rigs and ships are registered in incredible countries, which means that there are no controls and, if criminal penalties were imposed, they would be particularly difficult to enforce.

<sup>67</sup> V. Sizaire, "Peut-il exister un droit pénal de l'environnement?", *La Découverte*, 3/2019, no. 8, p. 48.

<sup>68</sup> Insofar as the breaches that lead to environmental damage occur during extractive operations, parent companies use this argument, so that the subsidiary bears sole responsibility. Quite often, the penalties fall on the technicians or employees who caused the environmental damage in the first place. These manoeuvres are common when it comes to damage to the marine environment: M. Ngo Nonga, *La problématique de la protection juridique de l'environnement marin et de la sécurité maritime au Cameroun*, doctoral thesis in law, University of Yaoundé II, 2014.



## 2.2. The demand for greater vitality of environmental law in civil matters

Recourse to environmental law is an essential asset in achieving climate justice, as it enables sites damaged by extractive activity to be restored and multinationals to be ordered to pay punitive damages.

### 2.2.1. Systematic restoration of sites damaged by extractive activity

The right to the environment, constitutionally enshrined in most African supreme law<sup>69</sup>, is an effective tool for punishing offences related to extractive activities. It makes it possible to ask the judge to order precautionary measures to put an end to the disturbance and to order the restoration of degraded sites. This is a penalty that is rarely applied in litigation. Yet it is an effective means of enforcing environmental rights and a powerful mechanism for protecting not only the environment, but also the social and cultural functions that climate justice entails.

Compensation in kind by means of restoration enables victims of pollution caused by extractive activities to demand, on the basis of the right to the environment, that the court order the work necessary to put an end to the environmental threat. These victims could also, on the same basis, have the multinational ordered to decontaminate the polluted site. Finally, as a civil penalty, they could obtain damages to compensate, for example, for the loss of earnings caused by the absence of activity during the period of contamination.

Unlike traditional sanctions, which are ill-suited to ecological issues because they have no direct effect on the damage caused to the environment, restoration allows the situation to be returned to its previous state, resulting in the restoration *in integrum* or by equivalent of the damaged natural environment. Recourse to environmental law makes it possible to provide protection that is more effective and better adapted to the ecological philosophy and to the achievement of climate justice, by encouraging the restoration of disturbed balances.

### 2.2.2. Spontaneous publication of punitive damages awards

In addition to restoring sites damaged by extractive activities, punitive damages can also be awarded against the multinational. In some countries, the law provides for the perpetrator of environmental damage to be severely punished if he derives a net profit from his criminal activity. In ecological matters, such punitive damages could usefully be envisaged when the cost of the reparation actually fixed proves to be so modest that it has no deterrent effect. These punitive damages are generally set at an amount greater than the profit that the perpetrator of the environmental damage could make from the extractive activity in question. They play an important dissuasive role and contribute, through their high cost, to the achievement of climate justice. Punitive damages could be imposed on the perpetrator of environmental damage when reparation in kind seems impossible, or when the amount of such reparation is too high or undesirable.

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<sup>69</sup> It is recognised as a human right by the African Charter on Human and Peoples' Rights (article 24).

to prevent them from making a net profit from their activity. The dissuasive effect of this measure would open up the possibility of setting up measures to conserve and improve the environment, and would inexorably lead to an improvement in climate justice. The same applies to publicising the sanctions imposed on multinationals.

With public awareness of environmental concerns on the rise, the publication of a court ruling against a multinational has a definite dissuasive effect. This negative publicity casts a definitive shadow over the company's behaviour and publicly reveals the harmful and socially unacceptable nature of its activities. Negative publicity of this kind could help to weaken the economic position of the multinational responsible for the environmental damage. It is very much feared by the industrial world. Publication of the decisions would appear to be a real sanction, the dissuasive effect of which could be frightening and useful in preventing serious environmental damage and, by extension, protecting the environment and natural ecosystems in order to achieve climate justice.

In conclusion, we would say that the current system for punishing offences related to extractive activities is inadequate and unsuited to dealing with environmental damage. What already exists is not enough. Innovation is needed, in the form of both new penalties and new methods of remedying serious environmental damage. Existing environmental justice should therefore be shaped to meet the needs of something more pressing and overwhelming, climate change. By affirming that the earth, the home of humanity, constitutes a whole marked by interdependence, and that the existence and future of humanity are inseparable from its natural environment<sup>70</sup>, we are now seeing the emergence of a new common value on an international scale<sup>71</sup>.

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<sup>70</sup> The 2015 Universal Declaration of Human Rights, which uses the same wording as the 1992 Rio Declaration on Environment and Development.

<sup>71</sup> L. Neyret, "Ecocide", in M. Cornu, F. Orsi, and J. Rochfeld (eds.), *Dictionnaire des biens communs*, Dictionnaires Quadriège, 2017, pp. 477-484.





***ALTERNATIVE MECHANISMS FOR  
PROMOTING CLIMATE JUSTICE IN AFRICA***





# THE OPERATIONALISATION OF CIMATIC JUSTICE IN AFRICA: THE ACTION OF INDEPENDENT COMPLAINTS MECHANISMS

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## **Summary**

Making the extractive industry accountable is an essential part of the movement for climate justice in Africa. With this in mind, we examine the scope of independent complaints mechanisms, which are key instruments in the proactive regulation implemented by many multilateral development organisations.

**Key words:** climate justice; extractive companies, liability; non-judicial remedies.

## **Abstract**

*Making the extractive industry accountable is an essential part of the movement for climate justice in Africa. To do so, we examine the scope of independent complaints mechanisms that are flagship instruments of the voluntary regulation implemented by many multilateral development organisations.*

**Keywords:** *Climate Justice; Extractive Companies; Liability; Non-judicial Remedies.*

## Introduction

Once the international community became aware of the serious and urgent nature of the upheavals facing the planet's ecosystem<sup>1</sup>, it was quickly confronted with the reality of manifest inequality: "however common the situation may be in the face of climate change, its effects are very unevenly distributed"<sup>2</sup>. The countries and peoples that have historically contributed the least to climate change are the most vulnerable to its impacts, and have the least opportunity to protect themselves or adapt to it<sup>3</sup>. As a result, developing countries, particularly those in the tropics, "are and will be more affected than rich countries (...)"<sup>4</sup>. This inequality in terms of exposure to the risks and adaptation to the consequences of climate change, referred to by the philosopher Engone Elloué as the "North/South climate divide"<sup>5</sup>, was considered by all - politicians, scientists and civil society - as a global injustice whose remediation implies the implementation of policies and actions based on a fair recognition of causal responsibilities for contributing to the climate crisis and an equitable distribution of efforts to combat it.<sup>6</sup> This is what has come to be known as climate justice.

Speaking of the causal responsibilities of the countries of the North in climate change, some doctrine has conceptualised them as an "ecological/climate debt"<sup>7</sup> caused in particular by "an ecologically unequal exchange"<sup>8</sup> between the two hemispheres of the planet. In concrete terms, the industrialised countries, through their multinationals, receive exports of raw materials and other products from relatively poor countries and regions, without taking into account either the local externalities generated or the depletion of natural resources<sup>9</sup>. This is absolutely true when we look at the record of the extractive industry in Africa; for example, its negative impact on human rights, the environment and the climate no longer needs to be demonstrated<sup>10</sup>. Over the decades, transnational extractive companies have imposed a double burden on African populations: the pressure exerted on environments and resources has led to a considerable deterioration of

<sup>1</sup> Through a succession of reports and summits: the Meadows Report, the Brundtland Report, the summary reports of the Independent Panel on Climate Change (IPCC), the United Nations Conference on the Human Environment in Stockholm (1972), the United Nations Conference on Environment and Development in Rio (1992), and all the "Conferences of the Parties" (COPs) that have been held every year since 1995.

<sup>2</sup> C. Larrère, "Préface", in N. Engone Elloué, *Restorative climate justice. Réparer les inégalités Nord/Sud*, Geneva, Globethics.net, 2020, p. 9.

<sup>3</sup> L. Laigle, "Justice climatique et mobilisations environnementales", *Vertigo - La revue électronique en sciences de l'environnement*, vol. 19, no. 1, 2019. <http://journals.openedition.org/vertigo/24107>; DOI: <https://doi.org/10.4000/vertigo.2410>.

<sup>4</sup> V. Van Gameren, R. Weikmans and E. Zaccai, *Adapting to climate change*, Paris, La Découverte, 2014, p. 48.

<sup>5</sup> N. Engone Elloué, *op. cit.* p. 18

<sup>6</sup> L. Laigle, *op. cit.*, § 10.

<sup>7</sup> D. Pouchain, "La dette écologique : d'une notion politique à un concept philosophique", *Développement durable et territoires*, vol. 5, no. 1, 2014. <http://journals.openedition.org/developpementdurable/10208>; DOI: <https://doi.org/10.4000/developpementdurable.10208>; N. Sersiron, *Dette et extractivisme. La résistible ascension d'un duo destructeur*, Paris, Utopia, 2014; M. Le Quang, *Laissons le pétrole sous la terre. L'initiative Yasunit-ITT en Équateur*, Montreuil, Omniscience, 2012.

<sup>8</sup> J. Martinez Alier, *L'écologisme des pauvres. A study of environmental conflicts around the world*, Paris, Les petits matins/Institut Vlebein, 2014.

<sup>9</sup> *Ibid.*, p. 474.

<sup>10</sup> I. Guessele, *La protection des droits de l'Homme dans le cadre des contrats d'État relatifs à l'exploitation des ressources au Cameroun*, PhD thesis in law, UCAC, 2020; R. White, "Resource extraction leaves something behind: environmental justice and mining", *International journal for crime justice and social democracy*, vol. 2, n° 1, 2013.

their living conditions and lifestyles<sup>11</sup>, creating an initial vulnerability, especially among already fragile social groups. To this will be added the gradual but certain effects of the climate crisis<sup>12</sup>, which poses a threat to their survival from both a humanitarian and security point of view.

Even more shocking is the feeling of impunity that surrounds the activities of these companies, which have always benefited from a "laissez-faire laissez-aller" environment that is conducive to human rights violations and environmental degradation, and which prevents them from being held accountable<sup>13</sup>. Logically, therefore, the need for an international framework for their extractive activities, but above all for their accountability, has become increasingly apparent, giving rise to numerous debates and attempts at responses. As a result, many intergovernmental organisations have "got in on the act" of regulating transnational companies, adopting a body of new rules in line with the proactive approach<sup>14</sup>, but above all a monitoring system designed to support their implementation.

This monitoring system, made up of what are known as "independent accountability mechanisms" or "non-judicial grievance mechanisms", is designed to offer recourse to communities affected by the negative impacts of a project - particularly an extractive project - carried out by a company or government<sup>15</sup>.

At a time when the demands and struggles for climate justice are becoming increasingly structured and forceful<sup>16</sup>, the question that could be asked is what is the scope of the action of independent complaints mechanisms in terms of operationalising climate justice in Africa? In other words, how do they contribute to more effective climate justice in Africa? The issue here is essentially a practical one: to reflect critically on alternative mechanisms for settling disputes between companies/States and local communities and their role in protecting the latter's fundamental rights, in this case the right to a healthy environment.

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<sup>11</sup> I. Guessele, *op. cit.* p. 190.

<sup>12</sup> L. Laigle, *op. cit.*, § 20.

<sup>13</sup> I. Guessele, *op. cit.*, p.100; P. Dumberry, "L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements", *Revue générale de droit international public*, vol. 108, No. 1, January-March 2004, p. 105; M. Ouassini Sahli, *La responsabilité de la société mère du fait de ses filiales*, doctoral thesis in law, Université Paris-Dauphine, 2014.

<sup>14</sup> I. Guessele, *op. cit.* pp. 55-58.

<sup>15</sup> More specifically, these are projects carried out by companies whose country of nationality is a member of the OECD and a signatory to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, and by governments and companies that receive financial support from one of the agencies of the World Bank Group.

<sup>16</sup> For example, in March 2023, the UN General Assembly adopted a resolution asking the International Court of Justice (ICJ) to give an advisory opinion on the obligations of States in relation to climate change: [https://www.citepa.org/fr/2023\\_05\\_a04/](https://www.citepa.org/fr/2023_05_a04/). In a judgement handed down on 3 February 2021, the Paris Administrative Court recognised the existence of ecological damage linked to climate change and ruled that the French State's failure to comply with the climate change targets it has set itself gives rise to liability: <http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Espace-presse/L-affaire-du-siecle>. In October 2019, a collective of six French and Ugandan associations summoned TOTAL, considering that it was not complying with its legal obligations to prevent human rights violations and environmental damage in connection with its Tilenga and EACOP oil projects in Uganda and Tanzania: CREDH, *Total en Ouganda : point d'étape sur la première action en justice sur le fondement de la loi sur le devoir de vigilance*, October 2029, <https://www.business-humanrights.org/en/latest-news/total-in-uganda-stage-point-on-the-first-action-in-justice-on-the-foundation-of-the-duty-to-watch-law-by-life-and-friends-of-the-earth/>.

This study is based on the following mechanisms: the National Contact Points (NCPs) set up to deal with breaches of the OECD Guidelines for Multinational Enterprises<sup>17</sup>, the World Bank Group mechanisms, namely: the Accountability Mechanism (AM)<sup>18</sup> which deals with breaches of the Safeguard Policies<sup>19</sup> and the *Compliance Advisor Ombudsman* (CAO)<sup>20</sup> which deals with breaches of the Environmental and Social Performance Standards<sup>21</sup>, and finally the Independent Recourse Mechanism (IRM)<sup>22</sup> of the African Development Bank (AfDB) Group which is based on the latter's sustainable development policies and procedures<sup>23</sup>.

Given that there is no single way of defining and defending climate justice, it would not be wrong to consider independent accountability mechanisms as an opportunity to improve the climate justice offer for communities made vulnerable by the activities of extractive companies (1); however, there are still a number of limitations that lead us to identify a certain mismatch between the challenges of climate justice and the action of accountability mechanisms (2).

### 1. Independent accountability mechanisms: an opportunity for climate justice in Africa

Whether in the ordinary sense or in the militant logic, "doing justice" consists of restoring the rights of the victim of a wrong or prejudice and thus "rebalancing the unequal situation resulting from the injustice"<sup>24</sup>. For this to be possible, the victim must have the opportunity to denounce the injustice he or she has suffered (1.1), so that measures can be put in place to prevent any future imbalance (1.2). Independent accountability remedies are part of this dynamic.

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<sup>17</sup> OECD, *The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, Paris, OECD Publishing, 2023.

<sup>18</sup> Since 2022, the Inspection Panel has become a sub-organisation of the NCM, supplemented by the Dispute Resolution Service, which is responsible for carrying out the discussion process between complainants and the borrower in order to reach a settlement agreement. The NCM and its sub-organisations are responsible for projects financed by the IBRD and the IGA: WB, *Inspection Panel. Operating Procedures (Final Draft)*, June 2022, <https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/documents/ipn-draft-operating-procedures-2022-english.pdf>.

<sup>19</sup> BM, *Environmental and social policies*, [www.banquemoniale.org/fr/projectsoperations/environmental-and-social-policies](http://www.banquemoniale.org/fr/projectsoperations/environmental-and-social-policies).

<sup>20</sup> The CAO is responsible for projects financed by the IFC and MIGA: WB, *Policy on the IFC/MIGA Independent Accountability Mechanism (CAO)*, June 2022, <https://documents1.worldbank.org/curated/en/355691628007067631/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf>.

<sup>21</sup> IFC, *Performance Standards for the Private Sector and Environmental Health and Safety Guidelines*, June 2012, [www.ifc.org/sustainability/policiesandstandards](http://www.ifc.org/sustainability/policiesandstandards).

<sup>22</sup> In 2021, the AfDB reformed the policy framework of its mechanism, changing its name from "Independent Review Mechanism (IRM)" to "Independent Recourse Mechanism": AfDB, *Independent Recourse Mechanism, Annual Activity Report*, 2021, <https://www.afdb.org/fr/documents/mecanisme-independant-dinspection-rapport-annuel-2021>.

<sup>23</sup> AfDB, *African Development Bank Integrated Safeguards System*, December 2013; AfDB Integrated Safeguards System - Policy Statement and Operational Safeguards | African Development Bank - Building a Better Africa Today, Better Tomorrow ([afdb.org](http://afdb.org)).

<sup>24</sup> N. Engone Elloué, *op. cit.* p. 45.

## 1.1 Mechanisms as a platform for whistleblowing

The right to effective recourse and remedy still struggles to make sense, especially for vulnerable groups such as indigenous peoples and women. Bringing a case before a foreign court (in the company's country of origin) is no easy matter and does not always guarantee a favourable outcome<sup>25</sup>. Similarly, bringing a case before national courts in a context where the defence of the environment and human rights is relegated to second place in favour of economic interests is a complex undertaking<sup>26</sup>.

In this sense, accountability mechanisms are proving to be a lifesaver for communities whose environment and living conditions have been damaged by the presence of a foreign extractive company. They are entitled to lodge a complaint so that the body can look into the negative impacts of the extractive project. In the case of the NCP<sup>27</sup>, this request, which is known as a specific circumstance, once considered admissible, will enable the mechanism to examine the activities of the company in question in order to verify whether they have caused harm<sup>28</sup>. With regard to the instruments attached to development banks, recent reforms have modified the procedure somewhat: the filing and admissibility of the complaint now give rise to an examination of the alleged facts according to two procedures: a verification of compliance, the aim of which is to ensure that the bank, as funder and pilot of the project, has complied with its own social and environmental standards and has therefore not been the cause of any violation or harm; and a dispute settlement, which consists of bringing the complainants and the company that has benefited from the bank's financing into discussion, or even conciliation, without complying with the environmental and social obligations imposed on it<sup>29</sup>.

It is clear, therefore, that this is a tool that enables communities to express their grievances and claims in complete safety, to defend their way of life, but above all to hold project stakeholders, whoever they may be, to account: first and foremost the company, but also the bank itself, and sometimes even other stakeholders such as the state hosting the project.

It should also be noted that these independent remedies offer many procedural advantages to victims. They are intended to be accessible to all those who suffer, or think they will suffer, the impacts of an extractive project. NCPs can be brought by any interested natural or legal person<sup>30</sup>; the MIR now allows complaints to be lodged by a single person<sup>31</sup>. Complaints do not need to meet any particular formal requirements or be backed up by a special legal instrument, especially as these procedures generally offer complaint forms or models; the parties do not even need to be accompanied by a lawyer<sup>32</sup>. Similarly, the notion of

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<sup>25</sup> I. Guessele, *op. cit.* pp. 256-261; see District Court (Southern) New York (No. 96-cv-08386), *Wiwa & al. v. Royal Dutch Petroleum*, note H. Cantu Rivera, *Fundamental Rights Review*, no. 9, 2012, p. 3.

<sup>26</sup> I. Guessele, *op. cit.* p. 233.

<sup>27</sup> This is generally the NCP of the company's home country, as it is a member of the OECD and a signatory to the Guidelines, even though in principle the NCP should be the one based in the country where the facts occurred.

<sup>28</sup> OECD, *Guidelines*, *op. cit.* pp. 68-70.

<sup>29</sup> AfDB, *Independent Recourse Mechanism*, p. 20; WB, *Inspection Panel*, *op. cit.* p. 15; WB, *Independent Accountability Mechanism Policy*, *op. cit.* p. 16.

<sup>30</sup> OECD, *OECD Guidelines*, *op. cit.* p. 70.

<sup>31</sup> ADB, *Independent Recourse Mechanism*, *op. cit.* p. 11.

<sup>32</sup> The CAO, for example, states that the complaint does not have to meet "strict standards"; it should provide as much information as possible to enable the mechanism to understand the complaint: WB, *Independent Accountability Mechanism Policy*, *op. cit.* pp. 8-9; the AfDB even accepts oral requests: AfDB, *Independent Recourse Mechanism*, *op. cit.* p. 11.

Harm is understood in a more flexible way than before the national courts; both present harm and the risk of harm are taken into account<sup>33</sup>.

Accountability is therefore at the heart of the action taken by independent remedies, as the aim is to make the company (or the bank that financed it) face up to the damage caused. A more operational follow-up, focused on monitoring, makes the action of these institutional tools just as valuable.

## 1.2 Mechanisms as tools for rebalancing the development process

Aware of the negative externalities, or rather the injustices created by the extractive industry, independent non-judicial remedies work to correct them, so that "no one is left behind"<sup>34</sup>. They position themselves as actors who work to find solutions that satisfy all parties.

In fact, the complaints handling procedure allows for a medium- and/or long-term commitment to fundamental change: sometimes it is a question of getting involved in monitoring the implementation of the dispute settlement agreement, sometimes in monitoring the action plan proposed in response to the compliance survey<sup>35</sup>. In both cases, the aim is not just to deal with the claims made in the application, but above all to put in place a sustainable framework that leads to development that benefits everyone, and therefore the communities that were previously affected. It is therefore a way of correcting the imbalance created by extractive activities by undertaking systemic reforms both at the level of companies and their financiers, in order to reduce and if possible prevent the occurrence of new breaches. In a way, this is a form of meliorative adaptation to which companies, banks and other stakeholders are called upon to subscribe, and which echoes the call for climate justice.

By way of illustration, the Chad-Cameroon pipeline project<sup>36</sup> gave rise to a number of complaints, including one from a group of eleven fishing villages to the CAO against the company COTCO. This complaint was resolved through mediation, resulting in a memorandum of understanding setting out the commitments of both parties.<sup>37</sup> The communities received training from the CAO to build the capacity of the fishermen's associations, and COTCO provided technical and material support to help them set up a fishing cooperative<sup>38</sup>. There is also the case of the request lodged by the Bagyéli pygmy communities in relation to the Chad-Cameroon pipeline, where the mediation process led to an overhaul of the project.

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<sup>33</sup> The CAO receives complaints from any person who "considers that he or she is likely to suffer harm as a result of a project": WB, *Policy on the Independent Accountability Mechanism*, *op. cit.*, p. 8; the Panel receives complaints in the event of "harm suffered or likely to be suffered [by applicants]": WB, *Inspection Panel*, *op. cit.*, p. 12.

<sup>34</sup> ADB, *Independent Recourse Mechanism*, *op. cit.* p. 8.

<sup>35</sup> *Ibid*, pp. 24 and 32; WB, *Policy on the Independent Accountability Mechanism*, *op. cit.* p. 30.

<sup>36</sup> World Bank, *Inspection Panel Survey Report*, July 2002, [https://documents1.worldbank.org/curated/en/116701468743969082/820140748\\_200405174094849/additional/Chad-Petroleum-Development-and-Pipeline-Project-Report-and-Recommendation-on-RequestforInspection.pdf](https://documents1.worldbank.org/curated/en/116701468743969082/820140748_200405174094849/additional/Chad-Petroleum-Development-and-Pipeline-Project-Report-and-Recommendation-on-RequestforInspection.pdf).

<sup>37</sup> [https://cao-ombudsman.org/sites/default/files/downloads/KribiAgreement\\_ChadCam\\_Pipeline-EN.pdf](https://cao-ombudsman.org/sites/default/files/downloads/KribiAgreement_ChadCam_Pipeline-EN.pdf).

<sup>38</sup> CAO, Rapport final - Oléoduc Tchad-Cameroun-02/Cameroun, March 2020, pp. 7-8. <https://caoombudsman.org/sites/default/files/downloads/CAOConclusionReportCameroonMarch2020FRE.pdf>.

of the project's environmental management plan, and assistance to rectify the loss of livelihoods<sup>39</sup>.

The independent complaints mechanisms set up by multilateral organisations such as the OECD, the WB and the ADB are all playing their part in implementing climate justice in Africa. In fact, the afflictions of the extractive sector correspond to breaches of important *soft law* standards, which offers the victim populations the possibility of denouncing the prejudices suffered. More interestingly, this denunciation gives rise to discussions, proposals and recommendations designed to restore humanity, sustainability and inclusiveness to the project. Despite these positive points, there are many limitations that considerably reduce the contribution of these complaints bodies.

## **2. Independent complaints mechanisms: a placebo for achieving climate justice in Africa**

It would be wrong to deny the contribution of independent grievance mechanisms in promoting sustainable investment. However, the truth is that their action is still limited when it comes to holding companies accountable, particularly extractive companies. There are difficulties both in the way these bodies are designed (2.1) and in the implementation of their remedial action (2.2).

### **2.1 Limits linked to the conceptual aspect of independent recourse**

The first stumbling block to be highlighted is the limited material scope of the accountability mechanisms. NCPs only come into play when the company's home country is a member of the OECD and a signatory to the Guidelines for Multinational Enterprises; the CAO, the MR and the IRM are each dedicated to the deployment of specific institutions. While the skills-based approach is not in itself a problem, practical complexity can very quickly lead to deadlock; it may happen that the extractive company is neither subject to the OECD guidelines nor a client of one of the donors mentioned. What accessible solution is left for the populations affected by the company's activities? At present, there are many Chinese mining companies operating on the African continent<sup>40</sup>, and unfortunately they very often relegate environmental, climate or social considerations to the background<sup>41</sup>.

Another pitfall is the voluntarist approach underlying their creation, which reduces their scope for action in the area of dispute resolution. NCPs are programmed to offer their good offices for the resolution of disputes between complainants and companies<sup>42</sup>; in this sense, they are limited to proposing a "constructive dialogue" to and between the parties, facilitating the conclusion of agreements and/or making recommendations<sup>43</sup>. If the company refuses to take part in mediation,

<sup>39</sup> *Ibid.* The complaint, lodged in 2011, highlighted the fact that the laying of the oil pipeline had caused displacement and loss of livelihood among the Bagyeli indigenous communities bordering the project. They also argued that they had not been properly involved in the review of the Indigenous Peoples Plan (IPP) included in the project's environmental management plan.

<sup>40</sup> H.-L. Vedier, *Chinese mining investments in Africa*, April 2017, <https://www.policycenter.ma/sites/default/files/2021-01/OCPPC-PB1715vEn.pdf>.

<sup>41</sup> Business & Human Rights Resource Centre, *Unpacking clean energy. Human rights impacts of Chinese overseas investment in transition minerals*, July 2023.

<sup>42</sup> OECD, *OECD Guidelines*, *op. cit.*, p. 70.

<sup>43</sup> *Ibid.*



they can only note the situation in a press release<sup>44</sup>, as they have no coercive power over the company that would oblige it to comply with the procedure. It can therefore be deduced that the lodging and acceptance of a complaint does not guarantee the existence of a procedure, and the settlement of the dispute may result in a denial of the harm alleged by the complainants, and therefore a failure<sup>45</sup>.

As far as the World Bank's mechanisms are concerned, the problem is posed in slightly different terms; they are also called upon to play the role of dialogue facilitator when the parties decide to resort to the dispute resolution option<sup>46</sup>, but refusal of this option<sup>47</sup> triggers the compliance verification procedure, in which it is rather the role of the donor that is called into question. In this context, if it turns out that the funder has complied fully with its environmental and social policies and directives, but that it is the client who has been incorrect, the situation becomes embarrassing.

In the light of the above, it is clear that it is possible for an extractive company, despite being responsible for many wrongdoings, to escape the action of independent complaints mechanisms. And if the company is found liable, it is possible that problems will arise in terms of compensation.

## 2.2 Limits linked to the functional aspect of independent recourse

One of the functions of complaints mechanisms is to ensure that the negative impacts suffered by complainants are mitigated or, at best, cease altogether. Sometimes negotiations are conducted, sometimes investigations and assessments are carried out in order to reach an agreement or action plan dedicated to remedying and repairing the damage caused. However, this result is far from always being achieved, as the mechanisms are not necessarily equipped.

As far as NCPs are concerned, their status as mere mediators means that not only can they not compel a company to participate in the settlement of a dispute, but they cannot compel it to respect the agreement to which it consented during the procedure. In other words, you end up with disillusioned complainants whose living conditions have not changed, and a Contact Point that has no choice but to close the case<sup>48</sup>. This is what happened in the case opposing Oxfam Canada and the Zambian NGO DECOP to Mopani Coppers Mines, a joint subsidiary of Glencore International and First Quantum Minerals<sup>49</sup>.

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<sup>44</sup> *Ibid*, p. 71.

<sup>45</sup> The *ATTAC & FoE Sweden vs. Sandvik* case is a case in point: the complaint lodged by Ghanaian NGOs denounced human rights violations and recurrent pollution perpetrated by Ashanti Goldfields Company and its suppliers Atlas Copco and Sandvik. Not only did the companies refuse to take part in the procedure from the second meeting onwards, contenting themselves with sending in reports, but the Canadian NCP to which the case was referred played down the companies' responsibility, simply encouraging them to better inform their subsidiaries and partners of the guidelines, <https://www.oecdwatch.org/complaint/attac-foe-sweden-vs-sandvik/>.

<sup>46</sup> WB, *Inspection Panel*, *op. cit.* p. 21; WB, *Independent Accountability Mechanism Policy*, *op. cit.* p. 16.

<sup>47</sup> Or failure to reach an agreement: WB, *Inspection Panel*, *op. cit.* p. 18; WB, *Independent Accountability Mechanism Policy*, *op. cit.* p. 22.

<sup>48</sup> I. Guessele, *op. cit.* pp. 203-205.

<sup>49</sup> The complaint, filed in 2001, denounced the expulsions carried out by Mopani, which had given rise to social, economic and psychological difficulties. Despite a complicated procedure, a settlement was reached before the Canadian NCP. However, investigations by civil society revealed that Mopani had not only resumed its evictions, but that no plans had been made to work towards lasting solutions in line with the OECD guidelines: <https://www.oecdwatch.org/complaint/oxfam-canada-vs-first-quantum-mining/>.



Redress remains an equally problematic issue for mechanisms linked to financial institutions. Of the two World Bank mechanisms, only the CAO monitors the action plan drawn up following its evaluation by management<sup>50</sup>. But in both cases, a number of weaknesses reduce the ability of the mechanisms to work effectively to repair the damage suffered by complainants. The first relates to the fact that the action plan dedicated to this objective follows a compliance review focused on the financial institution and not on the company that borrowed the funds; yet it is the latter that should have been at the heart of the process, since its actions and inactions led to the complaint. Similarly, this document is mainly drawn up by the institution's staff, and even if the company is involved in drawing it up<sup>51</sup>, it may ultimately refuse to implement it and nothing will be done about it. Moreover, an external evaluation commissioned by the IFC<sup>52</sup> states that staff feel they do not always have the necessary influence to persuade the client to take corrective action, even when the client clearly bears the main responsibility for the damage. In some cases, the late submission of complaints and the length of the investigation stages mean that the action plan comes at a time when the commercial relationship between the customer and the financial institution has ended; in other cases, the customer's insolvency makes redress impossible.

Faced with all this, the mechanisms do not have any solutions, which is a pity because, in the end, the fate of the complainants hangs on the goodwill of the company<sup>53</sup>.

## Conclusion

The advent of independent grievance mechanisms proposed by certain international organisations represents an appreciable step towards making the extractive sector accountable, and therefore an asset in the fight for climate justice for the people of Africa. However, their action should not be overestimated: they remain imperfect despite regular reforms. It is therefore important to equip them a little more. To do this, widening their room for manoeuvre seems to be a priority: States that are responsible for creating NCPs should strengthen their powers, by establishing bridges between them and other government structures responsible for tax administration or investment promotion; in this way, a company that does not comply with the NCP's recommendations could risk losing its export credit, certain tax benefits or even civil or environmental liability proceedings brought by the NCP.

The second area for reform concerns compensation. In the case of development banks, it would be interesting to set up a special fund backed by each project and dedicated to compensating for the damage caused. It would be financed either by the borrower alone, or by the borrower and the lender, and would remain open for a certain period after the end of the contractual relationship. The mandate of the claims mechanisms will be not only to check that the fund is being supplied, but also to manage the financing of the measures to be taken.

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<sup>50</sup> The Panel is excluded from the monitoring process unless the complexity and seriousness of the case require it: WB, *Inspection Panel, op. cit.*, pp. 26-27.

<sup>51</sup> *Ibid*; WB, *Policy on the Independent Accountability Mechanism, op. cit.* p. 30.

<sup>52</sup> P. Woicke (Chairman of the Review Team), *External Review of IFC/MIGA E&S Accountability, including CAO's Role and Effectiveness Report and Recommendations*, June 2022.

<sup>53</sup> This aspect is generally described as "the problem of the last mile": S. Amoako, *Abidjan Meeting on Accountability in International Finance*, 2 July 2019, *Accountability Counsel*, 2020, [www.accountabilitycounsel.org/2020/02](http://www.accountabilitycounsel.org/2020/02).





remediation. This will be a way of circumventing the lack of means of coercion on companies and strengthening their action with victims.

These few avenues for reform are conditional on concerted action by the Member States of these intergovernmental organisations. Unfortunately, to date, their commitment to this kind of work has very often been two-speed: a lot of promises for little action.

# EXTRACTIVE COMPANIES' CLIMATE JUSTICE DUE DILIGENCE IN CAMEROON

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## **Summary**

The development of the extractive industries generates income for the state, but it also concentrates the majority of negative impacts on the environment in general and on the climate in particular. To ensure that development is sustainable, extractive companies must comply with a number of rules designed to prevent damage to nature as a result of their activities. This is the *raison d'être* of the duty of vigilance which, through its due diligence process, provides benchmarks for all companies in order to guarantee human rights. Unfortunately, in Cameroon, it is still difficult to put this process into practice, which exacerbates the vulnerability of populations exposed to climate change.

**Keywords:** due diligence; human rights; climate justice; human vulnerability.

## **Abstract**

*The development of extractive industries generates income for the state, but it also concentrates most of negative impacts on the environment in general and the climate in particular. To ensure sustainable development, extractive companies must comply with some rules designed to prevent damage to nature because of their activities. This in the mainspring of the duty of vigilance which, through its due diligence process, offers benchmarks for all companies to guarantee human rights. Unfortunately, in Cameroon, it is still difficult to operationalize this process, which exacerbates the vulnerability of populations exposed to climate change.*

**Keywords:** Due Diligence; Human Rights; Climate Justice; Human Vulnerability.

## Introduction

"Climate change makes it clear that a 'habitable' Earth is no ordinary commodity. It is the primary condition governing the very existence of humanity and the entire living world"<sup>1</sup>.

The deployment of extractive industries is considered to be key to Africa's development<sup>2</sup>. This is why the Cameroonian government felt it was important to implement "major first-generation extraction projects" in its National Development Strategy (SND 30)<sup>3</sup>. Between 2018 and 2019, 295 exploration licences were granted and 10 exploitation licences granted. Between 2015 and 2017 alone, 580 artisanal mining permits were granted<sup>4</sup>. This represents at least 25% of the national territory. In addition to the 25% already covered by the extractive industries, there are the three iron ore mining projects at Kribi-Lobé, the iron ore deposit at Mbalam-Nabeba and the iron ore mining project at Bipindi-Grand Zambé, whose implementation was instructed by the President of the Republic in his speech to the nation on 31 December 2022. While the implementation of these "major projects" is indicative of the government's desire to achieve "emergence" by 2035, it barely conceals their negative environmental and social impacts. These include the destruction of forests, the pollution of waterways and their diversion, the destruction of animal biodiversity, the degradation of arable land and agro-pastoral areas, the loss of schooling and school drop-out rates, child labour, etc., the exacerbation of morbidity among the population as a result of the use of dangerous substances, and the loss of human life<sup>5</sup>.

These various impacts show that the proliferation of permits does not benefit vulnerable and/or exposed populations, even though it is they who bear the brunt of the injustices caused by the extraction process. Depending on their effects, these injustices may be social, environmental or even climatic, insofar as the negative impacts of these activities exacerbate changes in several microclimates - and through interactions, in the overall climate of the state or even the sub-region - with no possibility of adaptation for populations vulnerable to the whims of nature. It is therefore clear that the proliferation of extractive industries considerably increases the need for climate justice in Cameroon.

Before going any further, we need to clarify the semantics of the expression "climate justice". It is subject to a number of interpretations, depending on who is using it and the ambiguity of the term "justice". Nevertheless, there is a consensus in the literature<sup>6</sup> that climate justice has its origins in environmental justice movements.

<sup>1</sup> M. Delmas-Marty, "Climate damage. Quelles responsabilités ? Quelles réparations ?", *International Journal of Bioethics and Ethics in Science*, vol. 30, no. 2, 2019, pp. 11-12.

<sup>2</sup> African Union, *Vision for Africa's Mining Regime*, February 2009, p. 2.

<sup>3</sup> République du Cameroun, *Stratégie nationale de développement 2020-2030: pour la transformation structurelle et le développement inclusif*, MINEPAT, 2020, p. 45.

<sup>4</sup> CED, *Cameroon: l'or, secteur miné. La mine artisanale semi-mécanisée au Cameroun*, Publish What You Pay, 2022, p. 21.

<sup>5</sup> *Ibid*, pp. 35-43.

<sup>6</sup> J. Jouzel, A. Michelot, "Quelle justice climatique pour la France?", *Revue de l'OFCE*, n° 165, 2020, p. 78; L. Eloi, "Après l'accord de Paris, priorité à la justice climatique", *L'économie politique*, n° 69, 2016, pp. 90-91; A. Adriana, *La justice climatique EST un droit de l'homme*, Déclaration de Hic à l'occasion de la journée mondiale de l'habitat, 2021.

They all share the idea that environmental degradation generates inequalities and exacerbates the vulnerabilities of the poorest and most marginalised populations<sup>7</sup>. Underlying climate justice is the right not to suffer the consequences of climate change or any form of ecological degradation<sup>8</sup>. More than a concept, climate justice seeks to address all the dimensions of vulnerability to climate change, particularly from the point of view of human and social vulnerability. Its inclusion in the extractive process is therefore not neutral. It calls for a new approach to the development and articulation of extractive policies that aims to guarantee effective and sustainable human rights<sup>9</sup> including for those most exposed and vulnerable to climate change<sup>10</sup>. In this study, climate justice will refer to the idea that the protection of social and human values must be the guiding principle of extractive industries in order to prevent/reduce as far as possible the harmful effects that climate change, resulting from the deployment of such industries, may have on vulnerable and/or exposed people.

This idea is reflected in the 2015 Paris Agreement, which siblyline mentions in its preamble "the importance to some of the notion of climate justice in addressing climate change". However, it is the Guiding Principles on Business and Human Rights, unanimously approved in 2011 by the United Nations Human Rights Council, that provide a framework for analysing the behaviour of extractive companies in the fight against climate change. Under the terms of Article 14 *in limine* of this text, "the corporate responsibility to respect human rights applies to all companies regardless of their size, sector, operating environment, ownership or structure". In simple terms, whenever a company's activities may have an impact on human rights, these guiding principles are likely to apply. It is by virtue of this provision that they apply to extractive companies. Article 15 goes further, stating that in order to fulfil their responsibility, companies must have in place "a human rights due diligence process". This consists of identifying the impacts of the company's activities on human rights, preventing these impacts, mitigating their effects and reporting on how they are remedied.

Even if it does not *expressly* refer to it as such, the Cameroonian legislator has accepted due diligence as part of its extractive policy. This follows from the interpretation of section 137 of the Mining Code<sup>11</sup>. Due diligence is therefore implicit in the obligation for companies to carry out an environmental and social impact study<sup>12</sup>, to draw up an environmental management plan<sup>13</sup>, or to open an environmental rehabilitation account<sup>14</sup>. The Petroleum Code, however, seems to be more expressive, stating that

<sup>7</sup> M. Torre-Schaub, *Justice climatique : Procès et actions*, CNRS Editions, 2020, p. 6.

<sup>8</sup> J. Jouzel, A. Michelot, "Quelle justice climatique pour la France", *op. cit.* p. 78.

<sup>9</sup> M. Petsoko, *Exploitation minière et droits fondamentaux en droit camerounais: concilier développement économique et droit à la vie et à la santé*, L'Harmattan, 2022, pp. 53-62.

<sup>10</sup> J. Jouzel, A. Michelot, "Quelle justice climatique pour la France", *op. cit.* p. 80.

<sup>11</sup> "In order to ensure the rational exploitation of mining and quarrying resources in harmony with environmental protection, holders of mining and quarrying permits must take care to: prevent geohazards and geocatastrophes; prevent or minimise all discharges into the environment; protect flora and fauna; promote or maintain the general health of the population; reduce waste; [...]".

<sup>12</sup> Article 17 of law no. 96/12 of 5 August 1996 on the framework law for environmental management.

<sup>13</sup> Article 126 of Decree no. 2002/648/PM of 26 March 2002 laying down the conditions for applying Law no. 001 of 16 April 2001 on the Mining Code.

<sup>14</sup> Paragraph 3 of Article 136 of Law 2016-17 of 14 December 2016 on the Mining Code.



the obligation on the holder to "conduct the petroleum operations for which it is responsible with diligence and in accordance with the rules of the trade"<sup>15</sup>.

Despite this, the extractive industries remain a source of climate instability in Cameroon, with adverse consequences for the fundamental rights of vulnerable and/or exposed people. According to Edwige Jounda, "both oil and mineral extraction have the greatest environmental impact [...]: the opening of roads and deforestation to reach the exploitation sites; the destruction of soil, the diversion of watercourses and the drying up of water tables for water needs; the subsidence of land due to the extraction of subsoil resources; noise, air, water and soil pollution"<sup>16</sup>. The repercussions of these impacts on climatic instability stem from the interdependence of ecological phenomena. To take the case of forest destruction alone, Cameroon recognises in its Nationally Determined Contribution (NDC) that "the contribution of deforestation to climate change and to the vulnerability of local and indigenous populations is undeniable"<sup>17</sup>. Given that extractive processes require large amounts of land to be cleared, and that the actual restoration of sites is rare, the link between the deployment of these activities and the exacerbation of the vulnerability of local populations is blatantly obvious.

This leads us to the fundamental question at the heart of this analysis, which can be formulated as follows: does Cameroonian law provide for due diligence by extractive companies in such a way as to guarantee the fundamental rights of vulnerable people in the life cycle of projects? The answer to this question is of social and legal interest insofar as the implementation of due diligence contributes to the operationalisation of the social responsibility of extractive companies. This is particularly important in a context where the extractive industry is responsible for most of the negative impacts on the environment. In order to respond to this challenge, an analysis of the legal texts is insufficient, as the question of effectiveness must remain at the heart of legal analysis in environmental matters<sup>18</sup>. The sociology of law was therefore used as a complement to compare the legal system with Cameroon's environmental reality. Cameroon is characterised by great geo-climatic diversity, which, through its five agro-ecological zones, provides an excellent opportunity to understand the manifestations, impacts and responses of a developing country to climate justice<sup>19</sup>. Prematurely, the operationalisation of this process has been mixed. On the one hand, the identification and consideration of the impacts of the extractive industry on vulnerable people are unsatisfactory, as they are likely to allow certain types of damage to flourish (1). Secondly, it is still difficult to monitor the effectiveness of measures and processes designed to remedy negative impacts on human rights (2).

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<sup>15</sup> Article 78 of Act no. 2019/008 of 25 April 2019 on the Petroleum Code.

<sup>16</sup> E. Jounda, "Les compensations environnementales face au développement de l'industrie extractive au Cameroun", in O.C. Ruppel, E. D. Kam Yogo (eds.), *Droit et politique de l'environnement au Cameroun - Afin de faire de l'Afrique l'arbre de vie*, Recht Und Verfassung in Afrika - Band/Volume 37 Law and Constitution in Africa, 1st Edition, 2018, p. 597.

<sup>17</sup> République du Cameroun, *Contribution déterminée au niveau national - actualisée (CDN)*, 2021, p. 3.

<sup>18</sup> J. Morand-Deville, *Droit de l'environnement*, PUF, 12<sup>e</sup> édition, 2019, p.124.

<sup>19</sup> J. A. Amougou, "Situation des changements climatiques au Cameroun - Les éléments scientifiques, incidences, adaptation et vulnérabilité", in O.C. Ruppel, E. D. Kam Yogo (eds.), *Droit et politique de l'environnement au Cameroun - Afin de faire de l'Afrique l'arbre de vie*, op. cit, p. 687.



## 1. Approximate assessment of the impact of extractive activities on the environment

First and foremost, due diligence requires companies to assess the actual and potential impact of their activities on the natural and human environment<sup>20</sup>. As comprehensive an assessment as possible is therefore necessary, as it is a prerequisite for integrating and managing the negative impacts of the project on human rights and the environment. Unfortunately, in Cameroon this is insufficient due to the incomplete identification of impacts (1.1) and the specious nature of their integration into the company's relevant processes (1.2).

### 1.1. Incomplete identification of the impacts of extractive activities on human rights

Whether in the context of mining or an oil contract, the company in charge of the project is required to carry out, at its own expense, an environmental and social impact assessment<sup>21</sup> (ESIA) in accordance with article 17 of the framework law on environmental management. The ESIA is a systemic examination designed to determine the favourable and unfavourable effects likely to be caused by a project on the natural and human environment. Properly applied, the ESIA is likely to reduce the impact of the extractive industry on exacerbating climate change by identifying, upstream, the sources of nuisance and taking appropriate corrective action.

However, the Cameroonian legislator has restricted the phases of projects subject to an ESIA. Initially, it exempted mining companies from the obligation to carry out an ESIA when they wished to obtain an exploration permit. This is what emerges from article 135 paragraph 2 *in limine* of the Mining Code, according to which obtaining an exploration permit is an exception to the obligation to carry out an ESIA. It has to be said that this provision is not in keeping with the spirit of the framework law on environmental management which, in the first paragraph of article 17, requires an ESIA to be carried out for "any project [...] which, because of its size, nature or the impact of the activities carried out on the natural environment, is likely to harm the environment". It goes without saying that, from the exploration phase onwards, the holder's actions may already be causing damage to the environment<sup>22</sup>. At least 25% of Cameroon's surface area is being explored without even an ESIA having been carried out, even though the risks of degradation have already been proven at this stage, as the diagram below shows<sup>23</sup>:

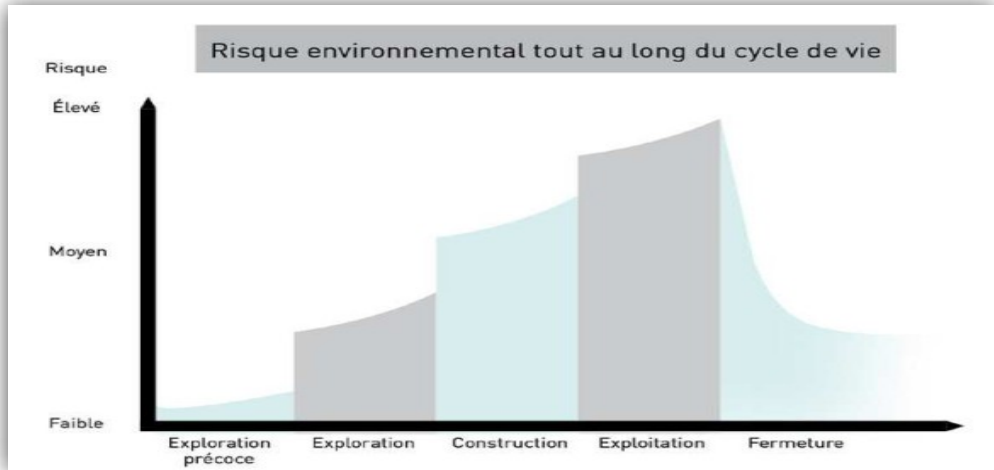
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<sup>20</sup> Article 17 of the Guiding Principles on Business and Human Rights.

<sup>21</sup> Article 135, para. 2 of Law no. 2016-17 of 14 December 2016 on the Mining Code and article 92, para. 1 of Law no. 2019/008 of 25 April 2019 on the Petroleum Code.

<sup>22</sup> According to article 40 of the Mining Code, an exploration licence authorises the holder to: access and occupy the area covered by the exploration licence; extract, remove and dispose of rock, earth, soil or mineral substances in the quantities permitted by the approved work programme; take and use the water located on or flowing through the said land for any purpose necessary for the exploration work; and carry out any other work appropriate for undertaking exploration on the land.

<sup>23</sup> J. Bell *et al*, *Contrats miniers, comment les lire et les comprendre*, September 2014, p.137.



This exclusion is all the more difficult to understand given that the extractive industries policy on petroleum requires an ESIA for "any project to explore for, exploit and transport hydrocarbons"<sup>24</sup>. Cameroonian lawmakers would therefore do well to adopt this practice in the mining sector.

Secondly, the same paragraph exempts artisanal mining from the requirement to carry out an ESIA. However, as one author points out, "the difference between artisanal mining and industrial mining is less one of quantity than of nature"<sup>25</sup>. The environmental effects are the same, and sometimes even a small-scale mining operation can have more negative environmental effects than a large-scale mining operation, especially as large-scale miners have more resources to protect the environment"<sup>26</sup>. If Cameroonian law does not require an ESIA to be carried out, it would be better to make the carrying out of this type of activity subject to the production of a study of the dangers and risks in order to mitigate the effects on fundamental ecological balances.

## 1.2. Specious integration of impacts into the company's relevant processes

Assessing the impact of extractive activity is not limited to carrying out an ESIA. The law provides for the production of an environmental management plan (EMP). Depending on the activity planned, the EMP may be drawn up separately from the ESIA (mining<sup>27</sup>) or as an integral part of the ESIA (oil extraction<sup>28</sup>). In any case, the EMP aims to prevent extractive activities from causing unnecessary and excessive environmental degradation; to protect public health and safety, particularly for communities in the area of operations; to ensure that impacts occurring within the perimeter of the area of operations are restricted to that area and to ensure that the

<sup>24</sup> Article 87, para. 2 of Decree no. 2023/232 of 4 May 2023 setting out the terms of application of the Petroleum Code.

<sup>25</sup> M. Petsoko, *Exploitation minière et droits fondamentaux en droit camerounais: concilier développement économique et droit à la vie et à la santé*, op. cit, p. 109.

<sup>26</sup> *Ibid.*

<sup>27</sup> Article 126 of the decree setting out the terms of application of the Mining Code.

<sup>28</sup> Article 89 (j) of the Decree of 2023 laying down the procedures for implementing the Petroleum Code.



the exploitation zone can be used safely by future generations<sup>29</sup>. Its importance in mitigating climate vulnerabilities arising from the extractive industry is therefore proven. However, it seems difficult to verify that the risks identified have been effectively integrated into the company's relevant processes. There are two main reasons for this.

The first relates to the tacit nature of the admissibility of the ESIA for both mining and oil extraction. Mining industry regulations simply state that the ESIA must be carried out in accordance with the framework law on environmental management and its implementing decrees. To find out more, you need to read the 2013 decree that sets out the procedures for carrying out ESIA's. Under the terms of article 24 paragraph 2 of the decree, "the inter-ministerial committee for the environment has twenty days to give its opinion on the impact study. Once this period has elapsed, the opinion is deemed to be favourable". The same applies to the second<sup>30</sup>. The problem is that, in the case of mining, the law makes the granting of a mining permit subject to the definition, in an EMP, of how the impacts identified in the study are to be managed. However, tacit approval casts doubt on whether the results of the ESIA have actually been taken into account. In the oil industry, the situation is more complex in that the EMP is an integral part of the ESIA, and both may be subject to tacit approval. As Dean Michel Prieur points out, it therefore seems essential, in the interests of the environment, to outlaw any tacit authorisation<sup>31</sup>.

The second reason is of an economic nature insofar as the environmental management activities described in the EMP, while they must follow the principles of the best proven technology available, must not entail "excessive costs"<sup>32</sup>. In fact, this restriction reduces the practical scope of this provision insofar as "requiring that the development of the technology be significant, that it result in a very high level of performance and that its cost be reasonable at the same time seems somewhat utopian"<sup>33</sup>. This provision therefore seems to make the application of the best technologies conditional on the financial capabilities of the operator<sup>34</sup>. This may provide a safe haven for extractive companies, which will use the excessive cost of the best technologies as a justification for numerous environmental attacks.

It is clear from the above that Cameroon's legislation seems lax when it comes to assessing the impact of extractive activities on the environment. Unfortunately, this situation allows injustices to flourish, which environmental monitoring fails to correct.

## **2. Ineffective monitoring of the appropriateness of the measures taken**

The protection of human rights in the context of extractive activities requires monitoring of the adequacy of the measures taken throughout the life cycle of the project. However, in Cameroon, climate monitoring is an incidental part of the life cycle of extractive projects (2.1) and this sector of activity is marked by the seal of

<sup>29</sup> J. Bell *et al*, *Contrats miniers, comment les lire et les comprendre*, *op. cit.*, p. 142.

<sup>30</sup> Article 93, para. 3 of the 2023 decree setting out the terms and conditions for implementing the Petroleum Code.

<sup>31</sup> M. Prieur, *Droit de l'environnement*, Précis Dalloz, 2001, p. 20.

<sup>32</sup> Article 126 *in fine* of the Decree implementing the Mining Code.

<sup>33</sup> M. Moliner-Dubost, *Le droit face à la pollution atmosphérique et aux changements climatiques*, doctoral thesis in environmental law, Université Jean Moulin - Lyon 3, 2001, pp. 60-63.

<sup>34</sup> *Ibid.*

confidentiality of data, thereby reducing the role of vulnerable people in the decision-making process (2.2).

## 2.1. The ineffectiveness of conventional environmental monitoring in reducing climate vulnerability

Environmental monitoring refers to observation and measurement activities aimed at determining the actual impacts of a facility compared with the impact forecasts made during the ESIA<sup>35</sup>. In Cameroon, environmental monitoring is a technical-administrative function and consists of "ensuring the conservation of all deposits, the safety of goods and people, the conservation of buildings, dwellings and communication routes, and the protection and rational use of water sources, water tables and the environment"<sup>36</sup>. However, the environmental reality in Cameroon sufficiently demonstrates that it fails to achieve its objective. It is therefore said to be ineffective because of its inability to regulate extractive industries in the interests of greater protection for human and non-human life. A report by the Ministry for the Environment, Nature Conservation and Sustainable Development notes that many extractive companies operate underground and without carrying out an ESIA. The report found that in 2016, of the 44 companies audited in East Cameroon, only one held a mining concession. This means that 98% of companies were in breach of the law<sup>37</sup>. It should be emphasised here that sometimes the administration itself can be the cause of this state of affairs. This was the case in October 2007 when the Ministry of Mines launched "Operation Gold Safeguard", without an ESIA, in anticipation of the impounding of the Lom-Pangar hydroelectric dam<sup>38</sup>. This may also justify the fact that companies almost never undertake rehabilitation work on sites after mining. In 2019, as part of a study on environmental fraud in the mining sector, a non-exhaustive mapping of holes identified 248 abandoned holes in the localities of Bétaré-Oya and Ngoura, representing a sum of 248,000,000 CFA francs that could have contributed to compensating the affected communities<sup>39</sup>. By 2021, there will be an estimated 2,000 mining holes in Ngoura alone<sup>40</sup>. The damage they cause will amount to more than 300 deaths between 2017 and 2021<sup>41</sup>, in addition to the deterioration in the quality of the environment and life<sup>42</sup>.

These different illustrations show the extent of the human and social vulnerabilities resulting from the development of the extractive industries. To take better account of these vulnerabilities and deal with them, we would have expected the relevant ministries to work in collaboration with the National Climate Change Observatory, but this is not the case. Yet the Observatory is responsible for "establishing relevant climate indicators for monitoring environmental policy", and "proposing measures to the government".

<sup>35</sup> ECOSCAN SA, *Surveillance et suivi environnemental des projets soumis à EIE en Suisse*, 30 March 1999, p. 25.

<sup>36</sup> Article 27(1) of the 2013 decree setting out the procedures for carrying out ESIA's.

<sup>37</sup> E. Etoga Fouda, *Transparence et fraude environnementale dans le secteur minier au Cameroun : cas de l'exploitation artisanale semi-mécanisée à l'Est et dans l'Adamaoua*, Publish What You Pay Cameroon, June 2019, p. 20.

<sup>38</sup> E. Voundi, Ph. Fendong Mbevo, P. Essigüe Emissi, "Analyse des mutations environnementales induites par l'exploitation minière à Bétaré Oya, Est Cameroun", *Vertigo*, vol. 19, no. 1, March 2019, p. 1.

<sup>39</sup> CED, *Cameroun: l'or, secteur miné. La mine artisanale semi-mécanisée au Cameroun*, op. cit, p. 48.

<sup>40</sup> *Ibid*, p. 39.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*, p. 46.

preventive measures to reduce greenhouse gas emissions, as well as measures to mitigate and/or adapt to the adverse effects and risks associated with climate change"<sup>43</sup>.

As a result, the implementation of due diligence is hampered by the administration's limited control capacity and poor coordination between institutions. Unfortunately, the confidentiality of the data that prevails in this area makes it impossible to exercise citizen control over extractive activities.

## **2.2. Data confidentiality takes precedence over the public's right to information**

The due diligence process requires the company to always report on how it remedies the negative impacts of its activities on the environment<sup>44</sup>. This raises the de facto importance of public disclosure. Under Cameroonian law, this is difficult because of the confidentiality of the data involved. Article 138 of the decree implementing the petroleum code states that "all data generated during petroleum operations are and remain the property of the State". In line with this, article 153 paragraph 1 of the decree implementing the mining code goes further, stating that "the Minister responsible for mines shall preserve the confidentiality of all documents, reports, statements, data, samples and other information submitted by the holder pursuant to the provisions of the mining code, its implementing texts and the mining agreement. This information may not be divulged to a third party by the administration before the perimeter to which it relates has been handed over or, in the absence of such handover, before mining activities have been completed".

This principle of data confidentiality poses difficulties in terms of monitoring the proper implementation of the EMP. The Constitution states that "protection of the environment is a duty for all". However, in order to protect the environment, people must first "be informed about the harmful effects of harmful activities on human health and the environment, as well as the measures taken to prevent or compensate for these effects"<sup>45</sup>. By cloaking "all data" relating to the extractive project in the seal of confidentiality, the legislator is considerably diluting the public's right to information and depriving it of its duty to protect the environment.

In view of the consequences of this opacity for the environment and exposed populations, it would certainly be appropriate to change the paradigm by questioning this principle of confidentiality. To this end, it would undoubtedly be more effective to make a distinction within the data in question. We could then consider that, since the protection of the environment and its resources is in the general interest<sup>46</sup>, data relating to the impact on the environment and on people, as well as the means implemented to prevent or repair damage, should always be communicated. It is this communication that conditions the exercise of the duty to protect the environment enshrined in the Constitution.

In addition - and given the weakness of technical and administrative control - public opinion could act through pressure groups (associations, chieftaincies, youth movements, etc.). These pressure groups do not carry out legal control,

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<sup>43</sup> Article 4 of Decree no. 2009/410 of 10 December 2009 on the creation, organisation and operation of the National Climate Change Observatory.

<sup>44</sup> Principle 15, paragraph b *in fine* of the Guiding Principles on Business and Human Rights.

<sup>45</sup> Article 7 of law no. 96/12 of 5 August 1996 on the framework law for environmental management.

<sup>46</sup> Article 2, para. 2, *ibid*.



because they do not have the legal authority to monitor the application of environmental policies. Nevertheless, they contribute in one way or another to monitoring through media and informal means, and raise public awareness<sup>47</sup>.

## Conclusion

The extractive industries are a source of injustice for the populations exposed to the various activities. This position of vulnerability seems "almost schizophrenic"<sup>48</sup> if we look at the number of permits issued and the surface area covered by an extraction project. Cameroon's legislator therefore needs to rethink the implementation of the due diligence process for extractive companies, at the risk of ending up with an emergence without an emergence<sup>49</sup>. Climate justice can no longer afford to be a luxury for communities exposed to the harmful effects of the extractive industries, but is an existential issue to which the public authorities must pay greater attention in the exercise of their regalian functions.

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<sup>47</sup> I. Ly, *Problématique du droit de l'environnement dans le processus de développement économique et social d'un pays africain : l'exemple du Sénégal*, thesis, Université Cheikh Anta Diop de Dakar, 1994, p. 211.

<sup>48</sup> H. Drif, "La vulnérabilité environnementale de la population de l'État dans le contexte du changement climatique", in R. Bentirou Mathlouthi, A. Pomade (eds.), *Vulnérabilité(s) environnementale(s) : perspectives pluridisciplinaires*, L'Harmattan, 2023, p. 497.

<sup>49</sup> In the sense of those who benefit from this emergence.

# ARBITRAL JUSTICE AND THE PROTECTION OF LOCAL COMMUNITIES' RIGHTS IN EXTRACTIVE INDUSTRIES DISPUTES IN FRENCH-SPEAKING BLACK AFRICAN STATES

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## Summary

In the countries of French-speaking black Africa, the approach to development based on the exploitation of extractive industries, despite the associated threats to the climate, is economically justified by the scale of the financial resources it generates. However, taking account of the climate, a *sine qua non* of sustainable development, in the exploitation of these industries seems to remain a cosmetic effect, because the interests of the investor take precedence over those of the host State and even more so over those of its populations. Hence the ambition to examine how the rights of local communities are taken into account in extractive industries disputes, based on arbitration in French-speaking black Africa. An analysis based on sociological positivism reveals that these rights are taken into account only to a limited extent, and calls for a rethink of the role of local communities in the exploitation of these industries.

**Key words:** climate justice; arbitration justice; extractive industries; local community rights.

## Abstract

*In the states of French-speaking black Africa, the approach to development through the exploitation of extractive industries despite the threats to the climate associated with it is economically justified by the importance of the financial resources it generates. However, considering the climate, a sine qua non of sustainable development in the operation of these industries, seems to remain a cosmetic effect because the interests of the investor take precedence over those of the host State and more over that of its populations. Hence the ambition to question the considering of the rights of local communities in the litigation of the extractive industries from arbitration justice in French-speaking black Africa. The analysis by sociological positivism reveals a mixed considering of these rights in the exploitation of the extractive industries.*

**Keywords:** Climate justice; Arbitral justice; Extractive industries; Rights of local communities.

## Introduction

Arbitration and climate. Rarely have these two words been so infrequently associated, as one authoritative writer points out<sup>1</sup>. But in reality, legal instruments are increasingly being called upon to facilitate climate protection and the effectiveness of environmental policies on extractive industries. In reality, the exploitation of these resources transforms the environment, leading to the destruction of biodiversity, air, soil and water pollution, poaching, nuisances and greenhouse gas emissions<sup>2</sup>.

Despite these threats, in African countries in general and in French-speaking black Africa in particular, the approach to development based on the exploitation of extractive industries, despite the associated threats in terms of social and environmental impacts, has been justified in economic terms by the importance of the financial resources it generates. From an environmental point of view, it was accepted that the agreements for exploiting these resources, generally signed with direct foreign investors, are a means of reducing environmental risks, since the latter have modern technologies at their disposal and are able to carry out their own operations.

"It was also presented as a key factor in local development through the redistribution of wealth. At the same time, mining has been presented as an essential factor in local development through the redistribution of the wealth it generates. As a result, it has regularly proved to be a source of dispute between local communities and economic operators. These are indirect disputes between local communities who are victims and third parties to extractive contracts between extractive companies and host states<sup>3</sup> which are superimposed on the traditional disputes between the last two players mentioned. The contractual framework for exploitation highlights the specific features of the extractive project, the rights and duties of the parties and the specific clauses in anticipation of disputes.

In fact, for a long time, the procedure for settling disputes arising from public contracts was criticised for being cumbersome and costly. Today, however, it is undergoing significant change. Partners are increasingly demanding, and negotiating power is growing in their favour. With the rapid emergence of mining contracts, it is logical that the administration's co-contractors are demanding a slightly more direct relationship. As this cannot be reduced to referral to the administrative courts, a new requirement for an effective dispute resolution system has arisen. The administrative courts, which until then had exclusive jurisdiction over matters involving public bodies<sup>4</sup>, are increasingly being challenged. In response, various alternative dispute resolution methods were introduced. These resolution techniques are set out in the mining codes<sup>5</sup> or, failing that, in the mining agreements<sup>6</sup>. Specifically, since the end of the second

<sup>1</sup> T. Clay, "Arbitration and the environment", *Gazette du Palais*, no. 149, 2003.

<sup>2</sup> T. Lauriol, E. Raynaud, *Le droit pétrolier et minier en Afrique*, Lextenso Éditions, France, LGDJ, 2016.

<sup>3</sup> E. Jolivet, "Préface", in A. Ngwanza, G. Lhuillier, *Le contentieux extractif*, International Chamber of Commerce, 2015.

<sup>4</sup> TC *Blanco ruling*, 8 February 1873.

<sup>5</sup> Cameroon Mining Code, 11 articles 231 and 232; Congolese Mining Code, articles 181 and 182; Gabon Mining Code, article 335; Equatorial Guinea Mining Code, article 37; Chad Mining Code, 98; Central African Mining Code, articles 191 to 193; articles 381 to 384 of the draft CEMAC Mining Code.

<sup>6</sup> A number of investors are already active in Cameroon's mining sector, including: the Republic of Congo with the Mbalam project in 2012 for the joint exploitation of the Mbalam iron ore deposits for Cameroon and Naleba for Congo; Hydromine Global Mineral, bringing together the Indian firm Hindalco and Dubai Aluminium Company with an interest in Ngaoundal alumina and bauxite; Geovic Cameroun, a subsidiary of GeovicMiningCorp, which holds the Mada and Nkamouna licences for the Nkamouna cobalt, nickel and manganese deposits, etc. Other examples: mining agreement signed on 3 January 2019 between Nouvelle Gabon Mining and the State of Gabon for the mining of Okondja manganese; mining agreement between CAISI Tchad and the State of Chad for gold mining signed on 24 November 2014; mining agreement between the State of Chad and Société Sogem S.A. relating to exploration and mining licences in the Misky area, Tibesti region and Tchaga area, Fitre department, Batha region, signed on 9 July 2015, with an addendum signed on 21 January 2016; gold mining licences signed between the Chadian State and Société Sogem



World War<sup>7</sup>, foreign investors are shying away from state justice and prefer arbitration as a means of settling disputes<sup>8</sup>. As Philippe Kahn points out,

"In investment matters, arbitration is considered to be one of the most valuable guarantees that can be granted to the private entrepreneur"<sup>9</sup>, because "the complexity of the problems raised in investment matters calls for flexible solutions"<sup>10</sup>. Criticised at the outset, the acclimatisation of arbitration within the perimeter of administrative action has clearly not been<sup>11</sup>. As a result of the stringent demands made by the State's investor partners, this restriction on the arbitrability of disputes involving public bodies was to undergo changes<sup>12</sup>, in an economic environment marked by the growing importance of operating contracts.

Arbitration in disputes relating to the extractive industries therefore deserves particular attention, especially when it concerns local populations. It should be noted at the outset that the extractive industries include the extraction of mineral products<sup>13</sup> present in their natural state in solid (coal and ores), liquid (oil) or gaseous (natural gas) form. A mineral resource is a concentration of material naturally present in solid, liquid or gaseous form in the earth's crust, in a form and quantity such that its extraction for economic purposes is actually or potentially feasible. These include energy resources such as fossil fuels like coal and oil, and mineral resources such as iron, bauxite, potash, gold and diamonds<sup>14</sup>. Extractive contracts are any contract under which a State grants a company the right to explore and/or exploit and market mining, oil or gas resources on a specific piece of land, in exchange for a price in the form of royalties, taxes, production or profit sharing, or other economic or social compensation obligations<sup>15</sup>. Most of these contracts are signed on the basis of the mining title granted to the operator and, in special cases, in the absence of any mining title. According to the *Legal Vocabulary*<sup>16</sup>, arbitration is "a method, sometimes called amicable or peaceful, but always jurisdictional, of settling a dispute by an authority (the arbitrator or arbitrators) whose power to judge is derived, not from a permanent delegation of the State or an international institution, but from the agreement of the parties (who may be private individuals or the State)". Arbitration is therefore a dispute resolution procedure agreed by the parties: under an arbitration agreement (compromis or clause compromissoire), the parties agree to submit their dispute to one or more private individuals in an uneven number, called arbitrators, to whom they confer real jurisdictional power<sup>17</sup>. The arbitral tribunal that is the subject of this study thus refers to all the parties to a dispute.

<sup>7</sup> D. C. Sossa, "L'aptitude des personnes morales de droit public à compromettre dans l'arbitrage OHADA : les mobiles d'une telle option", Proceedings of the colloquium held in Yaoundé on 14 and 15 January 2008, on the theme "The ability of legal persons under public law to compromise in OHADA arbitration: the motives for such an option".

"Arbitration in Africa: a topical issue", *Revue camerounaise de l'arbitrage*, special issue (2), June 2010.

<sup>8</sup> *Ibid.*

<sup>9</sup> P. Kahn, "Les problèmes juridiques de l'investissement dans les pays de l'ancienne Afrique française", *JDI*, 1965-2.

<sup>10</sup> *Ibid.*

<sup>11</sup> The prohibition on compromising appears to have been formulated with regard to the French State by the *Ouvrard* (CE 17 November 1824) and *Boyer* (CE 17 August 1825) judgments, followed by the *Evêque de Moulins* (CE 23 December 1887), *Société générale des téléphones* (CE July 1891) and *Ducartaing* (CE 24 January 1904) judgments: M. Sinkondo, "La notion de contrat administratif: acte administratif à contenu contractuel ou contrat civil de l'administration?", *RTDciv.* 1993, p. 239.

<sup>12</sup> R. Nemedeu, "Recherche du critère d'arbitrabilité des litiges concernant les personnes morales de droit public en droit OHADA", *Revue africaine des sciences juridiques*, vol. 6, n° 1, 2009.

<sup>13</sup> [www.insee.fr/fr/metadonnees/nafr2/section/B](http://www.insee.fr/fr/metadonnees/nafr2/section/B).

<sup>14</sup> Article 9 of Law 2016-17 of 14 December 2016 on the Mining Code of Cameroon.

<sup>15</sup> G. Lhuilier, "Le contentieux extractif : essai de définition", in A. Ngwanza, G. Lhuilier, *Le contentieux extractif, op.cit.*

<sup>16</sup> "Arbitrage", in G. Cornu (ed.), *Vocabulaire juridique*, 12<sup>e</sup> ed., Paris, PUF, 2018.

<sup>17</sup> S. Guinchard, T. Debard, *Lexique des termes juridiques*, Paris, Dalloz, 25<sup>e</sup> ed., 2017.



arbitration bodies with jurisdiction over extractive industries disputes in French-speaking Africa, whether domestic or international, institutional or ad hoc<sup>18</sup>.

In its original sense, litigation is "that which opposes or is disputed"<sup>19</sup>. In short, it is what is the subject of a disagreement, especially a legal disagreement<sup>20</sup>. For the purposes of this paper, extractive litigation will be taken to mean any disagreement that may arise between the parties to a mining contract or agreement.

The aim of this study is to examine the extent to which the rights of local communities are actually taken into account in extractive industries arbitration disputes in French-speaking black Africa. The question of the role that arbitration can play in protecting the rights of local communities arises because formal contracts between economic operators and local communities are rare. The question is therefore how to ensure that the interests of local communities are taken into account in the field of arbitration. To achieve this, we will ask ourselves whether *the* role of the arbitration judge contributes to the effective protection of the rights of local communities in extractive industries litigation in French-speaking black Africa. Our analysis suggests that the extent to which these rights are taken into account is mixed. While extractive companies' compliance with climate requirements and consideration of the interests of local populations are formalised in contracts, the situation is different during the execution phase, particularly in the arbitration of related disputes, where the interests of these populations are not taken into account, and even less so environmental interests. In this respect, the subject has a dual theoretical and practical interest. From a theoretical point of view, it is an in-depth reflection on the effectiveness of the regulations of the States of French-speaking black Africa inherent in the arbitration of disputes relating to the extractive industries. In addition, this study will reveal the shortcomings of the arbitral justice system in terms of taking into account the interests of local communities, and how best to promote these populations and the climate in this method of dispute settlement.

Following an analysis framed, on the one hand, by normativist and sociological positivism and, on the other hand, by the comparative method, we shall endeavour to show that although there is perceptible protection of the rights of local communities by arbitral justice (1), this remains perfectible (2).

### **1. Perceptible protection of the rights of local communities by extractive arbitration justice**

As a high-potential economic activity, the extractive industry contributes to improving the situation of local communities through the resources and jobs it generates and its knock-on effects on other sectors of the local economy. It should also improve the resources of the State, and therefore its capacity to assume useful expenditure for society (education, health, infrastructure, etc.). The establishment of an extractive industry is accompanied by local development programmes designed to mitigate or compensate for the effects, particularly climatic, of extractive activity. For example, in the arbitration of disputes relating to extractive activities, consideration of the rights of local communities includes an assessment of whether extractive companies comply with climate requirements (1.1) and the implementation of social measures to promote local development (1.2).

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<sup>18</sup> As such, most mining agreements refer to arbitration by ICSID, the ICC and, increasingly, OHADA.

<sup>19</sup> J. Salmon (ed.), *Dictionnaire de droit international public*, Brussels, Bruylant, 2001.

<sup>20</sup> *Ibid.*

## 1.1. Assessment of extractive companies' compliance with climate requirements

In the context of the arbitration of disputes relating to the extractive industries, a case may be brought before the arbitration court on the grounds of a breach of the clauses relating to the taking into account of climate protection aspects. While the extractive industries are an economic sector that is both structuring and strategic for the country in terms of national and local development and access to basic services, the governance of the sector nevertheless poses a problem insofar as mining activities contribute to climate degradation, making it more difficult to access basic natural resources (water, land, fauna and flora). As a result, access to mining resources and their exploitation remain a source of regular disputes between local populations and mining companies, despite the existence of a specific legal framework.

Arbitral justice protects the rights of local communities by recognising the right of the host state to approve the proper performance of the investor's obligations. In the *Klockner* award, the constituted arbitral tribunal stated that: "the German party had the plant accepted not by a genuine representative of the Cameroonian party, but by an expatriate technician from the *Klockner* camp assigned to *Socame*, a highly unusual procedure in projects of this kind, where the legitimacy of the acceptance (and consequently its enforceability against the party that has to pay) is normally ensured by all possible precautions"<sup>21</sup>. Similarly, arbitral tribunals recognise the investor's obligation to inform the host State about the development of the investment and its effects on the climate. Such effects may lead the host State to terminate the contract that is harmful to the climate.

Similarly, taking climate obligations into account is of vital importance for populations that are closely dependent on renewable natural resources, whose regeneration and diversity determine their survival and the reproduction of their societies<sup>22</sup>. In so doing, Article 24 of the African Charter on Human and Peoples' Rights (ACHPR) opens the door to recognition of the damage caused by violation of people's right to a healthy environment. This provision constitutes the legal basis for the possible recognition of environmental damage insofar as the violation affects the right to a healthy environment of the populations concerned. This right to a healthy environment implies the duty of the judge, even if he is an arbitrator, to protect and preserve the integrity of the components of the environment against the significant negative effects of any extractive activity on the development of local communities.

Lastly, there are other clauses on corporate environmental responsibility that come into play upstream of contract formation. These include public tenders that include environmental impact assessments. Similarly, environmental management systems (EMS)<sup>23</sup>, the best known of which are the Responsible Care programme and the ISO 14001 standard.

These preservation and protection obligations are generally contained in contracts relating to mining operations and, in the event of breach, may be raised before the arbitration body by the State on behalf of local communities, to enable the arbitration court to assess the level of environmental protection provided by the company.

<sup>21</sup> *Klockner v. State of Cameroon*, judgment of 21 October 1983.

<sup>22</sup> O. Barrière and C. Barrière, *Foncier-environnement : fondement juridico-institutionnel pour une gestion viable des ressources naturelles renouvelables au sahel*, FAO, "Études législatives", n° 60, Rome, 1997.

<sup>23</sup> P. Halley, O. Boiral, "Les systèmes de gestion environnementale au Canada : enjeux et implications pour les politiques publiques de l'environnement", *McGill R.D.*, 2008, 53, p. 649 ; R. Joy Jiang, P. Bansal, "Seeing the Need for ISO 14001", *Journal of Management Studies*, 2003, 40, p. 1047 et seq., spec. p. 1050 ; O. Boiral, "Corporate Greening through ISO 14001: A Rational Myth?", *Organization Science*, 2007, p. 18.

extractive industries. The arbitration body may also consider aspects relating to the development of local communities.

## **1.2. Assessing extractive companies' actions to promote development**

In international law, the right of indigenous communities derives from the right of peoples to self-determination, as affirmed in Article 1<sup>er</sup> of the International Covenant on Civil and Political Rights of 16 December 1966, adopted by the United Nations General Assembly. Paragraph 2 of the same article adds that "to achieve their ends, all peoples may freely dispose of their natural wealth and resources", thus associating political independence with economic sovereignty. This is why, in the development of international environmental law, respect for the rights of indigenous communities has emerged as a lever for improving the protection of nature.

Since by arbitration the parties to a contract undertake to submit a dispute arising from its application (compromise) or which could arise (arbitration clause) to a private individual chosen by them<sup>24</sup>, the non-execution of a clause, even relating to social actions to be carried out by one of the parties, may give rise to arbitration. It is therefore accepted that the arbitration court can assess the implementation by the parties of contractual clauses, including those relating to social actions in favour of local populations. The protection of local communities thus finds in social and environmental responsibility the means by which it can penetrate the law and consequently benefit from the protection of arbitral justice.

Globalisation has led to an increase in private economic powers, particularly multinational extractive companies. These companies operate on a global scale, ignoring geopolitical borders. It is generally accepted that the economic purpose of a company is speculative and can be analysed as the search for and maximisation of profit. This economic perspective on corporate purpose has been somewhat attenuated in recent years by the emergence of the concept of corporate social responsibility. This refers to the idea that extractive companies are called upon, in their decision-making, to go beyond a purely speculative and economic purpose to integrate more holistic considerations of an ethical, social and environmental nature. It thus seeks to reconcile economic objectives with social, ethical and environmental considerations.

CSR is now an integral part of extractive activities. It has been incorporated into the clauses structuring mining and oil exploitation contracts. Such clauses require extractive companies to carry out a certain number of social projects for the benefit of local communities. Be that as it may, there is still a need to improve the protection of these communities.

## **2. There is room for improvement in the protection of local communities' rights by arbitration courts**

The challenges facing the extractive industries today are those of a new vision of the strategy for protecting the local communities directly concerned. This new vision consists of responding simultaneously to the needs of economic and social development and climate protection, under the impetus of the Africa Mining Vision (AMV) and Agenda 2063, which guides Africa in making the most of its mineral resources.

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<sup>24</sup> Ph. Fouchard, *L'arbitrage commercial international*, Paris, Dalloz, 1965, n° 11.

the continent<sup>25</sup>. However, this vision remains utopian in sub-Saharan Africa because of the difficulty States and victims have in gaining access to arbitration, which is likely to be unilateral (2.1.). These shortcomings justify the need to redirect the protection strategy (2.2.).

## 2.1. A one-sided arbitration process that is disadvantageous for the State and closed to victims

Despite the caution and even mistrust they show when it comes to including arbitration clauses in extractive industries contracts, practice has shown that arbitration disputes are disadvantageous for the State. Numerous examples illustrate this point. Just think of the cases of *SOABI v Senegal*<sup>26</sup>, *AMT v Democratic Republic of Congo*<sup>27</sup> and *Atlantic Triton v Guinea*<sup>28</sup>, which ended in an unfavourable award for the states involved and ordered them to pay large sums of money. Extractive industries arbitration is therefore essentially an arbitration on financial compensation for investors. The majority of arbitration claims brought against African states concern financial compensation for breach of contract.<sup>29</sup>

As a result, extractive industries litigation is closed to local communities when their rights are violated by investors. From a procedural point of view in particular, the tools enabling local communities, as third-party victims, to intervene in arbitration proceedings are absent. Third parties, and therefore local communities, are also barred from intervening in domestic and international arbitration proceedings. Similarly, third-party opposition by a local community to an award that would harm its interests is prohibited a priori. The only option left to them is to simply participate in the proceedings, through expertise, testimony and the *amicus curiae*, the "Third Party Beneficiary Principle". But these approaches offer no guarantee of success, because the arbitrator is the judge of the agreement, and investment law protects investors more than the interests of these communities.

Finally, the rights of local communities are being systematically subordinated to the interests of foreign investors<sup>30</sup>. Indigenous communities are seeing their most basic rights trampled underfoot by certain states, in order to favour the interests of foreign investors<sup>31</sup>. Their participation in environmental governance is rendered ineffective. Arbitration justice exacerbates this neglect of the rights of indigenous communities, by refusing to apply human rights to disputes<sup>32</sup>. The legislative freeze imposed by

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<sup>25</sup> The vision supported by its action plan for its implementation is motivated by the disconcerting observation that, although African countries have significant natural resources, they rank among the poorest in the world. Poor governance of natural resources has knock-on effects and can often be a clear reflection of the overall weakness of governance in a country. Consequently, and given the finite nature of these extractive resources, the overall objective of the VMA is to promote a sustainable and well-governed mining sector that efficiently harvests and deploys revenues and that is safe, healthy, gender-sensitive and ethically inclusive, environmentally friendly, socially responsible and valued by resource-affected communities.

<sup>26</sup> Decision of the arbitral tribunal of 19 July 1984 on the objection to jurisdiction raised by the Government of the Republic of Senegal in case AIU 3/82/1.

<sup>27</sup> AR B/93/1 of 21 February 1997.

<sup>28</sup> Maritime International Nominees Establishment (MINE) Award against the Republic of Guinea, ICSID Case No. ARB/84/4.

<sup>29</sup> *MMS v. Central African Republic*: the arbitral tribunal decided that the sums paid would bear simple interest at the one-year Euribor rate +2 points until full payment of the award; ICSID Case No. ARB/07/10, award of 12 May 2011.

<sup>30</sup> P. Y. Le Meur, L. S. Horowitz, T. Mennesson, "Horizontal" and "vertical" diffusion: the cumulative influence of impact and benefit agreements (IBAS) on mining policy-production in New Caledonia", *Research Policy*, 38 (4), pp. 648-656.

<sup>31</sup> D. Szablowski, *Transnational Law and Local Struggles. Mining, Communities and the World Bank*, Hart Publishing, Oxford & Portland, 2007.

<sup>32</sup> V. Tauli-Corpuz, Report to the Human Rights Council on the impacts of investments agreements on the rights of indigenous people, 33<sup>me</sup> session of the Human Rights Council (A/HRC/33/42), 11 August 2016.

stabilisation also has the effect of subordinating the rights of indigenous peoples to the protection of foreign investment<sup>33</sup>.

All of the above points to the difficulties experienced by states and, more importantly, their local populations in obtaining protection in the context of mining arbitration. The difficulties encountered by victims in accessing justice in the country hosting the investment or in the investor's country of origin therefore call into question the effectiveness of existing legal procedures. Hence the need to redirect protection towards an approach that is more inclusive of local communities.

## 2.2. Reorienting protection towards a more inclusive approach for local communities

In view of the limitations associated with protecting the interests of local communities through arbitration, a shift towards a strategy involving them directly is required.

A number of avenues can be explored to improve the way their rights are taken into account in arbitration proceedings. As regards access by local communities to arbitration, their involvement may first be achieved by reforming the mechanism of stipulation in favour of third parties. This reform could lead to its generalisation where the main mining contract creates substantial rights for the benefit of the local community that is a third party to the contract. Arbitration procedures must also evolve and gradually incorporate the specific needs of local communities. The Hague Rules<sup>34</sup> on Business and Human Rights Arbitration offer opportunities for these communities. This can be complemented by a regulatory framework for *amicus curiae*<sup>35</sup> in the resolution of these disputes<sup>36</sup>.

Moreover, protecting the rights of local communities in extractive arbitration requires greater involvement of these communities. According to Bonnie Campbell and Myriam Laforce, the vacuum left by national deregulation of the mining sector, as well as policy and institutional weaknesses, have encouraged the emergence of informal methods of regulating mining investment. These are agreements negotiated between companies and communities, known as Impact and Expectation Agreements (IEAs). These agreements set out principles and standards for protecting the interests of communities, and their widespread adoption could make it easier for investors to take account of the rights of these communities.

Finally, the role of the host country is irreducible. Its right to development must be reaffirmed in its negotiation strategy with investors. In this respect, contractualisation in the extractive sector must be cautious in order to take greater account of the rights of these communities, the social responsibility of extractive companies and, ultimately, climate protection.

## Conclusion

At the end of this analysis, it was necessary to consider the protection of the rights of local communities in the context of the arbitration of disputes relating to the activities of the extractive industries. In response to the question of whether there is evidence of such protection, the hypothesis was put forward that such protection is mitigated. Verification of this hypothesis has made it possible to highlight the means of protection guaranteed by arbitration proceedings before considering the means of

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<sup>33</sup> *Ibid.*

<sup>34</sup> Hague Rules on Arbitration for Business and Human Rights, 2019.

<sup>35</sup> F. Griesel and J. Viñuales, "L'*amicus curiae* dans l'arbitrage d'investissement", *ICSID Review*, 2007, vol. 22, pp. 380 et seq.

<sup>36</sup> *Methanex Corporation v. United States*, brief of the non-contesting parties (Bluewater network and others), March 9, 2004.

how this protection can be improved. To be more effective, the protection of the climate and the rights of local communities in the extractive industries dispute settlement mechanism in French-speaking black Africa requires the genuine involvement of local communities, particularly in the defence of their direct interests and, above all, the rationalisation of CSR.









***VARIA***



# CORPORATE SOCIAL RESPONSIBILITY IN MINING IN BURKINA FASO: LEGAL ASPECTS

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## **Summary**

It was thanks to the mining boom and the influx of foreign mining companies into Burkina Faso that the social responsibility of mining companies gradually became more widespread. The environmental and social concerns arising from mining activities continue to challenge the Burkina Faso government and mining companies to take account of the vulnerability of local communities. The latter have not always received special attention, despite the sacrifices (abandonment of land, migration, loss of values and knowledge, etc.) that they reluctantly make and the suffering that ensues. The protection of human rights and the preservation of the environment are at the heart of the social responsibility of mining companies under Burkina law. However, this responsibility, as enshrined, does little to achieve climate justice.

**Key words:** social responsibility; mining company; human rights; environment, local communities; climate justice; Burkina Faso.

## **Abstract**

*It is thanks to the mining boom and the influx of foreign mining companies in Burkina Faso that the social responsibility of the mining company has gradually spread there. Environmental and social concerns arising from mining activity continue to challenge the Burkinabe State and mining companies to consider the vulnerability of local communities. The latter have not always received special attention, notwithstanding the sacrifices (abandonment of land, migration, loss of values and knowledge, etc.) that they reluctantly consent to and the resulting suffering. The protection of human rights and the preservation of the environment constitute the core of the regime of social responsibility of the mining company in Burkinabe law. However, this responsibility as enshrined, contributes little to the achievement of climate justice.*

**Keywords:** Social Responsibility; Mining Company; Human Rights; Environment; Local Communities; Climate Justice; Burkina Faso.

## Introduction

Burkina Faso was long considered to be primarily an agricultural country<sup>1</sup>, but it joined the ranks of mining countries around fifteen years ago. The start of production at industrial mines in 2007 boosted gold exports to 12,500kg in 2009, making the country a mining nation<sup>2</sup>. The country has significant mining resources<sup>3</sup> discovered after several exploration campaigns carried out since colonial times<sup>4</sup>. In 2021, Burkina Faso had 17 industrial mines and 26 quarries of useful substances in operation<sup>5</sup>. The extractive sector's direct contribution to the state budget is estimated at more than CFAF 322 billion in 2020, and it contributed more than 10% of gross domestic product<sup>6</sup>.

Despite these achievements, there have been protests from the population in mining areas, based on the negative environmental consequences of mining and the poor integration of the mining industry into the local economy<sup>7</sup>. To take account of the major socio-economic development guidelines set out in the Strategy for Accelerated Growth and Sustainable Development (SCADD)<sup>8</sup> and to put an end to these social upheavals, in 2013 the Burkina Faso government adopted a Sectoral Mining Policy<sup>9</sup>. The principles of this policy are to ensure that mining contributes to the socio-economic development of local communities affected by mining activities, to conduct mining activities in such a way as to ensure the preservation and sustainable management of the environment, to rehabilitate mined sites and to take account of the post-mining period. As a result, mining companies have become socially responsible. This responsibility has its legal basis in a series of national, sub-regional, regional and international texts governing Burkina Faso's mining sector.

According to Article 5 of Act No. 036-2015/CNT of 26 June 2015 on the Mining Code of Burkina Faso, a mining company's social responsibility refers to "its responsibility towards the impacts of its decisions and activities on society and the environment through transparent and ethical behaviour that contributes to sustainable development, including the health and well-being of society; takes into account the expectations of its stakeholders; complies with applicable laws and international standards of behaviour; and is integrated throughout the organisation and implemented in its relationships".

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<sup>1</sup> Burkina Faso's economy is mainly based on the primary sector, marked by the predominance of agriculture, which employs nearly 90% of the population: Ministry of Mines and Energy, *Politique sectorielle des mines 2014-2025*, Ouagadougou, 2013, p. 11.

<sup>2</sup> *Ibid.* As at 30 June 2022, total gold production amounted to 30,689.74 kg: Ministry of Mines and Energy, *Bulletin statistique du premier semestre 2022 des mines et des carrières*, Ouagadougou, December 2022, p. 3.

<sup>3</sup> Mining potential includes gold, zinc, copper, manganese, antimony, phosphates, limestone, marble, clay, iron, kaolin, talc, granite, bauxite and sand.

<sup>4</sup> As soon as it gained independence in 1960, Burkina Faso embarked on a deliberate policy to develop the mining sector, which continued until 1996, when it was liberalised: Ministère des Mines et de l'Énergie, *Politique sectorielle des mines 2014-2025, op. cit.*, pp. 31-32.

<sup>5</sup> Ministère de l'Énergie, des Mines et des Carrières, *Secteur de l'énergie et des mines : cap sur la promotion du local content*, MinErgieMag, n° double 00 et 01, January-June 2021, p. 9.

<sup>6</sup> *Ibid.* At 30 June 2022, revenues amounted to CFAF 111,674,118,708: Ministry of Mines and Energy, *Bulletin statistique du premier semestre 2022 des mines et des carrières, op. cit.*, p. 3.

<sup>7</sup> Commission d'enquête parlementaire sur la gestion des titres miniers et la responsabilité sociale des entreprises minières, *Rapport général*, Ouagadougou, 2016, pp. 43-45.

<sup>8</sup> Adopted in December 2010, it is the central reference point for socio-economic development policy.

<sup>9</sup> Decree No. 2014-287/PRES/PM/MME of 15 April 2014 on Sector Policy 2014-2025. This decree amends the 2013 decree.

Does this responsibility, as enshrined, contribute to climate justice? This article examines the obligations of mining companies to respect human rights and protect the environment. Secondly, it examines how this responsibility actually contributes to achieving climate justice. Under Burkina Faso law, the mining company's socio-environmental obligations are formally established (1). However, they make little contribution to climate justice (2).

## **1. Formally established socio-environmental obligations**

These obligations derive from a variety of normative sources (1.1.). The mining company must guarantee the protection of the human rights (1.2.) of local communities and the preservation of the environment in general and the mining environment in particular (1.3.).

### **1.1. Diversified sources of standards**

These instruments are national (1.1.1.), sub-regional, regional and international (1.1.2.).

#### **1.1.1. National instruments**

National legislation includes laws and regulations specific to the mining sector and general legislation applicable to it. Specific legislation includes the Mining Code and its implementing regulations, Act No. 028-2017/AN of 18 May 2017 on the organisation of the marketing of gold and other precious substances, and Act No. 027-2011/AN of 15 November 2011 on the suppression of fraud in the marketing of gold.

Among the general texts, mention should be made of :

- the Constitution of 2 June 1991 as amended by Constitutional Act No. 072-2015/CNT of 5 November 2015,
- Act no. 006-2013/AN of 2 April 2013 on the Environment Code,
- Act No. 003-2011/AN of 5 April 2011 on the environment and the forestry code,
- Law no. 002-2001/AN of 8 February 2001 on water management,
- Law no. 0022-2005/AN of 24 May 2005 on the Public Health Code,
- law no. 23/94/ADP of 19 May 1994 on the public health code,
- Act no. 025-2018/AN of 31 May 2018 on the Criminal Code,
- Act no. 028-2008/AN of 13 May 2008 on the Labour Code,
- Act no. 034-2012/AN of 2 July 2012 on agrarian and land reorganisation,
- Act no. 034-2009/AN of 16 June 2009 on rural land tenure,
- Act no. 055-2004/AN of 21 December 2004 on the General Code of Local Authorities.

With 215 articles divided into 19 titles, the Mining Code is the central instrument of the internal system. However, it is supplemented by a range of external instruments.

### 1.1.2. Sub-regional, regional and international instruments

At sub-regional and regional level, these include Regulation No. 18/2003/CM/UEMOA of 22 December 2003 adopting the UEMOA Community Mining Code, ECOWAS Directive No. C/DIR3/05/09 of 27 May 2009 on the harmonisation of guiding principles and policies in the mining sector, and the Treaty of 17 October 1993 on the Harmonisation of Business Law in Africa, together with its Uniform Acts. At international level, Burkina Faso is committed to the Extractive Industries Transparency Initiative (EITI)<sup>10</sup>, the Kimberley Process<sup>11</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 16 December 1966<sup>12</sup>. In addition to the environment, human rights are at the heart of the legal framework applicable to Burkina Faso's mining sector.

### 1.2. Protecting the human rights of local communities

The mining company must ensure community development. Under the terms of Article 2 of the Mining Code, this means sustainable development based on the constant improvement of living conditions for local populations (1.2.1.) and respect for human rights (1.2.2).

#### 1.2.1. Respect for human rights

Mining companies are obliged to protect social rights when carrying out their mining activities, particularly during reconnaissance, exploration, prospecting, research or exploitation of mineral substances, processing, transport, transformation and marketing operations. Under the terms of article 20 of the Mining Code, "holders of mining titles or authorisations and other commercial entities involved in mining operations shall conduct their activities with due regard for the human rights of the populations affected [...]". Social rights fall into the category of second-generation human rights. These are "economic, social and cultural rights"<sup>13</sup>. The ICESCR is without doubt the most comprehensive international legal framework for the protection of social rights. Among other things, it recognises the right to work and to social security<sup>14</sup>, the right to family protection<sup>15</sup>, the right to an adequate standard of living and the right to be free from hunger<sup>16</sup>, the right to health<sup>17</sup>, and the right to education<sup>18</sup>.

Mining activity must therefore not constitute an obstacle to the effectiveness of the social rights of populations likely to be directly or indirectly affected by it. To this end, the mining company has an obligation to create all the conditions and implement all the policies likely to guarantee full respect for these rights.

Article 19 of the Mining Code also states that the State is the guarantor of human rights and that it must fulfil its obligations to respect, protect and fulfil. To this end, it

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<sup>10</sup> Burkina Faso became an EITI Compliant Country on 27 February 2013. The EITI aims to strengthen governance by improving transparency in the extractive sector.

<sup>11</sup> Created in May 2000 in Kimberley, South Africa, this process was endorsed by the UN in 2000. It is an international system for certifying rough diamonds. Burkina Faso does not currently produce any.

<sup>12</sup> Burkina Faso ratified it on 4 January 1999.

<sup>13</sup> D. Roman, "L'opposabilité des droits sociaux", *Informations sociales*, no. 178, 2013, p. 33.

<sup>14</sup> ICESCR, articles 6 and 9.

<sup>15</sup> *Ibid*, article 10.

<sup>16</sup> *Ibid*, article 11.

<sup>17</sup> *Ibid*, article 12.

<sup>18</sup> *Ibid*, articles 13 and 14.

must "put in place, by regulation, a system for preventing and, where appropriate, remedying human rights violations against affected communities recorded in the context of mining activities". The mining company must therefore comply with this system at every stage of its mining activity, throughout the entire period of operation of the mine. In respecting human rights, the company must ensure that the living conditions of local communities are constantly improved.

### **1.2.2. Constantly improving living conditions**

The mining company must conduct its activities in a way that safeguards the right of local communities to an adequate standard of living. It must ensure the constant improvement of their living conditions<sup>19</sup>. To this end, it must create direct jobs for these communities and guarantee the promotion of employment for local managers in both skilled and unskilled jobs. This commitment is decisive for the government of Burkina Faso, which grants research, exploration and exploitation licences on this basis. Under the terms of article 41 of the Mining Code, "the application for an industrial exploitation permit for a large or small mine shall be accompanied by a feasibility study including a training and skills transfer plan for local managers and staff, a promotion system for these managers and staff [...]". Article 102 para. 3 provides further clarification when it states that :

"The company is required to respect progressive quotas of local jobs according to the different levels of responsibility. A decree issued by the Council of Ministers establishes the nomenclature of positions and the local employment quotas required according to the life cycle of the mine". In addition to a good distribution of jobs, the positions offered must allow for permanent and equitable recruitment of local labour and comply with the provisions of the Labour Code<sup>20</sup>.

Article 41 also states that the company must ensure that its activity is anchored in the local and national economy. The socio-economic impact of the mine at national level in general and at local level in particular must be clearly visible. To this end, the company must pay the various taxes and royalties established for the benefit of local communities or from which they benefit indirectly. These include surface taxes, aggregate extraction taxes, taxes for occupying the State's public domain, taxes on crushers and taxes on pits. Throughout the life of the mine, local communities must benefit from the social expenditure incurred by the company, in particular through the purchase of local goods and services, the construction of infrastructure and equipment (boreholes, water reservoirs, roads, schools, health and maternity centres, etc.), compensation for damage caused, etc.

Article 25 of the Mining Code also establishes the Fonds minier de développement local (mining fund for local development), with the aim of constantly improving the standard of living of local communities. Mining companies are obliged to contribute to the Fund. The Fund is used to finance local and regional development plans. It is financed by a contribution from the State of 20% of the proportional royalties collected, linked to the value of the products extracted and/or sold, and from holders of mining permits and industrial quarrying authorisations of 1% of their turnover.

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<sup>19</sup> Article 20 of the Mining Code.

<sup>20</sup> Article 102, paragraph 1 of the Mining Code.

or the value of products extracted during the month<sup>21</sup>. In addition to human rights, the mining company must ensure the protection of the mining environment.

### 1.3. Protecting the mining environment

The mining company has a general obligation to protect the environment (1.3.1.) during site exploitation and to rehabilitate exploited sites (1.3.2.).

#### 1.3.1. The general obligation to protect the environment

Article 139 para. 1 of the Mining Code states that "mining activities shall be conducted in such a way as to ensure the preservation and sustainable management of the environment under the conditions and procedures established by the regulations in force". In the same vein, article 142 subjects mining companies "[...] to the general legislative and regulatory provisions in force, in particular those relating to the preservation and sustainable management of the environment, classified establishments [...], nuclear safety and security". This means that, in addition to complying with the Mining Code, the company is required to comply with general legislative instruments. Secondly, mining activities must take into account the regulations governing classified establishments. In short, mining is subject to national and international environmental protection provisions.

The obligation to protect the environment applies to all stages of mining activity as defined by article 2 of the Mining Code. This includes all operations relating to prospecting, research and the exploitation of mineral deposits, as well as the treatment, transport, processing, marketing and saving of the said substances, with the exception of water and liquid and gaseous hydrocarbons.

The mining company is personally liable for its obligations. It may not delegate this responsibility<sup>22</sup>. This responsibility can only end with the issue of an environmental discharge by the Minister of the Environment. "The environmental discharge is the administrative act [...], which recognises that the holder of a mining title or the beneficiary of an administrative authorisation issued pursuant to the Mining Code has fulfilled all its environmental obligations, in particular those defined by the environmental impact studies and notices approved by the environmental authorities"<sup>23</sup>.

In order to identify and assess the negative or positive impact of mining activities on the environment in the short, medium and long term, mining companies are required to produce an environmental impact statement (NIE) or an environmental impact study (EIS). As part of the application for a mining permit, the applicant is required to provide an EIS or NIE<sup>24</sup>. An EIS is required for any mine with a production capacity of one hundred tonnes or more of ore per day and for any mine producing uranium or other radioactive elements, regardless of its production level<sup>25</sup>. The NIE is required for mines,

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<sup>21</sup> Since 2019, the Fund has raised 20 billion CFA francs annually: Ministère de l'Énergie, des Mines et des Carrières, *Secteur de l'énergie et des mines : cap sur la promotion du "local content"*, *op. cit.*, p. 11.<sup>22</sup> Décret n°2007-853/PRES/PM/MCE/MECV/MATD du 26 décembre 2007 portant dispositions réglementaires environnementales particulières pour l'exercice de l'activité minière au Burkina Faso, article 4.

<sup>23</sup> *Ibid*, article 5.

<sup>24</sup> Article 41 of the French Mining Code and article 7 of Decree no. 2007-853.

<sup>25</sup> Decree no. 2007-853, article 7.



other than mines producing uranium or any other radioactive element, with a daily ore production of less than one hundred tonnes per day.

Article 120 of the Mining Code allows the State to set up environmental protection zones within prospecting, exploration or mining areas. These zones are defined around sensitive areas such as villages, engineering structures, roads, cultural or religious sites, classified areas, etc., within which mining activity is subject to certain conditions or prohibited for reasons of public utility or general interest. After mining, the company must rehabilitate the sites.

### **1.3.2. Rehabilitation of mining sites**

The purpose of rehabilitation is to decontaminate the site, restore arable land to the site of mined workings and regenerate the vegetation cover, or prepare the site for another use. To this end, article 141 of the Mining Code requires holders of mining titles to open and maintain a trust account at the Central Bank of West African States (BCEAO) or a commercial bank in Burkina Faso, which will be used to set up a fund to cover the costs of implementing the environmental preservation and rehabilitation programme. The fund is called the Mine Rehabilitation and Closure Fund<sup>26</sup>. It is financed by an annual contribution from holders of operating permits or beneficiaries of industrial quarrying authorisations, based on the estimated costs of implementing the environmental preservation and rehabilitation programme.

The ministries responsible for mines, the environment and finance produce an exhaustive and comprehensive joint annual report on the state and management of the site. An environmental discharge can only be issued once the site has been rehabilitated. In Burkina Faso, social responsibility in the mining sector, as enshrined, does little to help achieve climate justice.

## **2. Social responsibility makes little contribution to climate justice**

Community development is still latent (2.1.) despite the mining boom. Civil mining litigation is also underdeveloped (2.2.). Recommendations (2.3.) are needed.

### **2.1. Community development still latent**

The achievements of mining companies in implementing their responsibilities (2.1.1.) remain derisory<sup>27</sup>. Indeed, the benefits of mining for local communities are low (2.1.2.).

#### **2.1.1. The implementation by mining companies of their responsibilities**

In implementing their responsibility, mining companies sometimes have their own action plans. Some companies have set up foundations for this purpose. These include Nantou Mining in Perkoa, Société des Mines de Bélahourou in Inata and SEMAFO.

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<sup>26</sup> Article 27 of the Mining Code.

<sup>27</sup> Parliamentary Commission of Inquiry into the Management of Mining Titles and the Social Responsibility of Mining Companies, *op. cit.*, p. 71.



Mana, with the "Nantou", "Avocet" and "SEMAFO" foundations respectively. Some of these foundations have experienced difficulties in their operations, leading to the suspension of their activities.

In carrying out their activities, some companies, unlike others, take into account communal development plans. These are the development strategies of decentralised local authorities, i.e. the communes. Mining companies are not obliged to monitor these plans, as they are not required to do so in their specifications. They are only obliged to contribute, as they should, to the Mining Fund for Local Development, which is earmarked to finance these plans. However, most companies carry out actions that are indirectly part of these plans. These include job creation, infrastructure development, etc.

The achievements of mining companies do not follow a community development guide. The main reason is that there really is no such thing in Burkina Faso. The concept of community development goes beyond respect for human rights and environmental protection. It is a strategy for implementing activities aimed at improving living standards, based on the participation of the population concerned. It is a form of development that aims to be endogenous. Local communities can organise themselves effectively to define their priorities and solve their development problems. Mining companies must take more action in this direction, given that the benefits of their activities remain low.

### 2.1.2. Minor mining spin-offs for local communities

Mining companies do not promote the supply of local goods and services. The supply market is awarded to a few approved subcontractors who prefer to source their supplies from the capital, to the detriment of local producers and suppliers. Also, most of the subcontracting companies are of foreign origin, which does not encourage the emergence of local companies and industries in the mining goods and services chain. On 22 September 2021, the Council of Ministers adopted a decree laying down the conditions for local supply in the mining sector<sup>28</sup>. This decree promotes *local content*. Accordingly, mining companies must give preference to Burkinabè companies and individuals for any contract for the provision of services or the supply of goods on equivalent terms in terms of price, quality and deadlines. It also appears that mining companies do not do enough to promote local employment<sup>29</sup>. There are also major disparities between the salaries paid to locals and expatriates.

At Perkoa in the province of Sanguié, the housing built by Nantou Mining to rehouse people who had been evicted took no account of their customs or household size. The people deserted these settlements to build new ones at their own expense<sup>30</sup>. Some mining companies found themselves obliged to carry out two population resettlement plans linked to substandard housing construction (at Essakane) or to the demands of the population (at Bissa Gold). At Niankorodougou, the mining company offered compensation that fell short of the value of the fields and plants destroyed, in addition to the cost of the land.

<sup>28</sup> This decree implements article 101 of the Mining Code.

<sup>29</sup> At 30 June 2022, only 10,634 direct jobs had been created by mining companies: Ministry of Mines and Energy, *Bulletin statistique du premier semestre 2022 des mines et des carrières*, *op. cit.*, p. 3.

<sup>30</sup> Parliamentary Commission of Inquiry into the Management of Mining Titles and the Social Responsibility of Mining Companies, *op. cit.*, p. 57.

delays in compensation payments<sup>31</sup>. Some companies come to the end of their operations without having been able to rehabilitate the environment that they contributed to degrading. Notwithstanding all this damage, environmental civil litigation is very underdeveloped.

## 2.2. Very little civil mining litigation

Civil mining litigation presupposes the existence of a loss suffered by an individual as a result of environmental damage caused by mining activity. Apart from labour disputes, Burkina Faso courts are rarely called upon to hear mining disputes (2.2.1.), despite the increasing number of conflicts over use (2.2.2.).

### 2.2.1. Little use made of Burkina Faso judges

The challenge in civil mining litigation is to compensate for the damage suffered by establishing the liability of the mining company. In addition to their inability to oppose public policies, local communities are likely to struggle to make their voices heard before the courts in Burkina Faso. Explanations for this include the privilege given by the Burkina Faso government and mining companies to non-contentious procedures for settling disputes and misunderstandings; the sporadic actions taken by companies in an attempt to calm the climate; and the communication strategy of certain companies.

Internal non-contentious procedures concern, firstly, administrative police measures designed to ensure public order and safety by preventing environmental damage. Secondly, they concern the repression by the administration of damage caused to the environment. Finally, they involve the amicable settlement of disputes without recourse to the courts. The administration's power of repression can be exercised through administrative sanctions<sup>32</sup> or through a transaction<sup>33</sup>. Consultation and international negotiation are also procedures favoured by the State and companies.

By way of appeasement, some companies are recruiting irregularly, in particular on 3-month fixed-term contracts for unskilled temporary jobs<sup>34</sup>. Others, as a sign of good faith, are committed to increasing the number of social projects, in particular the construction of infrastructure.

Communication strategy is the key for some companies to avoid any mining-related disputes and any possible recourse to the courts. For example, the Bissa Gold mining company has adopted a local communication strategy. This involves setting up village consultation committees in the five villages most affected by the project, bringing together all the different sensitivities<sup>35</sup>. These committees act as an interface between

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<sup>31</sup> *Ibid.*, p. 58.

<sup>32</sup> These include: administrative fines, suspension of activities and closure of establishments, withdrawal of permits, seizure, confiscation and destruction, and restoration of the site to its original state: Environment Code, article 103.

<sup>33</sup> This is "an out-of-court settlement by which the environmental authorities offer the perpetrators of an offence the possibility of abandoning criminal proceedings or waiving enforcement of a court decision in return for payment of a sum of money, the amount of which they themselves determine": *ibid.* article 116 et seq.

<sup>34</sup> Parliamentary Commission of Inquiry into the Management of Mining Titles and the Social Responsibility of Mining Companies, *op. cit.*, p. 49.

<sup>35</sup> NordGold Bissa, *Quarterly information and communication bulletin*, no. 006, 2013, p. 6.



the company and communities on all sensitive issues relating to mining. However, all these measures have not prevented the proliferation of conflicts of use.

### 2.2.2. An increase in conflicts of use

A number of examples illustrate the dissatisfaction of local communities with the consequences of mining activities. Here are just a few examples. In November 2012, young people in the rural commune of Sabcé in the Centre-Nord region demonstrated against the recruitment of non-native workers by Bissa Gold at a time when the local population was out of work. The movement was suspended after the company opened part of its fence to allow farmers access to their fields<sup>36</sup>. In 2021, people in the village of Zandkom, also in the same commune, interrupted the company's mining activities to demand that it build the village church, secondary school and teachers' accommodation before resuming mining.

In 2019, the facilities of the Youga gold mine in the Centre-East region were attacked by a disgruntled mob after a peasant was shot dead by a mine security guard. This incident came on top of weeks of tension. Local people were complaining that their land was being taken over without any improvement in their living conditions<sup>37</sup>.

More recently, on 17 May 2022, the machinery and buildings of Houndé Gold Operation in the Hauts-Bassins region went up in smoke following a demonstration by gold miners accusing the company of monopolising their gold mining area<sup>38</sup>. Recommendations are needed to ensure effective climate justice.

### 2.3. A few recommendations

With regard to the national legal framework applicable to the mining sector, Burkina Faso's legislator, with the support of the executive, must ensure that all its shortcomings are corrected in order to make it more appropriate, more precise and more attractive. This applies to most legislation, especially the Mining Code. The latter is currently being reviewed at<sup>39</sup>. An appropriate framework will help, among other things, to make the State itself, companies and all players in the mining sector more accountable in the face of the challenge of climate change; to make it easier for mining to become an integral part of the national economy; and to make it easier to monitor.

This legal framework must now be followed to the letter. For example, Article 27 of the Mining Code provides for the publication by the ministries responsible for mines, the environment and finance of an exhaustive and comprehensive joint annual report on the status and management of the Mine Rehabilitation and Closure Fund. In practice, however, the report in question is not published.

With regard to the loss of revenue to the State budget due, among other things, to fraud and misrepresentation by companies of their production, it is important to analyse other factors, such as

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<sup>36</sup><https://libreinfo.net/exploitation-miniére-au-burkina-situation-tendue-entre-les-populations-de-sabce-et-bissa-gold>.

<sup>37</sup><https://sig.bf/2019/08/drame-a-la-miniére-dor-de-youga-le-gouvernement-appelle-les-populations-du-village-de-youga-aucalme-et-a-la-retenué/>.

<sup>38</sup> <https://burkina24.com/2022/05/17/exploitation-miniére-au-burkina-chaude-journée-a-houndé-gold-operation>.

<sup>39</sup> The national workshop to validate the draft mining code was held on 2 June 2023.

sources of data on production other than those derived from company declarations. Government departments (customs, tax, environment, mining, local authorities) must step up their control and monitoring of mining activity.

With regard to the limited benefits for local communities, the government of Burkina Faso must take into account the vulnerability of these communities to the harmful effects of climate change and strengthen their rights of access to environmental assets. It must also ensure that the various mining funds are managed transparently and fairly. All of this will help to guarantee climate justice, but above all it will prevent this frustration from becoming a gateway to the terrorist activity that we are already experiencing so painfully.



The next issue of RADE will focus on  
theme

**"Plastic pollution in African law**

