THE ROLE OF THE AFRICAN HUMAN RIGHTS SYSTEM IN ADVANCING CORPORATE ACCOUNTABILITY IN THE EXTRACTIVE INDUSTRIES

Submitted in fulfilment of the requirements of the degree

DOCTOR OF LAWS (LLD)

By

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Declaration of originality

I, ***Chairman Okoloise*****,** bearer of student number **u15395652**, declare that:

1. I understand what plagiarism is and I am well aware of the University's policy in this regard.
2. This thesis titled '*The role of the African human rights system in advancing corporate accountability in the extractive industries*' is my original work. I have given due acknowledgment and referenced all sources used in the course of my writing (whether printed, online or other sources) in accordance with the requirements of the Centre for Human Rights, Faculty of Law.
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.....

MC Okoloise (DAAD Scholar)

LLD Candidate

.....

M Killander (Professor)

Supervisor

Dedication

The Almighty Creator

- Father, Son and Holy Spirit – the One and only true justice giver

All victims

of ongoing and past corporate exploitation and violations in the extractive industries in Africa and the world over, including Ken Saro-Wiwa, Baribor Bera, Barinem Kiobel, Daniel Gbooko, Felix Nuate, John Kpuine, Paul Levera, Saturday Dobee, victims of the Kilwa and Marikana massacres, communities poisoned by toxic spills, children born with birth defects arising from exposure to pollution, and the workers who have prematurely died on duty or been permanently disfigured due to corporate negligence - my heart bleeds for you

Dr Thomas O Okoloise

of blessed memory, who would have been so proud

My loving family

Centre for Human Rights

University of Pretoria, for this unexpectedly golden PhD opportunity

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To all of you, I say a big 'THANK YOU'!

Chairman Okoloise
PRETORIA, South Africa
28 December 2020

Abbreviations

2nd Cir	Second Circuit
3TG	Tantalum, tin, tungsten and gold
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
All ER	All England Law Reports
All NLR	All Nigeria Law Reports
AMD	Acid mine drainage
AMGF	African Minerals Governance Framework
AMV	African Mining Vision
APDH	Actions Pour la Protection des Droits de L'Homme
ASEAN	Association of South East Asia Nations
ATS	Alien Tort Statute
AU	African Union
AU Assembly	Assembly of the African Union
BITs	Bilateral investment treaties
CAMS	Corporate Accountability Monitoring System
Cap	Chapter
CCCMC	Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters
CERES	Coalition for Environmentally Responsible Economies
CESCR	Committee on Economic, Social and Cultural Rights
Cf	Cross reference
CHR	United Nations Commission for Human Rights
CO2	Carbon Dioxide
CoE	Council of Europe
CRT	Caux Round Table
CSOs	Civil society organisations
CSR	Corporate social responsibility
CTC	United Nations Commission on Transnational Corporations
DC Cir	United States Court of Appeals for the District of Columbia Circuit
DDC	United States District Court for the District of Columbia
DRC	Democratic Republic of Congo
EAC	East African Community
ECCJ	Economic Community of West African States Community Court of Justice

ECOSOC	United Nations Economic and Social Council
ECOSOCC	African Union Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
ECSLR	East Central State Law Reports
EITI	Extractive Industries Transparency Initiative
ESG	Environmental, social and governance
Et al	And others
ETO	Extraterritorial obligations
EU	European Union
EUR	Euro
EWHC	England and Wales High Court
FATCA	Foreign Account Tax Compliance Act
FCPA	Foreign Corrupt Practices Act (United States)
FDIs	Foreign Direct Investments
FPIC	Free, Prior and Informed Consent
FQM	First Quantum Minerals
FREP	Fundamental Rights (Enforcement Procedure) Rules (Nigeria)
FSI	Fragile State Index
GATT	General Agreements on Tariffs and Trade 1994
GDP	Gross domestic product
GDPR	General Data Protection Regulation
GHI	Global Hunger Index
GSRM	Guidelines for Social Responsibility in Outbound Mining Investments (Chinese)
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
HRC	United Nations Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Committee for the Settlement of Investment Disputes
IFC	International Finance Corporation
IFFs	Illicit financial flows
IGOs	Inter-governmental organisations
IHRDA	Institute for Human Rights and Development in Africa
IIA	International investment agreements
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monetary Fund

Inter-Am Ct HR	Inter-American Court on Human Rights
IoDSA	Institute of Directors in Southern Africa
IOE	International Organisation of Employers
ISOA	International Stability Operations Association
JVCs	Joint venture contracts
KCM	Konkola Copper Mines
LBI	Legally binding instrument
LFN	Laws of the Federation of Nigeria
LLB	Bachelor of Laws
LLD	Doctor of Laws
LPELR	Law Pavilion Electronic Law Reports
MITs	Multilateral investment treaties
MOSOP	Movement for the Survival of Ogoni People
MSA	Modern Slavery Act
NAPs	National Action Plans on Business and Human Rights
ND Cal	Northern District of California District Court
NgHC	Nigerian High Court
NGO	Non-governmental organisation
NHRIs	National human rights institutions
NIEO	New International Economic Order
NWLR	Nigerian Weekly law Reports
OAS	Organization of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development
OEIGWG	Open-ended Intergovernmental Working Group
OPL	Oil prospecting licence
PCIJ	Permanent Court of International Justice
PIB	Petroleum Industry Bill
PLHIV	People living with HIV
PSAs	Production sharing agreements
QB	Queen's Bench Division
RECs	Regional economic communities
RGI	Resource Governance Index
RSLR	River State Law Reports
S Ct	Supreme Court of the United States
SADC	Southern African Development Community
SAPs	Structural Adjustments Programmes
SC	Judgments of the Supreme Court of Nigeria
SCNJ	Supreme Court of Nigeria Judgments

SDNY	Southern District of New York District Court
SEC US	Securities and Exchange Commission
Ser	Series
SERAC	Social and Economic Rights Action Centre
SERAP	Social and Economic Rights Action Project
SI	Statutory Instrument
SIFORCO	Société Industrielle et Forestière du Congo
SLAPPs	Strategic lawsuits against public participation
SPDC	Shell Petroleum Development Corporation
SRGPs	State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Human Rights and the Environment
SRSG	United Nations Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises
TCC	Technology and Construction Court
TNCs	Transnational corporations
TVPA	Torture Victims Protection Act
TWAIL	Third World Approach to International Law
UK	United Kingdom
UMA	Arab Maghreb Union
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UNGPs	United Nations Guiding Principles on Business and Human Rights
US	United States
USD	United States Dollars
USSC	United States Supreme Court
WBG	World Bank Group
WGEI	Working Group on Extractive Industries, Environment and Human Rights Violations in Africa
WGES	Working Group on Economic, Social and Cultural Rights in Africa
WGIP	Working Group on Indigenous Populations or Communities and Minorities in Africa
WTO	World Trade Organisation
ZAGPJHC	South Africa: South Gauteng High Court, Johannesburg
ZCCM	Zambia Consolidated Copper Mines

The history of oil [gas and mineral] extraction

In Africa is one of greed, complicity,

Destruction of livelihoods and natural habitats,

And Human rights violations.

- The Green Connections
  Oil and gas exploration

THESIS TITLE:

THE ROLE OF THE AFRICAN HUMAN RIGHTS SYSTEM IN ADVANCING CORPORATE ACCOUNTABILITY IN THE EXTRACTIVE INDUSTRIES

Abstract

For over a century, corporations engaged in the extractive industries in Africa have operated without ethical rules. They have been notoriously fingered for rampant environmental, labour, health and human rights violations, including land despoliation, forced displacement, environmental pollution, cultural infringements and, sometimes, deaths. While the responsibility for regulating companies and protecting human and peoples' rights primarily rests with states, they have often been unable or unwilling to do so effectively. Amidst these persisting challenges, the phenomenal rise of transnational corporations in the global economy have rendered more complex the gaps in global governance by presenting new challenges that make territorial regulation by single countries impracticable. While victims groan, contestations about the human rights obligations of corporations have allowed extractive and other companies to fly below the radar of accountability; thereby, enabling extractive businesses to ride roughshod over communities and the environment. After several United Nations-led initiatives to address the adverse impacts of corporations, they have proven insufficient to hold companies accountable for violations in the extractive sector.

This thesis, therefore, is a dispassionate attempt to explore the role of the African regional human rights system as an important complementary level of normative and institutional governance for regulating abusive corporate conduct and advancing human rights accountability in the extractive industries. It adopts an African approach to corporate human rights accountability in critically evaluating the contours of the corporate accountability discourse. It problematises the near-total reliance on inadequate domestic action in host states for regulating powerful corporate conglomerates in this age of globalisation and highlights the limits of extraterritorial regulation by home states in addressing transborder abuses. After a careful assessment, it finds that African human rights norms and regional mechanisms can play a key part in regulating abusive corporate practices and protecting the human rights and environmental wellbeing of resource-rich communities affected by the extractive industries in Africa.

Key words: Corporate accountability, Extractive industries, Human rights, Regulation, Remedies, African human rights system

Table of Contents

Table of Figures

List of Tables

Setting the scene

1.1 Background and problem statement

For many decades, corporations engaged in the extractive industries in Africa have operated outside the rules, often flouting regulations and taking little or no precautions to minimise the adverse impacts of their activities on individuals, local populations, and the environment. They have been cited for many human rights abuses including environmental pollution, poor labour and health conditions, widening inequality, inflaming armed conflicts, and complicity in the execution of human rights and environmental activists.[1] From Nigeria's Niger Delta region to Kilwa in the Democratic Republic of the Congo (DRC) and from the Copperbelt in Zambia to the rich gold and platinum mines of South Africa, the activities of extractive corporations prominently illustrate devastating examples of corporate abuses with little or no accountability.[2] The 'escalating charges' of reprehensible corporate

[1] C Okoloise 'Contextualising the corporate human rights responsibility in Africa: A social expectation or legal obligation' (2017) *African Human Rights Yearbook* 191 196; Amnesty International *A criminal enterprise? Shell's involvement in human rights violations in Nigeria in the 1990s* (2017) 7; Amnesty International 'Investigate Shell for complicity in murder, rape and torture' 28 November 2017 <https://www.amnesty.org/en/latest/news/2017/11/investigate-shell-for-complicity-in-murder-rape-and-torture/> (accessed 26 December 2017); NMC Jägers & MJC Van der Heijden 'Corporate human rights violations: the feasibility of civil recourse in the Netherlands' (2008) 33 *Brooklyn Journal of International Law* 833 833-834; M Winston 'Corporate responsibility for preventing human rights abuses in conflict areas' in JG Frynas & S Pegg (eds) *Transnational corporations and human rights* (2003) 79-98; B Stephens 'The amorality of profit: Transnational corporations and human rights' (2002) 20 *Berkeley Journal of International Law* 45.

[2] E Cairncross & S Kisting 'Platinum and gold mining in South Africa: The context of the Marikana massacre' (2016) *New Solutions: A Journal of Environmental and Occupational Health Policy* 513 515; L London & S Kisting 'The extractive industries: can we find new solutions to intractable problems' (2015) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 421 422; AL Shinsato 'Increasing the accountability of transnational corporations for environmental harms: the petroleum industry in Nigeria' (2005) 4 *Northwestern Journal of International Human Rights* 186 189.

conduct, Ruggie aptly states, 'are the canary in the coal mine, signalling that all is not well.'[3]

While the opportunities for a comprehensive regime of corporate regulation and human rights accountability exist primarily at the domestic level, several prevailing factors limit the regulatory reach of states over transnational corporations (TNCs) in Africa.[4] Domestic legislation, for example, are by themselves incapable of universal application; and weak state institutions in Africa often fail to holistically and effectively regulate the human rights violations by corporate actors. For many reasons that are explained in the literature and cascading chapters, domestic systems – host states and home states - are often either unable or unwilling to regulate TNCs.[5] Where they manage to regulate, such regulations are limited to the territory to which they apply and the circumstances of their enforcement. With a limited capacity to regulate, domestic law and enforcement often prove ineffective against the multinational and fluid character of powerful corporations. These factors exacerbate the difficulties in holding corporations to account and significantly limit the extent to which victims of abuses may seek remedies domestically.

Beyond the regulatory and remedial lapses of host and home states, international corporate accountability faces tremendous governance deficits at the global level.[6] The inability of United Nations (UN) human rights standards to directly regulate corporate abuses in any substantive way limits the effectiveness of its mechanisms in remediating corporate wrongs and ensuring that businesses account for abusive conduct or be sanctioned.[7] The adoption of voluntary initiatives such as the UN Global Compact 2000 and 'soft' law instruments applicable to business like the UN 'Protect, Respect and Remedy' Framework 2007 (Ruggie Framework) and the UN Guiding Principles on Business and Human Rights 2011 (UNGPs) that set standards of human rights due diligence for businesses, have in no significant manner equipped

[3] UN Human Rights Council UN Doc A/HRC/8/5 'Protect, respect and remedy: A framework for business and human rights – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (7 April 2008) para 2.

[4] E Oshionebo *Regulating transnational corporations in domestic and international regimes: An African case study* (2009) 251.

[5] A Ramasastry 'Closing the governance gap in the business and human rights arena: lessons from the anti-corruption movement' in S Deva & D Bilchitz (eds) *Human rights obligations of business: Beyond the corporate responsibility to respect?* (2013) 162 164.

[6] P Simons & A Macklin *The governance gap: Extractive industries, human rights, and the home state advantage* (2014) 178.

[7] S Droubi 'Transnational corporations and international human rights law' (2016) 6 *Notre Dame Journal of International Comparative Law* 119 121.

individuals and communities with any functional basis for enforcing claims against corporations.[8] The essentially state-focal nature of UN mechanisms and special procedures as well as the lack of support for the treaty process on business and human rights by most industrialised states of the Global North dash any hopes that there will be any strong regime of corporate human rights accountability at the UN level any time soon.[9]

These fundamental governance gaps in regulating abusive corporate actions and remediating victims of corporate abuses even more necessitate 'that new and more effective accountability mechanisms need to be invented or perfected.'[10] This thesis makes a case for strengthening or 'perfecting' the steadily increasing role of the African regional human rights treaty mechanisms as important supplementary means for advancing corporate accountability in the extractive industries in Africa, where domestic systems fail to address corporate abuses.

To effectively demonstrate the magnitude of the problem, I adopt two levels of analysis in this section. First, I will consider the domestic regime of corporate regulation and protection of victims of human rights abuses at the hands of corporations in Africa to determine: (a) the scope of corporate impunity, (b) the (in)efficiency of domestic regulation, and (c) the (un)availability, (in)adequacy, or (in)effectiveness of domestic remedies. At the same time, I will briefly assess the challenges of extraterritorial regulation of corporations by the home state and the procedural difficulty faced by victims in seeking justice in foreign jurisdictions. Secondly, I will consider the increasing role of the African regional human rights system, its direct engagement with non-state actors and its bourgeoning criminal justice system in advancing stronger corporate accountability in Africa.

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[8] B Santoso 'Justice business – Is the current regulatory framework an adequate solution to human rights abuses by transnational corporations' (2017) 18 *German Law Journal* 533; JG Ruggie *Just business: Multinational corporations and human rights* (2013) 171; J Nolan 'The corporate responsibility to respect human rights: soft law or not law' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 138 157; S Deva 'Human rights violations by multinational corporations and international law: where from here?' (2003) 19 *Connecticut Journal of International Law* 1.

[9] LC Backer 'Shaping a global law for business enterprises: framing principles and the promise of a comprehensive treaty on business and human rights' (2017) 42 *North Carolina Journal of International Law* 417 423-427; J Ruggie 'The past as prologue? A moment of truth for UN business and human rights treaty' 8 July 2014 <https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre> (accessed 28 April 2018).

[10] D Baumann-Pauly & J Nolan (eds) *Business and human rights: From principles to practice* (2016) 239; J Nolan 'With power comes responsibility: human rights and corporate accountability' (2005) 28 *University of New South Wales Law Journal* 581 582.

Across Africa, the human rights violations by corporations operating in the extractives industries sector leave sore ironies of pro-development investments that have become nightmares for individuals and communities alike. In the oil and gas industry and in the mining sector, the unsupervised pursuit of commercial objectives often leads to serious consequences for victims with little or no accountability. Within the internal operations of extractive corporations, violations of labour rights manifest in the form of inappropriately low wages, the non-provision of personnel protective equipment, gender discrimination (including disparate remuneration between women and men), child labour, forced labour, and other subtle forms of modern slavery.[11] Externally, corporate violations have been more palpable in the context of land grabs, forced displacement, environmental degradation and pollution (including the destruction or contamination of the food and water sources of local populations), and the transgression of the spiritual and cultural heritages of communities. Where corporations have not been directly involved in human rights violations, corruption and tax evasion,[12] they have been complicit in violations perpetrated by state actors as have been witnessed in the Kilwa massacre in the DRC and the brutal suppression of environmental rights activists in the Niger Delta region of Nigeria.[13]

For the victims, the inability to seek justice and demand accountability against an increasingly insensitive power broker – the corporation - raises deep questions about the effectiveness of the human rights corpus altogether.[14] Domestically, fundamental legal and institutional dysfunction hinder the ability of victims to ventilate their human rights grievances or seek redress against corporations. Under international human rights law, states have the primary

[11] IM Borges 'The responsibility of transnational corporations in the realization of children's rights' (2016) 5 *University of Baltimore Journal of International Law* 1; D Raigrodski 'Creative capitalism and human trafficking: a business approach to eliminate forced labor and human trafficking from global supply chains' (2016) 8 *William & Mary Business Law Review* 71.

[12] D Hess & T Dunfee 'Taking responsibility for bribery: The multinational corporation's role in combatting corruption' in R Sullivan (ed) *Business and human rights: Dilemmas and solutions* (2003) 260.

[13] JG Frynas 'The oil industry in Nigeria: Conflict between oil companies and local people' in JG Frynas & S Pegg (eds) *Transnational corporations and human rights* (2003) 99-114; Winston (n 1 above) 79.

[14] U Idemudia 'Corporate-community engagement strategies in the Niger Delta: Some critical reflections' (2014) 1 *The Extractive Industries and Society* 154 155, 159-160; N Logan 'Corporate voice and ideology: An alternate approach to understanding public relations history (2014) 40 *Public Relations Review* 661 664; JJ McMillan 'Why corporate social responsibility? Why now? How?' in S May, G Cheney & J Roper (eds) *The debate over corporate social responsibility* (2007) 1 19; P Dahler-Lars 'Corporate culture and morality: Durkheim-inspired reflections on the limits of corporate culture' (1994) 31 *Journal of Management Studies* 1 11.

responsibility to protect human rights within their territories, including from the damaging activities of corporate actors.[15] However, due to the structural and institutional weakness of many African states, widespread corruption and freezing clauses in international investment agreements (IIAs), African governments are often either unable or unwilling to effectively regulate powerful corporations.[16] This state of weak regulation and lack of accountability ensure that 'local legal remedies are often absent or not efficient.'[17]

Despite ratifying and, in some cases, domesticating the African Charter on Human and Peoples' Rights 1981 (African Charter) and other important regional and UN human rights instruments, the failure to domestically enforce such instruments limit the ability of victims to demand accountability either of the African state itself or local and international corporate actors. Equally, poor legislation on corporate governance and weak institutional regulatory and enforcement mechanisms deflate the capacity of states to effectively and comprehensively regulate the excesses of transnational corporate actors domestically. This consequently makes domestic remedies either unavailable, inadequate or ineffective.

Beyond the structural and institutional constraints of host African states, the territorial interpretation and application of human rights by home states further widens the regulatory gaps concerning corporations and restricts access to remedies by foreign victims of corporate human rights abuses. Unless these governance lapses at the domestic and international levels are abridged, corporations retain the exclusive liberty to continuously operate below the accountability radar, while violations persist unaddressed. Amidst the apparent lack of an authoritative focal point for corporate accountability, there is a pressing need to utilise all avenues for human rights protection to bridge the prevailing governance gaps and avail victims as many avenues as possible for ventilating their grievances.

I argue that the African regional human rights system presents an equally important platform for complementarily regulating abusive corporate conduct and addressing the deficit of domestic remedies, where states fail to respond to

[15] Kigali Declaration 2003 para 27; Grand Bay (Mauritius) Declaration and Plan of Action 1999 para 15.

[16] J Hatchard 'Combating the bribery of foreign public officials and the art of persuasion: the case of Alstom and the energy sector' (2016) 28 *Denning Law Journal* 109.

[17] C Kaufmann 'Holding multinational corporations accountable for human rights violations: Litigation outside the United States' in D Baumann-Pauly & J Nolan (eds) *Business and human rights: From principles to practice* (2016) 253.

corporate human rights violations in a responsible way. The opportunities for concretely engaging the extractive industries sector at the regional level hold the promise of deepening corporate accountability in a way that pushes extractive corporations to take more seriously the human rights concerns of individuals and communities likely to be affected by their operations.[18] However, like any legal approach in regulating corporate conduct, there are generic factors that can affect the extent to which the African human rights system can tangibly regulate the adverse impacts of extractive corporations or remediate violations. *First*, international human rights mechanisms are a creation of states and are generally governed by the principles of public international law. Given that the basic relationship between corporations and individuals are located within the framework of private law, the increasing engagement between African human rights mechanisms and the extractive industries tends to blur the line for measuring which rules apply. *Second*, it takes time for new sets of legal standards to modify established forms of corporate conduct which society expects of corporations. Since globalisation and technological advancements are moving at a rapid pace, it may yet be that the normative or (quasi)judicial interventions at the regional level will only be reactive rather than proactive against corporate abuses.[19]

1.2 Research questions and relevance

1.2.1 The research questions and hypothesis

This study seeks to address one central research question:

> ***To what extent can the African regional human rights system respond to the challenges of corporate human rights and environmental abuses in the extractive industries in Africa, where corporate regulations have failed at the domestic and international levels?***

Two important elements highlight the essence of this question – the escalating incidences of corporate violations and the limited protection of victims by domestic, foreign and UN mechanisms. Through the obligations assumed by states under African instruments, I argue that African human rights mechanisms and the future regional

[18] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).

[19] F Viljoen *International human rights law in Africa* 2nd ed (2012) 39; S Pegg 'An emerging market for the new millennium: Transnational corporations and human rights' in JG Frynas & S Pegg (eds) *Transnational corporations and human rights* (2003) 1 21.

criminal procedure present an important, supplementary platform for: (a) getting states to better regulate extractive corporations; and where states fail, for (b) (in)directly addressing corporate human rights abuses in Africa. To support this hypothesis, the recent statement of the African Commission on Human and Peoples' Rights' Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (WGEI) is relevant in that it reiterates 'the imperative of establishing binding and effective regulatory frameworks at national, regional and international levels to address the human and peoples' rights issues arising from the operations of multinational companies.'[20]

In articulating an appropriate response to the central research question, the main thesis of this study is that AU human rights standards and mechanisms are relevant, on a supervisory and procedural basis, in resolving the conceptual conundrums on corporate accountability on the domestic and international domains, and in giving victims an active voice against human rights infractions by extractive enterprises. This study will attempt to justify this proposition by addressing the following five research sub-questions:

(a) *What historical and legal bases exist for articulating the human rights accountability of corporations in the extractive sector in Africa?*

(b) *If there exists a legal basis, to what extent does the current conceptualisation of the business and human rights discourse reflect the diversity of cultural and legal perspectives on human rights accountability and how can an African approach to corporate accountability for human rights abuses counterbalance any deficit in this regard?*

(c) *In the particular context of Africa, what factors in the human rights regimes of host states hinder effective corporate regulation, accountability and access to effective remedies in the extractive industries sector?*

(d) *Why are extraterritorial regulations and litigations in home country jurisdictions not sufficient to address corporate abuses arising from the extractive industries in Africa?*

[20] African Commission's Working Group on Extractive Industries, Environment and Human Rights Violations in Africa 'Statement on the negotiation of a UN treaty on business and human rights' 12 December 2017 <http://www.achpr.org/press/2017/12/d379/> (accessed 8 January 2018).

(e) *What existing substantive guarantees and institutional activities in the African human rights system advance the human rights accountability of corporations engaged in the extractive industries, and how can they be strengthened?*

1.2.2 Objectives

This study aims to achieve five overarching objectives.

First, *establish the theoretical and legal basis for corporate human rights accountability in Africa*. This objective seeks to address the conceptual foundation of corporate accountability for human rights through legal and theoretical justifications. It will look at the developments at the domestic (host state and home state) and UN levels on the human rights responsibility of corporations, and how that responsibility is understood. It will also assess whether the corporate responsibility for human rights translates to corporate accountability within the framework of human rights law and if there are conceptual variations associated with the term.

Second, *determine through law and theory the extent to which the business and human rights discourse is non-reflective of the perspectives from the global South and how an African approach to corporate accountability for human rights can counterbalance the deficit in this regard*. The aim here is to critique and problematise the current direction of the business and human rights discourse as manifestly representative of mainly western interests, doctrines and ideologies, and lacking any substantial infusion of perspectives from the global South. At the same, it seeks to highlight that had African perspectives been reflected in the discourse, the current notion that the 'corporate responsibility to respect' is defined by social expectation may perhaps have been construed differently.

Third, *demonstrate in the literature review confirmed through the case study of Nigeria that host state human rights systems neither effectively regulate nor offer an adequate response to corporate human rights violations in the extractive industries; as well as examine the factors militating against accountability locally*. The focus of this objective is to critically interrogate and assess the legal and institutional capacity of resource-rich African states like Nigeria to regulate the adverse human rights impacts of TNCs on human rights in the extractive industries, and at the same time discuss the adequacy of the international human rights system in addressing the human rights abuses by companies.

Fourth, *demonstrate through cases arising from Africa that home state jurisdictions are not sufficiently reliable in the pursuit of corporate human rights accountability against TNCs engaged in human rights abuses in the extractive industries sector in Africa.* The essence of this objective is to evaluate the challenge of corporate accountability in the various cases arising mostly from the DRC, Nigeria, and Zambia and adjudicated by the courts of Canada, the United States (US), the United Kingdom (UK), and the Netherlands; and determine their practical impact on corporate conduct in relation to human rights abuses in the extractive industries in Africa.

Fifth, *show the rapidly increasing role of the African human rights system in advancing victims' right of access to remedies in the extractive industries in Africa, and the need for its further normative and institutional strengthening.* The research will establish the importance of the increasing engagement between African human rights procedures and corporations and the need for that essential interaction to be expanded and deepened.

Lastly, *the study will make recommendations on how best to strengthen the African regional human rights system for its role in advancing corporate human rights accountability at the domestic and regional levels in Africa.*

1.2.3 Clarification of terms

Some terms have been used in the central research question and sub-questions which deserve clarification. Particularly, the term 'accountability' is used interchangeably with responsibility, answerability, or liability.[21] To be *accountable* means the ability to answer, be responsible or liable for an action. Grant and Keohane state that accountability implies the ability of some actors to hold other actors to a set of standards (or laws), adjudge whether those standards and the responsibilities they impose have been fulfilled, and demand sanctions for noncompliance.[22] This is because 'the source of legal responsibility is given by the Law'.[23] Schedler equally notes that accountability is underpinned by the two basic elements of answerability and enforcement. To Schedler, accountability presents paradigms for preventing and redressing the abuse of power in that it requires the exercise of power in a

[21] BA Garner (ed) *Black's Law Dictionary* 9th ed (2009) 21.

[22] RW Grant & RO Keohane 'Accountability and abuses of power in world politics' (2005) 99 *American Political Science Review* 29.

[23] MP Costache 'Legal connotations of the trichotomy responsibility-liability-accountability' (2013) 9 *Acta Universitatis Danubius. Juridica* 177 181.

transparent way, requires the justification of acts undertaken from a position of power, and subjects power to the threat of sanctions.[24]

Since corporate actors like TNCs manifest enormous power in the way they relate with states, individuals and resource-rich communities, the corporate obligation under regional and international human rights instruments to do no harm – to observe the sacred rights of human beings and communities – imposes a correlative duty of observance. The breach of that fundamental duty, couched as *responsibility* in the UNGPs, arguably contemplates the existence of a horizontal relationship between individuals and companies that necessitates accountability on three grounds. First, corporations can be held to the standards set by the African Charter and other relevant international instruments. Second, victims of corporate abuses can on the basis of those standards seek judicial review to determine whether corporations have fulfilled those standards like in Nigeria where the Charter has been domesticated and South Africa in terms of section 8(2) of the Constitution of the Republic of South Africa 1996. Lastly, individuals can request judicial or enforcement systems to impose sanctions on corporations found liable for abuses. These horizontal linkages between corporations and right-holders importantly define the parameters within which the idea of corporate accountability is articulated in this thesis.

1.3 Methodology

1.3.1 Methodology

The study implements a legal research methodology that aligns with the central research question and sub-questions. It adopts doctrinal or 'black letter' research methodology in analysing the normative and institutional strides of the African human rights system in advancing corporate accountability in the extractive industries and in reaching conclusions on violations. This is relevant because '[a] lack of appropriate doctrinal foundation,' Henskens notes, 'can lead to misconceived actions.'[25] To avoid any misconceived conclusions in this thesis, this research employs the doctrinal methodology in critically evaluating the rapidly increasing role

[24] A Schedler 'Conceptualising accountability' in A Schedler et al (eds) *The self-restraining state: Power and accountability in new democracies* (1999) 13 13-14.

[25] AA Henskens 'Legal education: Black letter, white letter or practical law' (2005) 9 *Newcastle Law Review* 81 83.

of the African human rights system in deepening corporate accountability in the extractive industries.

1.3.2 Method

Based on the research design and doctrinal methodology, the study will be essentially desk-based and adopts *descriptive* as well as *exploratory* approaches in the identification and analysis of its core arguments. As the focus of this investigation is not the geological processes of mineral extraction themselves, but primarily the *legal* and *socio-economic* issues concerning such activities and their impacts on human beings and the environment, it will be limited to analysing primary and secondary literature on the subject. The descriptive approach is relevant to the discussion on the scope and extent of the damaging impacts of extractive corporations on individuals, local populations and the environment in Africa, and, indeed, the legal history of corporate regulation in human rights law. In some cases, it undertakes a comparative analysis on the regime of accountability between the African human rights system and the international or other regional human rights systems such as the European system. Complementarily, the research adopts an exploratory approach in formulating the conditions for strengthening the role of the African human rights system in fostering corporate accountability in the extractive sector in Africa.

1.3.3 Analytical approach

In answering the central research question through the examination of each of the research sub-questions, the study applies four analytical approaches. First, the study applies critical legal theories in articulating the legal and theoretical foundation of corporate accountability. Through critical lenses, it will analyse the evolution of standards on business and human rights globally and their horizontal application to corporations, and then evaluate the power dynamics between TNCs and African states and the challenge of effective domestic corporate regulation in Africa. A critical legal approach seeks to 'expose political choice, discredit the "rights" discourse of liberal legalism, demonstrate the indeterminacy of law, and reveal the bias of liberal ideology' in the pursuit of social justice. [26] Critical legal theories are relevant to the research in terms of delineating the fundamental legal and

[26] N Purvis 'Critical legal studies in public international law' (1991) 32 *Harvard International Law Journal* 81 89.

theoretical misconceptions on the idea of corporate human rights accountability in Africa and its difference from corporate social responsibility (CSR) which is a nebulous and much broader concept based on voluntarism.[27]

Second, the analysis on the hurdles against strong domestic regulation of corporations engaged in the extractive industries in Africa is undertaken based on economic and political theories on state weakness. Given that weak states 'provide opportunities for actors outside of government' like TNCs to act arbitrarily,[28] weak-state theories help develop the argument on why African states alone cannot be depended on in the regulation of corporate abuses, and why complementary human rights protection mechanisms at the regional level should be explored and strengthened.

Third, in order to determine the relative unreliability of the extraterritorial regulation of TNCs and adjudication on corporate human rights abuses by home state jurisdictions, I will adopt a critical approach to foreign direct liability by looking at the difficult procedural requirements for the judicial exercise of discretion by foreign courts. In doing so, I will look at some of the cases originating from the extractive industries in Africa which have come up before the courts of Australia, Canada, the Netherlands, the UK and the US to support the conclusion that foreign jurisdictions are less reliable forums for the pursuit of corporate accountability in the extractive industries.

Fourth, in addressing the question on the necessity for a regional response to the inadequacy or ineffectiveness of local remedies, this study adopts two approaches: the human rights-based approach, and the 'Third World' or African approaches to international human rights law. The human rights-based approach is intended to 'operationalise human rights in the economic sphere.'[29] It is relevant to this research because violations in the extractive industries can only be properly

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[27] MP Low 'Corporate social responsibility and the evolution of internal corporate social responsibility in 21st century' (2016) 3 *Asian Journal of Social Sciences and Management Studies* 56-74; GB Sprinkle & LA Maines 'The benefits and costs of corporate social responsibility' (2010) 53 *Business Horizons* 445; D Crowther & G Aras *Corporate social responsibility* (2008) 11; A Dahlsrud 'How corporate social responsibility is defined: an analysis of 37 definitions' (2006) 15 *Corporate Social Responsibility and Environmental Management* 3; L Moir 'What do we mean by corporate social responsibility?' (2001) 1 *Corporate Governance* 16 17; HG Manne & HC Wallich *The modern corporation and social responsibility* (1972) 3-4.

[28] V Cojanu & AI Popescu 'Analysis of failed states: some problems of definition and measurement' (2007) 25 *The Romanian Economic Journal* 113 117.

[29] C Mbazira 'Land grabbing in Uganda by multinational corporation (World Court of Human Rights)' in M Gibney & W Vandenhole (eds) *Litigating transnational human rights obligations: Alternative judgments* (2014) 186 187-188.

addressed within the framework of accountability and the rule of law.[30] According to the United Nations Development Group, the human rights-based approach to development is based on the common understanding that 'states and other duty-bearers are answerable for the observance of human rights' and that where violations occur, aggrieved rights-holders are entitled to seek legal accountability.[31]

Given that the trajectory of resource exploitation by corporations operating in Africa is dirtied by human rights and environmental abuses, the human rights-based approach to corporate responsibility argues that any attempt to resolve the issue of corporate violations in the extractive industries must be centred on the individual's dignity and the international human rights standards that secure it. This is significant because only by pursuing fundamental human interests can the deadlock between corporate goals and human rights concerns be resolved.

The 'Third World' or African approaches to international human rights law is necessary to deflate the essentially northern-articulated argument that the idea of corporate responsibility is akin to CSR and therefore defined by social expectations rather than law. This approach argues from the standpoint of developing countries in articulating the counter-development argument of investments in Africa's extractive industries and the essence of binding international norms in striking a power balance between TNCs and developing countries.[32]

Where relevant, the research has deployed advanced research software tools with respect to the visual presentation of the research analysis such as Atlas.Ti to present the research design,[33] Google Reverse Image Search and Tineye for open-source images, Google Earth and Snipping Tool to picture the aerial view and authenticate the images on environmental pollution in the Niger Delta region of

[30] Care about Rights 'What is a human rights based approach?' <http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html> (accessed 12 April 2018)

[31] HRBA Portal 'The human rights based approach to development cooperation: towards a common understanding among un agencies' <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> (accessed 12 April 2018).

[32] B Meyersfeld 'Business, human rights and gender: A legal approach to external and internal considerations' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013) 193 212.

[33] See section 1.5 below.

Nigeria,[34] and Microsoft PowerPoint for the diagrammatic presentation of the other visual aspects of the research analysis.[35]

1.4 Thesis justification

This research considers primary and secondary literature on the linkages between human rights and business in addressing the central research question and each of the five research sub-questions. To ensure relevance and depth in my articulation, I will split the analysis of the literature consulted into four parts, by considering: (a) the human rights abuses by corporations engaged in the extractive industries and the factors that inhibit corporate regulation and accountability for human rights abuses in host states; (b) the obstacles to the extraterritorial regulation of TNCs by homes states and the difficult procedural requirements faced by victims seeking remedies in foreign jurisdictions, as well as the impact of such challenges; (c) the challenge of advancing corporate accountability at the UN level; and (d) the opportunities and limits of pursuing corporate accountability at the African regional level.

1.4.1 TNC regulation and accountability in host states

Every state has sovereignty and full control over the exploitation of its mineral wealth. Based on this right, the power to control TNCs vests in the state and is exercisable by the government through the sovereign acts of making and enforcing local rules and regulations. For extractive companies to comply with human rights rules at the same time as they observe industry standards, states have a responsibility to effectively regulate corporations operating within their jurisdiction and to protect individuals and communities that may be adversely impacted by the activities of such corporations. To Migdal, without effective control, a state can 'neither mobilize the human and material resources to develop significant autonomy nor regulate social relations.'[36]

Under the UN Charter on the Economic Rights and Duties of States 1974, every state is entitled to regulate and control foreign investment within its jurisdiction 'in accordance with its laws and regulations and in conformity with its national objectives and priorities.'[37] This includes the sovereign right to regulate TNCs in

[34] See Chapter Four, sections 4.6.1(c)(d) below.
[35] See Chapter Two, sections 2.3.1(b) below; Chapter Six, section 6.3.3(b)i&ii.
[36] JS Migdal *Strong societies and weak states: state-society relations and state capabilities in the Third World* (1988) 100; the Rio Declaration on Environment and Development 1992 para 2.
[37] United Nations Charter on the Economic Rights and Duties of States art 2(2)(a).

accordance with domestic laws and regulations, and in conformity with its economic and social policies.[38] The UNGPs similarly reiterate that:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[39]

In the exercise of this sovereign duty, states have adopted legislation and policies applicable to domestic companies, oil and gas, minerals and mining, health, labour and the environment by which they exert strong fiscal and regulatory control and impose compliance responsibilities on corporations.

However, African states lack the capacity to effectively regulate extractive TNCs through domestic regulation alone or afford victims effective remedies for three reasons. First is the colonial history of the African state. Many African states inherited a legal system dotted by an exploitative past of loose corporate accountability and regulation. The legacy of colonial exploitation ensured that legal and policy frameworks on mineral extraction were designed in a way that demanded little or no accountability from European or other foreign companies. Tull claims that, to date, colonial vestiges of mineral exploitation continue to form a major backbone of the economy of the post-colonial African state.[40] Migdal equally states that since decolonization, the post-colonial state has fared poorly in its ability to regulate social interactions.[41] Thus, some of the structural and institutional challenges faced by the African state can, in effect, be traced to colonial legacies.

Second, legal protection and restraints in many African states are fundamentally low, and comprehensive laws that address the human rights and environmental concerns in the extractive sector are either lacking or not enforced. With poorly-resourced enforcement agencies, pervasive corruption and collusion between government officials and corporate personnel, African states are often incapable of setting or enforcing human rights standards that protect the rights of

[38] United Nations Charter on the Economic Rights and Duties of States art 2(2)(b).

[39] United Nations Human Rights Council 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementation of the United Nations "Protect, respect and remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011) principle 1.

[40] D Tull *The reconfiguration of political order in Africa: A case study of North Kivu (DR Congo)* (2005) 42.

[41] Migdal (n 36 above) 5.

victims.[42] In most cases, the prioritisation of foreign investments over human rights concerns can mean that host countries may relax labour and environmental rules, taxation laws and other regulatory requirements in favour of foreign investors.[43] In other cases, joint ventures between government and companies engaged in the extractive sector prevent the state from dealing decisively with abusive conduct or from adopting legislation that enhance claims of victims of corporate abuse.

The third point pertains to lob-sided bilateral investment treaties (BITs), which are often laced with stabilisation clauses that prevent states from undertaking any major legislative reform. Kehl attributes the inability of most developing states to negotiate mutually beneficial investment deals with TNCs to perverse economic policies and weak institutions that make them easily exploitable.[44] The impact of stabilisation or 'freezing' clauses is that states waive their right to reform or enforce new laws that address the abusive conduct of TNCs operating within their jurisdictions.[45] In a study conducted in 2009 on the disparate use of freezing clauses between OECD and non-OECD countries, it was found that in non-OECD countries, 'stabilization clauses are sometimes drafted so as to insulate investors from having to implement new environmental and social laws;' or provide investors with compensation for compliance with such laws in non-OECD countries.[46]

Nigeria represents an example of a state beleaguered by the inability to either effectively regulate TNCs in the oil industry or ensure effective remedies to victims of corporate human rights abuses. Its failure to reform its oil industry legislation for over five decades, prevalent corruption and undisclosed joint-venture contracts between oil majors like Shell and the Nigerian government hamper sound corporate governance and accountability.[47] In 2000, Nigeria sought to reform the petroleum industry by introducing the Petroleum Industry Bill. For 21 years, the Bill has failed to scale through Parliament due to not only the diverse and conflicting political

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42 As above.

43 D Nandy & N Singh 'Making transnational corporations accountable for human rights violations' (2009) 2 *National University of Juridical Sciences Law Review* 75 77.

44 JR Kehl *Foreign investment and domestic development: Multinationals and the state* (2009) 1.

45 OA Oniyinde & TE Ayo 'The protection of energy investments under umbrella clauses in bilateral investment treaties: a myth or a reality?' (2017) 61 *Journal of Law, Policy and Globalization* 161 162.

46 A Shemberg 'Stabilization clauses and human rights' (2009) <https://business-humanrights.org/sites/default/files/reports-and-materials/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf> (accessed 2 January 2018).

47 Oshionebo (n 4 above) 26, 73 & 104.

interests of various stakeholders in Nigeria, but also the invisible hand of TNCs.[48] Cui argues that the slow amendment process to the oil industry laws, including the failure to transpose international human rights in the regulation of TNCs coupled with corruption, create a stalemate in the sustainable development of Nigeria's oil industry.[49] Oluduro equally argues that the laws regulating oil exploitation and the rights-protection regime in Nigeria are significantly limited because they do not guarantee a clear, coherent and accessible process for victims.[50]

Due to the grim state of corporate regulation in Nigeria, oil spills, gas flaring, and the contamination of water bodies and vast hectares of arable land by Shell and other oil majors 'continue to happen with alarming regularity' in the Niger Delta region.[51] Also, the Nigerian government's brutal crackdown on human and environmental rights activists at the instance of Shell, including the execution of Ken Saro-Wiwa and eight others, have spurred a chain of foreign tort litigations outside Nigeria. Nolan argues that the difficult political and social environment in a country like Nigeria necessitate close ties and mutual reinforcements between corporations and the government in ways that not just implicate corporations in aiding and abetting repressive regimes but also in blurring the lines between the regulator and the regulated.[52]

Although Nigeria boasts a bill of rights in its Constitution,[53] has ratified and wholly domesticated the African Charter[54] and revised its Fundamental Rights (Enforcement Procedure) Rules in 2009, the accountability of extractive corporations

48 S Saidu & AR Mohammed 'The Nigerian Petroleum Industry Bill: An evaluation of the effect of the proposed fiscal terms on investment in the upstream sector' (2014) 2 *Journal of Business and Management Sciences* 45-57.

49 R Cui *Oil multinationals in Nigeria: Human rights, sustainable development and the law* (2015) 73-74.

50 O Oluduro *Oil exploitation and human rights violations in Nigeria's oil producing communities* (2014) 180.

51 United Nations Environment Programme *Environmental assessment of Ogoniland* (2011) 150, 214.

52 J Nolan 'Business and human rights in context' in D Baumann-Pauly & J Nolan (eds) *Business and human rights: From principles to practice* (2016) 6-7; F Wettstein 'From side show to main act: Can business and human rights save corporate responsibility?' in D Baumann-Pauly & J Nolan (eds) *Business and human rights: From principles to practice* (2016) 78-79.

53 Constitution of the Federal Republic of Nigeria 1999 (As amended 2010) (Nigerian Constitution) cap 4. See the application of the Act in *Gbemre v Shell Petroleum Development Company (SPDC) and Others* (2005) AHRLR 151 (NgHC 2005) para 6, where the Federal High Court found that section 3(2)(a) and (b) of the Associated Gas Re-Injection Act 1979 and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations S1 43 of 1984 were in contravention of sections 33 and 34 of the Constitution to the extent that they conflicted with the fundamental rights concerned.

54 African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 8 of 1983, Cap A9, Laws of the Federation of Nigeria 2004.

for human rights abuses remains elusive domestically. The progressiveness of these pieces of legislation notwithstanding, poverty, the slow pace of adjudication, technicalities, and lack of progressiveness by the courts tend to clog the wheels of justice; and, in addition, prevent a healthy regime of corporate human rights accountability from taking root. In the light of glaring cases of corporate negligence and complicity, 'Nigeria's lack of capacity and the government's unwillingness to regulate the environmental impacts of oil production effectively have long been noted.'[55] The unwillingness to regulate corporations is also compounded by technicalities and the peculiarity of the Nigerian justice system. Victims' claims before domestic courts are often either defeated or knocked out on technical or procedural grounds.[56]

Nolan argues that local laws and enforcement systems that ought ordinarily to be the primary platform for human rights protection against TNCs in developing host states, are often weak and make an effective system of corporate regulation impracticable.[57] In explicating governments' inability or unwillingness to address human rights abuses by corporations, Kaeb similarly concludes that collaborative ventures between government and corporations in the extractive sector in many African states complicate the attribution of responsibility.[58] Hence, a system that targets only states as the sole subject of international obligations, Ratner argues, is inadequate for the effective protection of victims' rights.[59]

[55] S Pegg & N Zabbey 'Oil and water: the Bodo spills and the destruction of traditional livelihood structures in the Niger Delta' (2013) 48 *Community Development Journal* 391 395.

[56] *Shell Petroleum Development Company of Nigeria Ltd v Chief GBA Tiebo & Ors* (2005) 9 NWLR (Pt.931) 439 (2005) 3-4 SC 137 Supreme Court of Nigeria (Following a spill arising from Shell's oil facility, the Plaintiffs brought a representative action for themselves and on behalf of the Perembiri community. By the time the matter got to the Supreme Court, the issue was decided on the technical point of whether or not the award of damages by the lower court was properly treated as general damages instead of special damages. No pronouncement was made on the human rights obligations of Shell towards the Perembiri community). Also see TO Okoloise 'The Nigerian courts and judicial process' unpublished MS dissertation, California State University, Long Beach, 1982.

[57] J Nolan 'Refining the rules of the game: the corporate responsibility to respect human rights' (2014) 30 *Utrecht Journal of International and European Law* 7 9-10; C Nwapi 'Can the concept of social licence to operate find its way into the formal legal system?' (2016) 18 *Flinders Law Journal* 349.

[58] C Kaeb 'Emerging issues of human rights responsibility in the extractive and manufacturing industries: patterns and liability risks' (2008) 6 *Northwestern University Journal of International Human Rights Law* 327.

[59] SR Ratner 'Corporations and human rights: a theory of legal responsibility' (2001) 111 *Yale Law Journal* 443 461.

1.4.2 Home state regulation and adjudication of TNC abuses

With the inability of many African states to exert the sceptre of control over TNCs and ensure that domestic remedies are available, adequate and effective, victims of human and environmental rights abuses by TNCs have increasingly sought remedies in foreign jurisdictions with relatively scant success. Following the failure of the Nigerian government to hold Shell accountable for human rights abuses and environmental degradation, and aggrieved by the apparent lack of justice in Nigeria, victims have increasingly sought to adjudicate their respective claims in foreign jurisdictions with conflicting outcomes. Enneking confirms that practical and procedural barriers in foreign jurisdictions equally prevent victims of corporate human rights violations, who have been denied justice in the host state, from gaining access to the courts of the home state, irrespective of the merits of their claims.[60] Examples of such barriers include the cost of foreign litigation, challenges in securing legal representation in the home state, or 'inadequate options for aggregating claims or enabling representative proceedings.'[61]

This research considers the cases of *Kiobel v Royal Dutch Shell* (*Kiobel* case),[62] and *Bowoto v Chevron Corporation* (*Bowoto* case),[63] in evaluating the procedural and practical challenges involved in litigating cases under the ATS, including the impact of the 2018 US Supreme Court decision in the *Jesner* case, as well as the earlier decisions in *Sosa v Alvarez-Machain*.[64] These cases show that not only is the US apex court decisively reining in on the use of the ATS in pursuing TNC accountability in the US, but the relatively less reliability of home state jurisdictions as effective alternative forums for pursuing corporate human rights accountability in the extractive industries sector.[65] Kaufmann notes that, in the wake of the *Kiobel* decision, the number of cases by host state victims in the US and elsewhere have shrunk and will continue to shrink.[66] Even more will such cases dwindle in the light

[60] LFH Enneking 'Multinationals and transparency in foreign direct liability cases' (2013) 3 *Dovenschmidt Quarterly* 134 135.

[61] As above; RR Verkerk 'Multinational corporations and human rights' (2013) 3 *Dovenschmidt Quarterly* 148 150.

[62] 133 S Ct 1659 (2013) or 569 US (2013).

[63] 557 F.Supp.2d 1080 (ND Cal 2008), where the Northern District of California District Court ruled that Chevron was not liable for any of the allegations made by the Plaintiffs. The case was dismissed.

[64] 542 US 692 (2004).

[65] R Samp 'US Supreme Court continues to nibble away at Alien Tort Statute's sweep' 25 April 2018 <https://www.forbes.com/sites/wlf/2018/04/25/u-s-supreme-court-continues-to-nibble-away-at-alien-tort-statutes-sweep/#62ed3bc9d9fe> (accessed 28 April 2018).

[66] Kaufmann (n 17 above) 251.

of the recent *Jesner* case. In Canada and the UK, the cases of *Association Canadienne Contre l'Impunité v Anvil Mining* (*Anvil Mining* case)[67] and *Okpabi and others v Royal Dutch Shell* (*Okpabi* case),[68] respectively, also show the courts' tendency to moderate the pursuit of foreign direct liability cases in those jurisdictions.

Notwithstanding the settlements in *Wiwa v Royal Dutch Shell* (*Wiwa* case)[69] in the US, *Bodo Community v Shell Petroleum Development Company of Nigeria* (*Bodo* case)[70] in the UK, and the preliminary success in *Akpan v Royal Dutch Shell* (*Akpan* case)[71] in the Netherlands, 'those seeking to pursue foreign direct liability claims generally still face an uphill battle.'[72] Enneking fears that the persisting procedural requirements for determining the appropriate forum and the applicable law in foreign direct liability cases imply that there is absolutely no certainty that host state victims will obtain redress in the courts of the home state.[73]

In Europe, the Brussels I Regulation and the Rome II Regulation on the Law applicable to non-contractual obligations 2007 (Rome II Regulation), in a way, limit the ability of foreign victims to seek redress before European courts. While Brussels I states that the defendant's domicile is the primary standard for jurisdiction, and requires that a substantial connection must be established between the cause of action and the jurisdiction of the court of the home state, the Rome II Regulation requires that the applicable law must be the one where the harm occurred.[74] Nwapi states that strict jurisdictional rules have not always resulted in justice and do, in

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67 (27 April 2011) N°500-06-000530-101 Superior Court of the District of Montréal, Québec Province para 39.

68 [2017] EWHC 89 (TCC) para 122; Utrecht Centre for Accountability and Liability Law 'Okpabi v Shell: A setback for business and human rights?' <blog.ucall.nl/index.php/2017/02/okpabi-v-shell-a-setback-for-business-and-human-rights/> (accessed 24 March 2018). The latest 2021 victories (in the cases of *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 24 (para 98) (12 February 2021) and *Akpan v Royal Dutch Shell; Four Nigerian Farmers v Shell* 200126843-01 200126848-01 (29 January 2021)) do not upset this argument. See section 5.4.3(b)i & (c)i below for a more detailed analysis on why significant as these victories might be, they do not change the current travails of victims from Africa in foreign courts.

69 (SDNY 2002) No 96 Civ 8386 (KMW) 2002 US Dist. Lexis 3293 <http://ccrjustice.org/files/3.16.09%205th%20Amended%20Complaint.pdf> (accessed 22 March 2018). This settlement agreement followed a US Court of Appeal ruling vacating the decision of the District Court for declining personal jurisdiction in *Wiwa v Shell Petroleum Company of Nigeria Ltd* 08-1803-cv (2nd Cir) 3 June 2009, and remanded the matter back for further proceedings.

70 *The Bodo Community v Shell Petroleum Development Company of Nigeria (The Bomu-Bonny Oil Pipeline Litigation* [2014] All ER (D) 181 or [2014] EWHC 1973 (TCC), [2014] EWHC 2170 (TCC) 4 July 2014, where Lord Akinhead ruled that there was jurisdiction to hear the claim.

71 (30 January 2013) LJN BY9854/HA ZA 09-1580 para 5 (Akpana case) District Court of The Hague.

72 L Enneking 'The future of foreign direct liability? Exploring the international relevance of the *Dutch Shell Nigerian* case' (2014) 10 *Utrecht Law Review* 44 48.

73 As above.

74 Kaufmann (n 17 above) 262-263.

fact, frequently result in injustice.[75] Given the procedural difficulties involved in establishing a connection between a subsidiary and a parent company or in the application of weak African laws, the challenge of access to remedies in home state jurisdictions remains unresolved for victims from host African states.[76]

Traditionally, international human rights law was applied and enforced on a territorial basis until recently.[77] Developed home states did not originally prohibit the unethical business conduct or activities of TNCs abroad, unless it was expedient to do so. Oshionebo states that home governments seem to be more inclined to private self-regulation than public extraterritorial regulation of TNCs abroad because of the competitive disadvantage such regulation will put their corporations in relation to competitors from other states.[78]

However, the role of dubious companies in the global financial crisis in 2008 and campaigns against conflict-tainted minerals, forced labour, child labour, human trafficking and environmental violations, it would seem, began to change the way developed home states saw extraterritorial regulation. A number of developed states have adopted legislation that, to some extent, give effect to their extraterritorial obligations. In 2017, France adopted the Corporate Duty of Vigilance Law 2017-399, which requires large French corporations to have a due diligence plan that concretely addresses human rights, the environment, health and other business-related risks. In the UK, the Modern Slavery Act 2015 was adopted. It requires UK companies to submit an annual statement on slavery and trafficking and the measures taken to ensure that slavery and trafficking do not exist in their business or supply chain.

In the US, the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Act)[79] demands more accountability on payments made by oil, gas and mining companies abroad; the US Foreign Corrupt Practices Act 1977 prohibits US business executives from paying bribes to foreign officials for commercial gains;[80] and the Securities Exchange Act 1934 was strengthened to regulate the engagement of US companies involved with minerals tainted by conflict abroad. A 'conflict

[75] C Nwapi 'Jurisdiction by necessity and the regulation of the transnational corporate actor' (2014) 30 *Utrecht Journal of International and European Law* 24 29.
[76] Nwapi (n 75 above) 40.
[77] W Vandenhole & M Gibney 'Transnational human rights obligations' in M Gibney & W Vandenhole (eds) *Litigating transnational human rights obligations: Alternative judgments* (2014) 1.
[78] Oshionebo (n 4 above) 181.
[79] Dodd Frank Act sec 1502; CR Taylor 'Disclosure of payments under the US Dodd-Frank Act: The resource extraction rule' (2013) 31 *Journal of Energy & Natural Resources Law* 55 57-58.
[80] US Foreign Corrupt Practices Act 1977 sec 78dd-1.

minerals' rule was enacted that required US extractive companies to annually disclose if their minerals originated from the DRC and adjoining countries, and the due diligence measures taken on the source and chain of custody. [81]

However, judicial and political interventions in the application and enforcement of the extraterritorial regulatory responsibility of the US seem to have rolled back its progress. Not only did President Trump sign an Executive Order in 2017 suspending the application of the disclosure standards in the 'conflict minerals' rule, the rule was successfully challenged in 2015 before the US courts on the ground that it was prejudicial to the constitutional rights and corporate interests of Americans.[82] This is a major setback in the quest for accountability of TNCs through extraterritorial regulations by home states.

1.4.3 Corporate accountability at the UN level

With the difficulty faced by victims in obtaining justice domestically and in foreign jurisdictions, Deva suggests that neither host or home state regulations are sufficient to efficiently curtail the transboundary operations of TNCs because such 'regulation is essentially a state-centred method of regulation, [and] it faces inherent limitations as a consequence of MNCs' nature, structure, influence and modus operandi.'[83] Consequently, the sole reliance on domestic regulation of TNCs, Deva claims, proves inadequate in ensuring adequate remedies are delivered to victims of corporate violations.[84] Yet, he argues that there needs to be a reconceptualization of the UN human rights framework on accountability because the non-obligatory character of TNCs delivers 'a final and almost fatal blow to its inadequacy.'[85]

The current UN framework applies primarily to states in its application and enforcement of human rights obligations, and excludes from the realm of culpability

[81] Securities and Exchange Act sec 13(p) and Exchange Act rule 13p-1. In the State of California in the US, there is the Californian Transparency in Supply Chains Act 2010, which requires companies operating in California to verify their product supply chain, audit suppliers for trafficking or slavery in their supply chain, certify that products are free of slavery or trafficking, have internal accountability standards for trafficking and slavery issues in their supply chain, and train staff and managers on slavery and trafficking issues.

[82] Presidential Executive Order 13772 Core Principles for Regulating the United States Financial System sec 1 (3 February 2017); *Cf* Executive Order 13818 Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption sec 1(a)(ii)(B)(1) (21 December 2017). Also see *National Association of Manufacturers & Others v SEC* No 13-CF-000635 (DDC 3 April 2017); *National Association of Manufacturers & Others v SEC* 800 F.3d 518 530 (DC Cir 2015).

[83] S Deva 'Acting extraterritorially to tame multinational corporations for human rights violations: Who should "bell the cat"?' (2004) 5 *Melbourne Journal of International Law* 37 63.

[84] Deva (n 8 above) 9.

[85] Deva (n 8 above) 1-2.

other active participants whose actions on the international scene have increasingly distressing consequences on states and third parties.[86] Bilchitz and Deva equally criticise the inadequacy of the current UN accountability structure for its lack of sanctions for corporate human rights abuses.[87] The conceptualisation of corporate responsibility as being of a non-legal nature by western scholars has a significant impact on the degree of corporate human rights compliance, that makes the 'constraints of legal liability' imperative.[88] Nolan argues that voluntary compliance at the UN level with international human rights standards is an insufficient tool to temper the global governance gaps.[89] Zenkiewicz equally states that one of the most contemporary issues intensely debated by the human rights movement today is no longer just the imperative of attributing responsibility to corporations for human rights abuses. It is rather how best to redress corporate wrongs and compensate victims.[90]

The slowness of the UN system to keep pace with modern developments on the international scene has left the tendencies of TNCs unchecked, and victims devastated. Ruggie rightly states that the major cause of corporate impunity for human rights violations today 'lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences.'[91] Economic globalisation and the logic of market liberalisation have failed to deliver on the promise of shared prosperity. If anything, they have deepened the imbalance of economic structures between the global North and South, and ironically resulted in the 'globalisation of corporate capitalism' and the emergence of new power brokers.[92]

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[86] Kaeb (n 58 above) 327.

[87] D Bilchitz 'A chasm between "is" and "ought"? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles' in S Deva & D Bilchitz (eds*) Human rights obligations of business: beyond the corporate responsibility to respect* (2013) 107-137; S Deva 'Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles' in S Deva & D Bilchitz (eds*) Human rights obligations of business: beyond the corporate responsibility to respect* (2013) 91-98; Deva (n 8 above) 17-21. Also see N Barakat 'The UN Guiding Principles: beyond soft law' (2016) 12 *Hastings Business Law Journal* 591.

[88] S Udwadia 'Corporate responsibility for international human rights violations' (2004) 13 *Southern California Interdisciplinary Law Journal* 385.

[89] Nolan (n 57 above) 20-21.

[90] M Zenkiewicz 'Human rights violations by multinational corporations and UN initiatives' (2016) 12 *Review of International Law & Politics* 119 123; LJ Dhooge 'Human rights for transnational corporations (2007) 16 *Journal of Transnational Law & Policy* 197 198.

[91] UN Human Rights Council (n 3 above) para 3.

[92] H Fabig 'The body shop and the Ogoni' in MK Addo (ed) *Human rights standards and the responsibility of transnational corporations* (1999) 309.

Undoubtedly, the UN has, in the last century, recorded significant achievement in human rights standard-setting at the global level. Numerous human rights treaties and declarations have been made and over a dozen mechanisms established since the UN's establishment in 1945. It has also vigorously pursued the criminalisation of serious human rights atrocities, and the punishment of international crimes. However, its anticipated accomplishment in the protection of victims of human rights abuse has been limited.[93] Deva argues that the exclusion of TNCs from the umbrella of human rights accountability exposes its inherent inadequacy.[94] Indeed, it is ironic that while the UN human rights regime professes to secure fundamental individual and group interests from the oppressive conduct of states, it is unable to similarly guarantee effective protection from corporations and access by victims of corporate harms to effective remedies.

However, for human rights to be fully and widely realised, the UN's mechanisms of accountability and remediation should apply to all actors and violators.[95] I have elsewhere argued that as of now, 'the international human rights regime falls substantially short of fulfilling its objective of protecting human rights and fundamental freedoms.'[96] Since the earliest development of the UN human rights system, its juridical structure and scope have been centred around only states. It disengages abusive extractive TNCs from answerability under its redress mechanisms. Cassell and Ramasastry state that existing international law 'is uneven and extremely limited in practice in its application to business violations of human rights.'[97] Hence, the exclusion of corporations from accountability and victims' access to justice creates practical difficulties for the comprehensive administration of human rights law at the UN level.[98]

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93 N Rosemann 'The privatization of human rights violations - business' impunity or corporate responsibility? The case of human rights abuses and torture in Iraq' (2005) 5 *Non-State Actors and International Law* 77 89.

94 Deva (n 8 above) 1.

95 As above, 1.

96 Okoloise (n 1 above) 219.

97 D Cassell & A Ramasastry 'White paper: options for a treaty on business and human rights' (2016) 6 *Notre Dame Journal of International Comparative Law* 1 17. Also see CG Gonzalez 'Environmental racism, American exceptionalism, and Cold War human rights' (2017) 26 *Transnational Law & Contemporary Problems* 281 310.

98 D Muhvic 'Legal personality as a theoretical approach to non-state entities in international law: the example of transnational corporations' (2017) 2017 *Pécs Journal of International & European Law* 7 9; A Aust *Handbook of international law* (2010) 12; O de Schutter *International human rights law: Cases, materials, commentary* (2010) 415; N Jägers 'The legal status of the multinational corporation under international law' in MK Addo (ed) *Human rights standards and the responsibility of transnational corporations* (1999) 259 264; *Social and Economic Rights Action*

1.4.4 Corporate accountability at the African regional level

In the light of the glaring limitations of the host state, home state and UN human rights systems, Manirakiza suggests that there is a need for an African human rights perspective in the extractive sector.[99] Manirakiza conceptualises a 'human rights based framework for a humane extraction of natural resources' in Africa that places the rights of individuals and communities at the core of its functioning.[100] Underscoring the need for such a functional regional process on the extractive industries in Africa, Heyns and Viljoen poignantly argue that regional systems for the protection of human rights may in fact have some advantage over the global or UN system.[101] Such advantage includes providing complementary mechanisms of accountability and access to justice, giving a more genuine expression to local context due to proximity, and the potential for stronger pressure on states.

Shelton equally endorses the necessity and indispensability of a regional African system in achieving effective compliance within the international human rights system, and functioning as an important intermediary between states that fall short of fulfilling their human rights obligations and the UN system which is often incapable of providing remedies to victims.[102] On his own, Viljoen is of the view that regional and sub-regional courts can become veritable forums for the vindication of human rights due to the inaccessibility of national judicial systems or UN human rights mechanisms.[103]

In discussing the imperative for an African solution to the challenges in the extractive sector, Manirakiza argues that the pervasiveness of human rights abuses in the extractive sector in Africa, especially by non-state actors, and their negative consequences on local populations call upon the African human rights monitoring

Centre (SERAC) v Nigeria (2001) AHRLR 60 (ACHPR 2001) para 57 (*SERAC* case); *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 20; *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 84; *Social and Economic Rights Action Project (SERAP) v President of the Federal Republic of Nigeria and Others* ECW/CCJ/APP/08/09, ECCJ Rul No ECW/CCJ/APP/07/10 (10 December 2010); *Velásquez Rodríguez v Honduras* (*Rodríguez* case) Judgment of 29 July 1988, Inter-Am Ct HR (Ser C) No 4 (1988) para 172 176-177.

99 P Manirakiza 'Towards an African human rights perspective on the extractive industry: Symposium – Keynote address' (2013) 11 *Loyola University Chicago International Law Review* 1 2.

100 Manirakiza (n 99 above) 1.

101 C Heyns & F Viljoen 'Regional protection of human rights in Africa: An overview and evaluation' in PT Zelaza & PJ McConnaughay (eds) *Human rights, the rule of law and development in Africa* (2004) 129 131.

102 D Shelton 'The promise of regional human rights systems' in B Weston & S Marks (eds) *The future of international human rights* (1999) 351 353-398.

103 Viljoen (n 19 above) 563.

system to play a 'corrective role'.[104] That corrective role requires that African human rights monitoring and (quasi)judicial mechanisms increasingly descend into the arena of corporate human rights violations to rein in on the increasingly devastating impact of the extractive industries on individuals and local communities.

As the African human rights system functions on an open-ended mandate to promote and protect human rights in Africa, that mandate arguably endows its monitoring structures with the flexibility to adapt themselves and their work as the conditions may require.[105] Under the African Charter and the African Charter on the Rights and Welfare of the Child 1990 (African Children's Charter), the African Commission and the African Children's Committee can respectively deploy their monitoring roles through the state reporting process to elicit stronger corporate regulation and accountability at the domestic level.

Especially, the ability of the African Commission to increasingly enter the foray of business and human rights clearly highlights the Commission's ability to twist and turn its attention to relevant human rights violations as they arise.[106] In asserting that capacity, the African Commission established the WGEI in 2009 to '[f]ormulate recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples' rights by extractive industries in Africa.'[107] The Commission has already adopted a set of state reporting guidelines and principles on the extractive industries. Bekker notes that although the African Commission does not have an explicit mandate to establish special procedures through the appointment of Special Rapporteurs with specific thematic mandates, it has done so since the advent of the Rwandan genocide.[108]

The Commission is also developing its business and human rights jurisprudence through the determinations of communications emanating from Nigeria and the DRC. In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,[109] the

[104] Manirakiza (n 99 above) 2.
[105] GW Magwanya 'Realising universal human rights norms through regional human rights mechanisms: Reinvigorating the African system' (1999) 10 *Indiana International and Comparative Law Review* 40-41.
[106] Magwanya (n 105 above) 40-41.
[107] African Commission 'Resolution 148(XLVI)2009: Resolution on the establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2009) 46th Ord Sess Banjul, The Gambia 25 November 2009 <www.achpr.org/sessions/46th/resolutions/148/> (accessed 27 March 2018).
[108] G Bekker 'The African human rights system: An uphill struggle' (2009) 52 *German Yearbook of International Law* 45.
[109] (2001) AHRLR 60 (ACHPR 2001) para 57.

Commission found that Nigeria had an obligation to protect individuals from the damaging acts of corporations, and that the failure to do so was a violation of the African Charter. It also found that corporations ought to be 'ever mindful of the common good and the sacred rights of individuals and communities.'[110]

More recently, in *Institute for Human Rights and Development in Africa (IHRDA) v DRC* (*Kilwa massacre* case),[111] not only did the Commission find that the DRC violated the African Charter, it categorically berated Anvil Mining for its role in the massacre.[112] The Commission called for the prosecution of Anvil Mining personnel involved in the violations and wrote a letter inviting Anvil Mining to take responsibility for its complicity in the Kilwa massacre 'through a public statement and contribute to the reparations.'[113] By deploying a special procedure in this way, the Commission sets a novel precedent on the direct engagement with non-state entities – in this case, a corporation - in the advancement of corporate accountability in Africa.[114]

However, the effort to explore accountability at the regional level equally takes into consideration the limitations of the African human rights system. Viljoen states that although enforcement of decisions or recommendations by African treaty bodies is generally not the norm, some indicators show that states make efforts to comply with decisions reached at the African regional level.[115] Murray equally notes that the achievements of the African Commission's special procedures are so far 'modest' rather than far-reaching,[116] while Bekker states that the Commission's achievements are not as impressive as they are on paper.[117] However, despite the challenges faced by the African human rights system, they do not overtake the imperative of pursuing corporate accountability at the regional level in Africa.

[110] *SERAC* case (n 98 above) para 69.
[111] Comm 393/10 20th Extraord. Sess. of the African Commission 9-18 June 2016 Banjul, The Gambia.
[112] *Kilwa massacre* case (n 111 above) para 101.
[113] African Commission 'Letter to Anvil Mining Company on its role in human rights violations in the DRC' 19 December 2017 <www.achpr.org/press/2017/12/d381/> (accessed 22 March 2018).
[114] See the Commission's call on the DRC government to ensure that extractive companies 'comply with internationally acceptable standards of fiscal and transparency obligations, environmental standards and the rights of the people of DRC and particularly those living in the areas where extractive industries operate' - African Commission 'Press statement of the African Commission on Human and Peoples' Rights on the adoption of new mining legislation in the DRC' 22 February 2018 <http://www.achpr.org/press/2018/02/d390/> (accessed 28 March 2018).
[115] Viljoen (n 19 above) 565.
[116] R Murray 'The Special Rapporteurs in the African System' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2006* (2008) 344 345.
[117] Bekker (n 108 above) 54.

Third, and worth exploring, is the AU's recognition of 'corporate criminal responsibility', which is yet a contested issue in many states and at the global level.[118] Although the Malabo Protocol and the annexed amended Statute essentially confer jurisdiction on the future African Court over legal persons, the court will function based on the principle of subsidiarity and complementarity by differing to national or sub-regional courts.[119] When operational, corporations will be amenable to the jurisdiction of the court as defendants in claims either involving conventional crimes or egregious human rights violations. Notably, article 28A of the amended Statute empowers the court to try persons, among other things, for crimes against humanity, war crimes, corruption, money laundering, trafficking in hazardous wastes, and illicit exploitation of natural resources. Article 1 defines 'person' as 'a natural or legal person'. These provisions place beyond conjecture the AU's position on the international legal status of corporate actors under its judicial procedures.

In sum, despite the plausible contribution of the literature to the business and human rights discourse, they do not nearly or comprehensively marshal a clear case for either pursuing the accountability of corporations at the African regional level or strengthening the role of the African human rights system in achieving that end. This lacuna in the literature therefore presents an opportunity in this research to explore the conditions for deepening and expanding the role of African procedures in regulating abusive corporate conduct and advancing victim remediation in the extractive sector across Africa.

1.5 Structure and scope

The research is structured in seven chapters. This introductory chapter, which makes up the first segment of the thesis, sets the scene for appraising the context, issues, relevance, scope, and methodology of this research.

The second segment of the thesis is made up of five substantive chapters. The first part comprises chapters two and three which attempt to delineate the contours within which the concept of corporate accountability is understood. Specifically, Chapter Two will deal with the historical, legal and theoretical basis of corporate

[118] Amended Court Statute art 46C; AO Nwafor 'Corporate criminal responsibility: A comparative analysis' (2013) 57 *Journal of African Law* 81-107; H van der Wilt 'Corporate criminal responsibility for international crimes: exploring the possibilities' (2013) 12 *Chinese Journal of International Law* 43-77.

[119] Amended Court Statute art 46H. See also the African Commission's decision on the limits of the principle of subsidiarity in *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) paras 50, 51, 53.

accountability for human rights abuses in the extractive industries in Africa. It will consider the evolutionary trajectory of norms and standards on business and human rights and the various claims and counterclaims for rationalising or not rationalising corporation responsibility for human rights. After that, Chapter Three will address the non-reflectiveness of Southern perspectives in the business and human rights discourse and proffer an African approach to understanding the concept of corporate human rights accountability.

The second part consists of chapters four and five, which attempt to demonstrate the limits of domestic regulation and remedies. In particular, Chapter Four will consider the hurdles against a comprehensive regime of corporate accountability in host African states and will be accompanied by a case study on Nigeria and other relevant African countries. Thereafter, Chapter Five will analyse the relevance and limitation of the extraterritorial regulation of TNCs by the home state and the procedural difficulties faced by victims in the pursuit of corporate accountability in home state jurisdictions. By undertaking a critical analysis of the cases emanating from Nigeria and other African countries in foreign courts, this chapter will look at the legal and procedural challenges faced by victims in litigating foreign direct liability of parent companies abroad, and the implications of foreign political and judicial interventions on corporate human rights accountability.

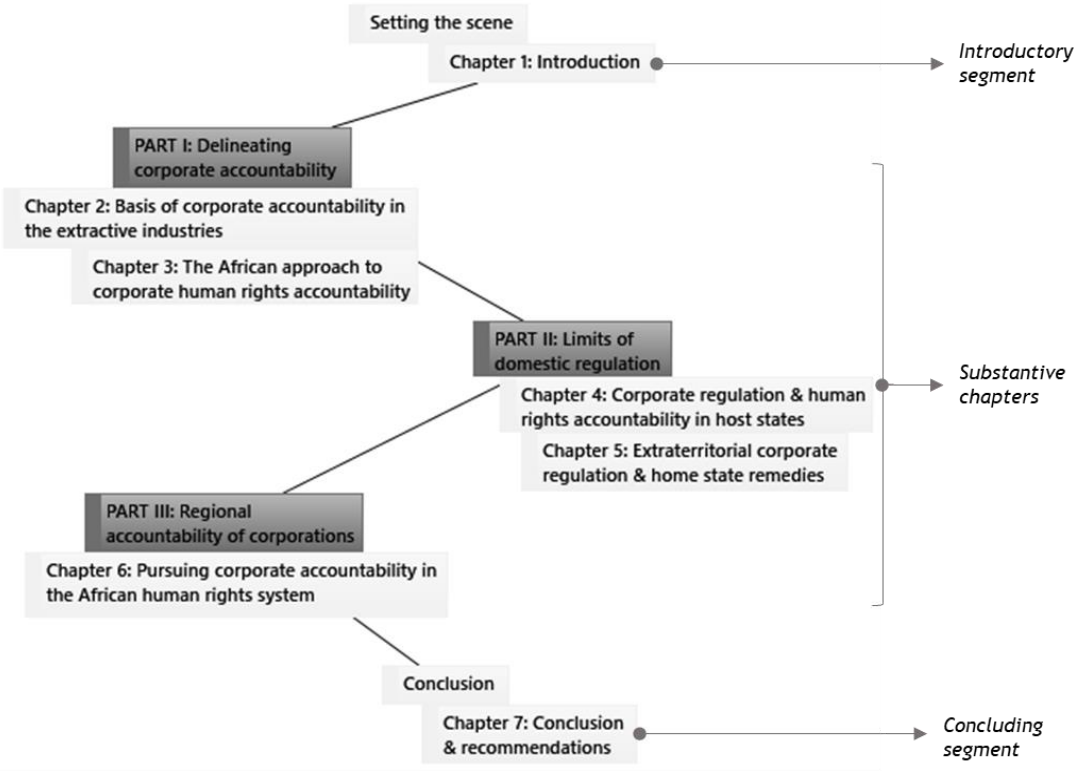

Figure 1-1: Research design.

The third part covers the sixth chapter which evaluates the regulation and remediation of corporate abuses. Specifically, Chapter Six will explore the advantages that the African regional human rights system in comparison to national jurisdictions, as well as the limitations that exist in relations to its effectiveness.

The last segment is the concluding aspect of the research and covers chapter seven. This chapter will summarise the thesis and its core findings, and then make a list of recommendations going forward. In particular, it will explore how existing African human rights standards and procedures can be strengthened to set normative and institutional standards for advancing corporate accountability in Africa (see research design structure in Figure 1-1 above).

1.6 Significance and scholarly contribution

This study aims to uniquely contribute to the business and human rights discourse in three important ways.

First, it seeks to rationalise legally justifiable and practicable bases for articulating corporate accountability in the extractive industries and in pursuing victim redress at the level of the African regional human rights system. By exploring the conditions for strengthening the African human rights system in its rapidly increasing engagement with private actors in the extractive industries sector, the study seeks to fill the normative and procedural void in international corporate regulation. As Carrello-Santarelli states, if neither domestic systems nor non-binding international standards can ensure the protection of victims, then '[t]hat void can be filled by regulating international corporate obligations, [and] preventing gaps in domestic legal systems that can be taken advantage of by [such] actors.'[120]

Second, this study will contribute to narrowing the governance gaps in international corporate regulation by critically exploring the regional dimension of corporate regulation, with two positive impacts in view: (a) create a detailed research output on how African regional procedures can help regulate corporate impunity in the extractive sector, and (b) contribute to the discourse on access to effective remedies for victims of corporate harms in Africa.

[120] N Carrillo-Santarelli 'Corporate human rights obligations: controversial but necessary' <https://business-humanrights.org/en/corporate-human-rights-obligations-controversial-but-necessary> (accessed 8 January 2018).

Last, this work aims, in a practical way, to support the work of the African Commission's Working Group on Extractive Industries. Through the solutions it seeks to proffer on the normative and institutional strengthening of African regional procedures, this research is relevant for not only shaping the debate on victims' access to remedies in Africa, but also for developing new ideas around regional corporate regulation in general.

1.7 Limitation

Like any other subject of critical consideration, this research is underscored by inherent limitations.

First, by speaking in the language of corporate *accountability*, the research already assumes that the persisting disputations about the nature and scope of corporate obligations for human rights have already been resolved or are least pronounced at the regional level. It is unclear if this is actually the case. However, the inference that accountability is deducible from African human rights instruments draws from the recent normative developments at the regional level. It is unclear if this is actually the case. However, that inference that accountability is deducible from African human rights instruments draws from the very notion that human rights are correlative of duties under African instruments. This means that the right-duty correlation under the African human rights system may be inapplicable in other human rights systems. This, by itself, limits the scope of the study to Africa and its human rights system.

Second, the presupposition in the study that corporations can be held accountable for human rights infractions tends to suggest a stow away from neutrality – an important value in legal scholarship.[121] Yet, this is hardly the case. The varied contentions on the human rights responsibility of business implies that the debate on corporate accountability for human rights is split – between those for and against. Between the conceptual clashes and resulting trade-offs, the substantive and procedural challenges faced by victims of corporate harms in Africa in terms of access to remedies often tend to take a back seat. This author considers that if human rights law is underscored by its primary essence of protecting the dignity of individuals and groups, then a position that seeks to advance that

[121] M Mutua 'Human rights in Africa: The limited promise of liberalism' (2008) 51 *African Studies* 17 18.

fundamental interest in favour of victims of corporate abuses should not be misunderstood as one of bias. This is the research's critical point of departure.

Third, the research's application of doctrinal rather than empirical methodology and its consideration of the structural and institutional challenges of a country like Nigeria and other African countries in the grand scheme of things is limiting given that it anticipates accountability in the extractive activities in many African states, each state with its own legal framework, resource strength and unique human rights challenges. When considering that the challenges faced by African states are commonly shared in the region, it is only appropriate that the study dwell more on doctrinal analysis in its efforts to justify the central hypothesis.

Lastly, by focusing on corporate accountability within the context of the African regional human rights system alone, the research loses an important opportunity to equally explore the applicability of the lessons to be learnt to other sub-spheres of the international human rights system – the regional and sub-regional systems. Those other spheres of the international human rights system present vast opportunities for critical scholarly reflection and could be the subject of future research.

Part I

Delineating corporate accountability

2.1 Introduction

For extractive TNCs to be held accountable for the human rights abuses with which they are involved, the normative and structural deficits of the human rights protection regime must first be resolved.[1] Under the current system of human rights norms, corporations are not expressly burdened by human rights obligations. As such, establishing any form of responsibility for human rights abuses perpetrated by corporate entities has historically been an arduous task and this may explain why a strong system of international corporate regulation is yet to materialise. Persisting uncertainty about the direct application of human rights obligations to business under either the catalogue of existing human rights treaties or recent non-binding standards and voluntary initiatives limit the extent to which corporate entities can be held liable for the adverse human rights impacts they create for third parties.[2] For victims of corporate harms, this significantly impacts the right of access to justice and to demand accountability for human rights harms.

The inarticulacy of the nexus between corporate businesses and human rights precipitates an intense and protracted debate among sections of the scholarly

1 K McCall-Smith & A Rühmkorf 'Reconciling human rights and supply chain management through corporate social responsibility' in VR Abou-Nigm, K McCall-Smith & D French (eds) *Linkages and boundaries in private and public international law* (2018) 147 159.

2 A Gatto *Multinational enterprises and human rights: Obligations under EU law and international law* (2011) 16-17; CM Vázquez 'Direct vs indirect obligations of corporations under international law' (2005) 43 *Columbia Journal of Transnational Law* 927 930; PT Muchlinski 'Human rights and multinationals: Is there a problem?' (2001) 77 *International Affairs* 31-47.

community on the existence of corporate human rights obligations such that has 'constituted a formidable obstacle to any meaningful progress' in addressing the global challenge of TNCs' involvement in human rights abuses.[3] The lack of any direct obligations under international law or structures for enforcing any implied or conceptually linked obligations continue to fuel the fire of scholarly disagreements and consequently split many positions along principled or ideological lines.

On the one hand, those objecting to the raging call for the imposition of direct human rights obligations on corporations argue in support of a more traditional indirect approach to corporate regulation.[4] To this group, the idea of corporations as bearers of international law obligations to respect human rights is antithetical to the state-centric nature of the international legal system for three reasons: that corporations are not subjects; that they lack international legal personality; and that they have no express or enforceable obligations for human rights.[5] They argue that international law is chiefly concerned with the management of inter-state affairs, and that only by holding states to account for the breach of their international obligations to protect human rights can corporations be properly regulated, and victims effectively protected. Corporate conduct, they argue, is predominantly controlled by market forces which operate in the private sphere, an aspect over which states have no territorial and jurisdictional competence.[6] To Shelton, '[h]uman rights law,' on the other hand, 'is considered to be located in the public realm, imposing obligations of protection and promotion predominantly, if not exclusively, on the State.'[7]

From the perspective of international law, the apportionment and application of obligations are defined by the subjects to which they apply.[8] Only states are

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3 E Duruigbo 'Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges' (2008) 6 *Northwestern Journal of International Human Rights* 222 224.

4 JD Bishop 'The limits of corporate human rights obligations and the rights of for-profit corporations' (2012) 22 *Business Ethics Quarterly* 119–144; JJ Praust 'The reality of private rights, duties, and participation in the international legal process' (2004) 25 *Michigan Journal of International Law* 1229 1230-1231.

5 BA Frey 'The legal and ethical responsibilities of transnational corporations in the protection of international human rights' (1997) 29 *Minnesota Journal of International Law* 153 160; Vázquez (n 2 above) 930.

6 DL Shelton *Advanced introduction to international human rights law* (2014) 209.

7 Shelton (n 6 above) 209.

8 McCall-Smith & Rühmkorf (n 1 above) 151; C Wittke *Law in the twilight: International courts and tribunals, the Security Council and the internationalisation of peace agreements between state and non-state parties* (2018) 71.

traditionally considered subjects of international law and bound by its body of rules.[9] Since its earliest creation, the international legal system has primarily prescribed rules that govern the conduct and relations of states, one to another. Little wonder Henkin argues that international instruments focus primarily on the state's obligations because international human rights law is made by states assuming obligations.[10] As its principal subjects, states possess two attributes that no other entity holds and which lie at the heart of the international legal order - sovereignty and international legal personality.[11] Based on the edifice of sovereignty and the sovereign equality of states, states are credited with international legal personality - the capacity to acquire, claim and maintain rights and duties before international adjudicatory mechanisms.[12] With these attributes, states can subscribe to and acquire binding human rights obligations under human rights treaties as parties and are invariably understood to be legally accountable for a violation of such obligations. Therefore, accountability in international human rights law is mostly understood in terms of a breach of state obligation.[13]

However, the corporation's capacity to incur obligations is not a precondition for accountability in international law even though it is often touted as an important consideration for subjectivity in international law. Karavias states that while there is a correlation between the idea of international legal personality of corporations and the issue of corporations as bearers of international obligations, '[t]he question of the applicability of international law to the corporation is not to be equated to the question of its personality.'[14] This is because the concept of legal personality remains imprecise and rests squarely on state recognition, there being no central authority in international law that determines its extent and scope.[15] Therefore, it

[9] A Aust *Handbook of international law* (2010) 12; K McCall-Smith 'Tides of change – The state, business and the human' in R Barnes & VP Tzevelekos (eds) *Beyond responsibility to protect* (2016) 219.

[10] L Henkin 'International human rights as "rights"' (1981) 23 *Nomos* 257 267.

[11] N Bernaz *Business and human rights: History, law and policy – bridging the accountability gap* (2017) 86.

[12] N Jägers 'The legal status of the multinational corporation under international law' in MK Addo (ed) *Human rights standards and the responsibility of transnational corporations* (1999) 259 262; MM de Bolivar 'A comparison of protecting the environmental interests of Latin American indigenous communities from transnational corporations under international human rights and environmental law' (1998) 8 *Journal of Transnational Law & Policy* 105.

[13] A Clapham *Human rights obligations of non-state actors* (2006) 5.

[14] M Karavias *Corporate obligations under international law* (2013) 7.

[15] N Jägers 'The legal status of the multinational corporation under international law' in Addo (n 12 above) 262.

would amount to a misstatement of the law to argue that corporations have no human rights obligations because they lack international legal personality.

The traditional state-accountability approach can be criticised for its remedial inadequacy in that it attributes states with the abusive acts of third-party companies. When a state ratifies a treaty, it acquires the obligation to adopt legislative, policy, administrative and other measures to give domestic effect to its international obligations under the treaty. This can imply that the state is required under international law to regulate the commercial activities of corporations domestically. In that case, corporations are expected to be accountable to local law and authority. Where the state fails to domestically regulate the damaging activities of private actors in a way that leads to violations of individual rights, the state can be imputed with responsibility. The duty to protect individuals through domestic regulation, however, raise questions about the extent to which a state can exercise jurisdiction over the extraterritorial impacts of TNCs domiciled in their territory without transgressing the principle of territoriality of domestic law or the sovereignty of the other state.[16]

Also, in the context of the developing world, indirect corporate accountability may be an inadequate response to the quest for a comprehensive regime of accountability and justice by victims of corporate violations for two reasons. First, it is hinged on the strength of domestic laws and institutions, the rule of law, and the effectiveness of local law enforcement mechanisms – in essence, on the capacity and efficiency of the state. In Africa where the capacity and authority of the state is often relatively weak when compared to developed countries, leaving the remedial regime to structurally weak states alone can tremendously limit the scope of protection available to victims. This is even more so where states' prioritisation of foreign investments may have adjusted their legal and economic relationship with TNCs and prevented them from enacting stronger legislation due to stabilisation

[16] HC Rivera 'Corporate accountability in the field of human rights: On soft law standards and the use of extraterritorial measures' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 109 110; E Durojaye 'The viability of the Maastricht Principles in advancing socio-economic rights in developing countries' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 135-153.

clauses.[17] De Schutter has argued, and rightly so, that when states are accused of failing to prevent abuses to individuals, it is speculative to assume that the state's intervention would have been effective in the first place in ensuring that the violations will not occur.[18]

Second, indirect corporate regulation suggests that the state incurs liability every time a violation occurs even where the state may be neither directly linked with the violation nor capable of remediating it.[19] It would be a misstatement of international law to argue that states are liable for the actual violations perpetrated by third-party private entities. This is because under international law, a state cannot be properly imputed with responsibility for violations committed by a third-party, unless it had *effective control* over such party at the time of its commission.[20] State responsibility is only imputable for the failure to regulate or exercise due diligence over the potential consequences resulting from the activities of corporations operating within its territory, not for the actual violations themselves.[21] In this context, responsibility for the actual violations are distinguishable from the failure to regulate. Therefore, it would seem practically implausible to victims that states, where effective corporate regulation suffer incredibly from systemic pathologies, should be attributed with the actual wrongful acts of corporations every time a corporate violation is committed.

On the other hand, those in favour of a more extensive regime of international law that brings corporations under its radar argue that in this era of globalisation, international law has long ceased to govern only inter-state relations. They argue that international human rights law and the intended effects of its protective cover anticipates compliance by both state and non-state actors.[22] Noticeable shifts have over the course of time begun to occur in the perception and reception of non-state

[17] S Deva 'Business and human rights, or the business of human rights' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 23 32-34. Also described as a 'regulatory chill' by states – S Gervais 'Investment and human rights: Reflections from mining in Latin America' in BA Andreassen & VK Vinh (eds) *Duties across borders* (2016) 253 256-257; SG Gross 'Inordinate chill: BITs, Non-NAFTA MITs, and host-state regulatory freedom – An Indonesian case study' (2003) 24 *Michigan Journal of International Law* 893 899.

[18] O De Schutter *International human rights law: Cases, materials, commentary* (2010) 415.

[19] RL Zohadi 'An introduction to human rights duties of transnational corporations' (2006) 3 *International Studies Journal* 69 70.

[20] International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts 2001 arts 4(1)(2), 5 8 & 11.

[21] De Schutter (n 18 above) 415. Also see *Rodríguez* case

[22] Duruigbo (n 3 above) 223.

actors on the international plane. Indeed, some important transformations have taken place with the acceptance in international law that other category of actors beside the state should be the focus of its protection or accountability mechanisms.[23] For instance, serious violations by individuals during the First and Second World Wars have led to the development of rules of international criminal law and international humanitarian law. Due to such rules, individuals, who are neither subjects of international law nor privy to the instruments prescribing obligations, have been laced with criminal responsibility and, therefore, targets of their intended consequences.

In the same way, rules on human rights at the regional level, international trade, international investment, the environment, the use of the sea, and space and its planetary resources have rapidly evolved that impact on not only the conduct of states but also of non-state actors. Under the European Convention on Human Rights 1950, international human rights claims have been upheld in favour of corporations.[24] Similarly, trade and investment treaties have bequeathed rights to corporations that are enforceable before tribunals such as the International Committee for the Settlement of Investment Disputes (ICSID).[25] Corporations are also known to be involved in the dispute settlement proceedings of the World Trade Organisation (WTO).[26] Furthermore, new rules on liability under international law for environmental damage increasingly require the apportionment of liability to all operators and entities responsible for environmental pollution, and demand that they contribute to any special fund or other mechanism of collective reparation established under domestic or international law.[27] These developments are not isolated cases. They form part of the evolutionary process of the broader regime of international law and support the understanding that the system of state

[23] D Murray *Human rights obligations of non-state armed groups* (2016) 13.

[24] J Wouters & L Chanet 'Corporate human rights responsibility: A European perspective' (2008) 6 *Northwestern University Journal of International Human Rights* 262 263.

[25] F Francioni 'Alternative perspectives on international responsibility for human rights violations by multinational corporations' in W Benedek, K De Feyter & F Marrella (eds) *Economic globalisation and human rights* (2007) 245 254.

[26] Shelton (n 6 above) 208-209; K Nowrot 'New approaches to the international legal personality of multinational corporations: Towards a rebuttable presumption of normative responsibilities' (1993) 9 *Journal of Global Legal Studies* 1 1-2.

[27] MA Berry & DA Rondinelli 'Proactive corporate environmental management: A new industrial revolution' (1998) 12 *Academy of Management Perspectives* 38 48.

responsibility alone cannot sufficiently address the demands of accountability for international crimes, human rights and environmental violations.

This chapter therefore importantly identifies and assesses the historical, legal and conceptual foundations of corporate accountability for human rights abuses in the extractive industries in Africa. By taking a cursory look at the evolutionary process of corporate abuses in Africa since the era of the transatlantic slave trade to date, albeit briefly, it takes a critical look at the legal basis of corporate responsibility beyond the notion of social expectation or voluntarism as an essential way to empower victims in challenging abuses and seeking justice against corporate violations wherever they occur. It does this to determine whether the conflicting conceptions of corporate accountability are victim of a pending crisis of global consensus or merely a state of the art of normative development. Thereafter, it assesses the remedial significance of the proposed legally binding instrument on business and human rights, before concluding the chapter.

2.2 Extractive TNCs and human rights abuses in Africa

2.2.1 The origins: TNCs, slave trade and colonialism

Business involvement in human rights violations in Africa is not a recent phenomenon. It dates back to the transatlantic slave trade over some four centuries ago and continued into the colonisation era and beyond. As far back as the 15th century, Portuguese and Spanish slave merchants used slave labour in the cultivation of sugar-cane plantations on the Madeira and Cape Verde islands along the west coast of Africa.[28] The expansion of those plantations and the discovery of gold in Latin America meant that the exploitation of 'enslaved Africans was the answer to the shortage of labour.'[29] It is estimated that chartered companies forcibly shipped over 10 000 000 Africans as slaves to the Americas between 1443 and 1870, and several more millions died during their forced marches to coastal ports.[30] The goal to secure Europe's economic interests in Africa and the Americas and sustain the flow of raw

[28] Bernaz (n 11 above) 20.
[29] Bernaz (n 11 above) 21.
[30] What-when-how 'Chartered companies, Africa (Western colonialism)' <what-when-how.com/western-colonialism/chartered-companies-africa-western-colonialism/> (accessed 29 May 2018).

materials to Europe's bourgeoning industries made colonisation an urgent imperative.

As the slave trade soured, Bernaz notes that '[a]ll the major slave trading countries … created companies to trade with Africa, which included the trade of African slaves.'[31] In this way, corporate monopolies such as the Dutch West India Company, the British Royal African Company, the Portuguese Guinea Company, and the French East India Company, including their successors or subsidiaries affiliated to imperial governments aided the colonisation agenda of the European powers (the United Kingdom, France, Belgium, German, Spain and Portugal) in the sourcing and plundering of Africa's resources.[32] According to Ratner, the support that the European merchants and enterprises received not only gave them unfettered access to the wealth of the colonial territories in unusually beneficial terms, 'European companies became the principal agents for the exploitation of the colonial territory.'[33] Černič claims that 'more than 40 European corporations were involved in facilitating the slave trade or controlling colonised territories.'[34]

Several centuries down the line the ghosts of forceful land seizures, forced and exploitative labour, gender and racial differentiation and discrimination, and the marks of the indelible harm inflicted on the traditional and spiritual life of the people have remained.[35] Little wonder Conklin describes Western colonisation as 'an act of state-sanctioned violence.'[36] For the duration of the economic exploitation, local communities received limited economic rewards for their work and had no room

[31] Bernaz (n 11 above) 28.

[32] C Okoloise Contextualising the corporate human rights responsibility in Africa: A social expectation or legal obligation?' (2017) 1 *African Human Rights Yearbook* 191 195-196.

[33] SR Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 443 453.

[34] JL Černič 'Corporations and human rights: towards binding international legal obligations' in MK Sinha (ed) *Business and human rights* (2013) 1 8.

[35] W Rodney 'How Europe underdeveloped Africa' in RR Grinker & SC Lubkemann & CB Steiner *Perspectives on Africa: A reader in culture, history, and representation* (2010) 439 441; S Donovan '"Figures, facts, theories": Conrad and chartered company imperialism' (1999) 24 *The Conradian* 31 47; F Cooper *Decolonization and African society: The labor question in French and British Africa* (1996) 290; B Davidson *Modern Africa: A social and political history* (1994) 12-14. Also see G Austin 'African economic development and colonial legacies' (2010) 1 *International Development Policy|Revue internationale de developpement* 11-32.

[36] AL Conklin 'Colonialism and human rights, a contradiction on terms? A case of France and West Africa, 1895-1914' (1998) 103 *The American Historical Review* 419.

to complain.[37] As Viljoen puts it, colonialism 'ruptured' traditional African societies.[38] Ratner claims that:

> The colonial legacy included swaths of African farmland owned by whites, African mineral wealth controlled by Europeans, and significant petroleum sources in the Middle East granted to Western oil companies.[39]

In many of what are now known as independent African states, the footprints of European companies remain prominently visible, even in the mining industry. In South Africa, Gold Fields of South Africa and the De Beers Group both of which possess large chunks of the market share in the gold and diamond mining sectors, respectively, trace their nineteenth century founding to London in the United Kingdom.[40] The Anglo-Dutch owned Royal Dutch Shell Company is a pre-independence European company involved in the commercial production of crude oil in Nigeria and many other states. Several other companies operating in Africa still trace their roots to business enterprises that participated or benefitted from the colonial project.

More importantly, the legal impact of the collaboration between business and the colonial home state was that individuals and communal groupings in the colonised host state were left in the margins of the process. With the man-power and logistical infrastructure provided to European businesses by the colonial power or their host state agents, individuals and groups enjoyed few rights, if at all, in relation to the government of the host state, the home state or the company. In economic terms, the absent protection of individuals and communities meant that the colonial powers and their transnational companies had considerable power in relation to the colonised African state and its people. It is this power dynamic that subsequently defined the economic gaps and imbalances between what is today categorised as the global North and South.

2.2.2 Globalisation, TNCs and the post-colonial state

After the Second World War, two major transformations occurred globally that altered the political and economic relationships and long-term calculations of the

[37] Ratner (n 33 above) 453.
[38] F Viljoen *International human rights law in Africa* 2nd ed (2012) 4.
[39] Ratner (n 33 above) 453.
[40] Gold Fields 'Our history' <https://www.goldfields.com/our-history.php> (accessed 1 October 2018).

colonial powers. First, for the colonial powers, the implication of decolonisation meant that they were to conduct their affairs with the colonies on the established notion of sovereign equality and independence. As the newly African states joined the UN and other multilateral organisations, they began to demand greater economic equality with the developed states of the North. The incremental demand for economic equality by developing states in the 1970's led to the adoption of a series of declarations and resolutions that called for a New International Economic Order (NIEO).[41] Of particular importance was the Charter of Economic Rights and Duties of States 1974 (Charter on States' Rights), which reiterated that international economic relations is predicated on the fundamental principles of the equal rights and self-determination of peoples, as well as the political independence and sovereign equality of all States.[42]

Second, with the period of decolonisation came sweeping changes in international law. It saw the development of international human rights instruments that imposed direct obligations on states as primary duty-bearers with respect to their people. Despite the notion of non-interference in the domestic affairs of states contained in the Charter of the United Nations (UN Charter), it did not constitute any hindrance to the promotion and protection of human rights under international law. Starting in 1948, UN member states adopted the Universal Declaration of Human Rights 1948 (Universal Declaration) and within the next several decades codified many of its provisions in the International Covenants and allied treaties on racial discrimination, torture, women and children's rights.[43]

[41] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970, the Declaration of a New International Economic Order 1974, Charter of Economic Rights and Duties of States 1974 and the establishment of the United Nations Conference on Trade and Development (UNCTAD). Also see RL Rothstein *Global bargaining: UNCTAD and the quest for a new international economic order* (2015) 2; E Laszlo, J Lozoya & AK Bhattacharya *The obstacles to the New International Economic Order: Pergamon policy studies on the New International Economic Order* (2014) 2; PN Agarwala *The new international economic order: An overview* (2014) 79.

[42] Chapter 1.

[43] International Covenant on Civil and Political Rights 1966 (ICCPR), International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT), Convention on the Rights of the Child 1989 (CRC), International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families 1990 (ICMRW), and Convention on the Rights of Persons with Disabilities 2006 (CRPD).

At the regional level, the alignment of political and economic aspirations inspired the formation of regional groups such as the Organisation of African Unity.[44] Worried that their peoples were 'still struggling for their dignity and genuine independence', the newly liberated African states sought a collective pursuit of 'freedom, equality, justice and dignity [which] are essential objectives for the achievement of the legitimate aspirations of the African peoples'.[45] And unimpressed by the ideological skirmishes between the East and the West over the categorisation of human rights into civil and political rights, on the one hand, and economic, social and cultural rights, on the other, they adopted the African Charter on Human and Peoples' Rights 1981 (African Charter) and supplementary treaties. In the Charter's preamble, they emphasised that no category of human rights could be dissociated from the other in their conception and universality, and that the right to development was equally as important.

However, the application of the newly developed international human rights regime with respect to human rights violations in domestic enclaves was gradual for a number of reasons. One, the spread of dictatorial regimes in the new independent countries soon gave rise to an opposition to international scrutiny of domestic human rights conditions. Two, the Cold War between the United States and the Soviet Union saw human rights take a back seat as both countries scampered to secure state and regional support of their ideologies.

For the post-colonial African state, the impact of these global developments on the relationship between host states and TNCs was significant. Independence and the desire to gain more control over resource rents prompted developing states to seek a change in the power dynamic between developed and developing states on the political and economic fronts.[46] The pushback was swift. Keen on levelling the playing field between the developed states and their TNCs, a diverse stream of resistance strategies was employed on the domestic, regional and international fronts. Between 1971 and 1979, for instance, the governments of Algeria, Libya and Nigeria nationalised the foreign investments of majorly Western TNCs involved in the

[44] Charter of the Organisation of African Unity 1963 (replaced by the Constitutive Act of the African Union 2000).
[45] Preamble to the African Charter.
[46] JM Kline 'MNCs and surrogate sovereignty' (2006) 13 *Brown Journal of World Affairs* 123 125.

extractive industries to pave the way for local control.[47] Relying on domestic law and the rights of states as affirmed under the Charter on States' Rights, they argued that there was nothing in international law granting foreign investors the right to the economic value of their investments. They also re-examined the economic and legal relationship between Western TNCs and their states.

At the global level, there was a push by many developing countries at the UN for a regime of international norms to regulate corporations. The rising concern on the incrementally devastating impact of fossil fuels and mineral extraction on the environment, coupled with the involvement of TNCs in aiding political change in Central and South America was harped on as a strong campaign tool for pushing for an international regulatory agenda for TNCs. This led to the establishment of the Centre for Transnational Corporations in 1974. By 1983, a draft UN Code of Conduct for Transnational Corporations (draft TNCs Code) was completed, but never adopted due to strong resistance from the developed world. To defeat the exercise, the developed world, through the platform of the Organisation for Economic Cooperation and Development (OECD), drafted its own set of guidelines for TNCs that 'contained far fewer and weaker obligations on TNEs and were not intended to be binding.'[48]

However, the fight to correct the imbalance in the power relationship between host states and home states (and their TNCs) was short-lived. In the 1970's, rising oil prices triggered a recession in the global North and a debt crisis in the South.[49] With rising international debt profiles resulting in relatively weaker economies, less economic aid and the Cold War at its peak, the rhetoric of a new international economic order gradually faded away. The reluctance of Western international lenders like the World Bank and the International Monetary Fund (IMF) to lend money for infrastructure projects in many developing countries until liberalisation or Structural Adjustments Programmes (SAPs) were adopted also had a

[47] Libyan Law No. 2 of 1971 (Mines and quarries) secs 4 & 7; DF Rieger Jr 'Public policy and negating discriminatory expropriations in the municipal courts' (1974) 7 *Cornell International Law Journal* 171 171-172; M Fitzgerald & T Megerisi 'Libya: Whose land is it? Property rights and transition' (2015) <https://lif.blob.core.windows.net/lif/docs/default-source/publications/libya---whose-land-is-it-2015-transitions-forum.pdf?sfvrsn=8> (accessed 24 October 2018). Also see PC Naylor *France and Algeria: A history of decolonization and transformation* (1962) 66-67; Nigerian Enterprises Promotion Decree 1972; FC Beveridge 'Taking control of foreign investment: A case study of indigenisation in Nigeria' (1991) 40 *The International and Comparative Law Quarterly* 302 309.

[48] Ratner (n 33 above) 457.

[49] D Simon 'Neoliberalism, structural adjustment and poverty reduction strategies' in V Desai & RB Potter (eds) *The companion to development studies* (2008) 86-87.

muzzling effect.[50] Entangled in the snares of harsh economic realities, African states soon retraced their steps. Gilpin and Gilpin argue that:

> Although some LDCs [least developed countries] charged that the demand for structural adjustment was a new form of capitalist imperialism, the LDCs had little choice other than compliance if they wanted financial assistance… this basic approach soon defined the position of the industrialised countries and the IMF toward the LDCs and economic development.[51]

Fazed by this development, developing states had not much of a choice. By accepting the liberalisation programmes, they agreed to a neo-capitalist system characterised by free markets, trade liberalisation, and a significantly limited role for the state in the economy. They entered into bilateral and multilateral investment treaties that obliged them to protect foreign investments. Many joined the World Trade Organisation and the General Agreements on Tariffs and Trade 1994 (GATT). These treaties included guarantees on national treatment, fair and equitable treatment based on international law, and most favoured nation clauses. In effect, it saw developing states invariably discard the draft TNCs Code or any further pursuit of the NIEO.

The effect of the 'concessions' made by host states was the implied restraint on their sovereign power. With the opening-up of Africa's national economies to foreign investments, the influx of extractive TNCs to Africa to compete for its vast mineral resources precipitated concerns about the security of investment. Aside from the rights conferred on investors in the bilateral and multilateral trade and investment agreements signed by African states, several other clauses were introduced to further guarantee the protection of foreign investors. Stabilisation clauses prevented the host state from making changes to its laws that imposed new 'detrimental' obligations on investors. And dispute resolution clauses allowed investors and investment companies to approach bodies such as the ICSID, the WTO and even the domestic courts of Western states in the event of investment disputes. With these in place, priority had been effectively given to foreign investors and the trade-off of human rights was, essentially, complete.

[50] DE Sahn, PA Dorosh & SD Younger *Structural adjustment reconsidered: Economic policy and poverty in Africa* (1997) 47; JB Riddell 'Things fall apart again: Structural Adjustment Programmes in Sub-Saharan Africa' (1992) 30 *The Journal of Modern African Studies* 53-68.

[51] R Gilpin & JM Gilpin *Global political economy: Understanding the international economic order* (2001) 315.

2.2.3 Impact of economic liberalisation on human rights

Although it is generally acknowledged that the liberalisation programmes resulted in the paralysis of African economies, its impact on the relationship between the host state and TNCs was enormous.[52] On the one hand, it created a new paradigm in the relationship between the host state (and its elite) and foreign investors. In the extractive sector, for instance, it saw an increasing desirability for both to collaborate in the exploitation of natural resources, as opposed to the exclusive dominance by western TNCs that was rife during the colonial and pre-nationalisation eras of the 1970's. Joint ventures were formed between state-owned enterprises and new foreign investment companies. With TNCs more embedded in the host state's economy, the result was that the density of the relationship invariably blurred the line between the state as the primary duty-bearer under international human rights law and individuals, on the one hand, and the corporation and individuals, on the other. In order words, it essentially reorganised the power essentially, this time, with the support of the host state against individuals and communities.

Over the next several years, the collaboration between TNCs and host African states ruled by military dictators witnessed the corporate capture of the regulatory state – as the state became a regulator and participant in the extractive industries.[53] Akinola, analysing the impact of this relationship in the Nigerian oil industry, states that:

> Chains of corruption are also identifiable in the allocation of oil licences and oil blocs; Public officials, who are in charge of its allocation and regulating oil licences, exercise their free will by acting in their own interests, and colluding with oil investors to further their interests and that of the oil companies.[54]

Besides oiling the wheels of corruption, the relationship between TNCs and the post-colonial state have produced some of the vilest and most brutal human rights violations in Africa's history. Several examples abound across Africa where the collaboration of the host state and foreign investors resulted in grievous human rights abuses and killings. In the DRC, Anvil Mining facilitated the massacre of nearly 100

[52] M Hilgers 'The historicity of the neoliberal state' (2012) 20 *Social Anthropology* 80 83; D Harvey 'Neoliberalism as creative destruction' (2007) 610 *The ANNALS of the American Academy of Political and Social Science* 21 34.

[53] JM Hobsin & M Ramesh 'Globalisation makes of states what states make of it: Between agency and structure in the state/globalisation debate' (2002) 7 *New Political Economy* 5 6.

[54] AO Akinola *Globalisation, democracy and oil sector reform in Nigeria* (2018) 276.

residents of Kilwa in 2004.[55] In Nigeria, the army is considered to have responded with excessive force to a peaceful protest by members of the Ogoni people, based on the prompting of Shell.[56] In South Africa, the support of corporations in the Apartheid era aided[57] the government's human rights violations. More recently, the killing of 34 mineworkers in Marikana by the South African police in 2011 emanated from Lonmin's request to the government that its workers' protest be suppressed.[58] Also, Austrian, Malaysian and Swedish firms are alleged to have been complicit in the war crimes committed by the Sudanese military between 1997 and 2003.[59]

For the neo-liberal African state, the effects of globalisation and the new patterns of economic interactions had far-reaching consequences under international law for all four categories of actors, namely: the home state, the host state, extractive TNCs and individuals. Firstly, while existing international human rights standards protecting individuals remain active with regard to the state, shifts in the status of corporations from being subjects of the state to that of co-actor and co-violator on the international arena did not clearly delineate the corporate responsibility for human rights. Secondly, the trade and investment treaties concluded between the home and host states created new investment rights for TNCs and imposed a new set of obligations against the host state that were enforceable under international law.[60] These placed hosts states at a dilemma on which set of

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55 Environmental Justice Atlas 'Massacre in Kilwa facilitated by Anvil Mining, operating Dikulushi open pit, Katanga province, DR Congo' 18 August 2018 <https://ejatlas.org/conflict/kilwa-mine> (accessed 8 September 2018); P Feeney 'Anvil mining and the Kilwa massacre' *Open Society Initiative for Southern Africa* 7 March 2012 <http://www.osisa.org/openspace/global/anvil-mining-and-kilwa-massacre.html> (accessed 9 September 2018).

56 Amnesty International *A criminal enterprise? Shell's involvement in human rights violations in Nigeria in the 1990s* (2017) 7.

57 WM Hoffman & RE McNulty 'International business, human rights, and moral complicity: A call for a declaration on the universal rights and duties of business' (2009) 114 *Business and Society Review* 541 554-555; RG Steinhardt 'Soft law, hard markets: Comparative self-interest and the emergence of human rights responsibilities for multinational corporations' (2007) 33 *Brooklyn Journal of International Law* 933 938; GW Seidman 'Monitoring multinationals: Lessons from the Anti-Apartheid era (2003) 31 *Politics & Society* 381 388.

58 South African Human Rights Commission 'Marikana Commission of Inquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province' 556-557 <https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf> (accessed 9 September 2018). Also see T Bell 'The Marikana massacre: Why heads must roll' (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 440-450.

59 Associated Press 'Human rights report about oil companies in Sudan leads to Swedish probe' *Fox News* 21 June 2010 <https://www.foxnews.com/world/human-rights-report-about-oil-companies-in-sudan-leads-to-swedish-probe> (accessed 9 September 2018); Human Rights Watch *Sudan, oil and human rights* (2003) 69 510-632.

60 JO Voss *The impact of investment treaties on contracts between host states and foreign investors* (2010) 85-86.

obligations to prioritise – investment obligations or human rights obligations or both? Thirdly, as TNCs proved to be equally vicious human rights violators like the state, the collaborative relationship between the host state and TNCs complicated traditional notions of human rights duty-bearers in relation to individuals.[61]

In essence, what had started as an effort by host states to maintain their independence, level the dominance by home states and exert greater control over their natural resources and foreign investors soon all vanished. The quest to achieve these objectives through nationalisation, the draft TNCs Code, and specific laws targeting TNCs all quickly shifted. Globalisation and the expansion of the free market economy, it can be argued, facilitated the paralysis of the host state, but they were not the only underlying factors. The instability that emerged soon after independence due to internal political conflicts, coupled with increasing poverty, systemic corruption by a constantly rent-seeking political elite, poor laws and weak institutions led to the collapse of the national economies of African states. These structural weaknesses highlighted the mismanagement of the post-colonial state by its leaders and placed it at the mercy of the West, TNCs and lending Brettonwood institutions.

As a condition for ensuring a climate suitable to foreign investments, host state had to adjust their laws to make them investor-friendly, transfer huge tracts of land, grant tax holidays, or soft-pedal on regulating human rights violations by business. This trajectory of what can be regarded as neo-colonialism, in essence, adversely unravelled and impacted the rights of resource-rich communities and countries to self-determination and a satisfactory environment suitable to their development. With the global campaign for international corporate regulation losing steam in the 1990s, corporate accountability was limited to compliance with national law alone. Consequently, in the extractive sector, the relationship between individuals and the corporate entity was largely defined by the extent to which domestic labour, human rights and environmental laws were enforced.

[61] A Ramasastry 'Corporate complicity: From Nuremberg to Rangoon - An examination of forced labor cases and their impact on the liability of multinational corporations' (2002) 20 *Berkeley Journal of International Law* 91 117-118.

2.2.4 Environmental and human rights risks in extractive industries

According priority to investors without, at the same time, a strong regime of legal and regulatory accountability places human rights and the environment at risk. If at all, the laws and policies that followed the discovery and extraction of minerals in Africa have nearly always imposed low-cut obligations on corporate actors. As a result, the general business attitude was that there was no responsibility beyond those owed to its shareholders or imposed by law.[62] Human rights were the responsibility of government, not theirs. In the drowning belief that corporations had no human rights responsibility under domestic or international law, they conducted resource exploitation processes in a manner that often resulted in mortal consequences for individuals and communities in Africa. Only willing to make opportunistic concessions to the most pressing demands, unchecked violations became corporate options where it was expedient and most profitable to do so.[63]

Often poorly characterised, however, are the significant environmental health and socio-economic consequences associated with extractive processes.[64] The extractive industries sectors is one of the most dangerous in the world.[65] Oil and gas drilling as well as solid mineral mining are associated with inherent risks that may be physical, chemical, biological, psychosocial or ergonomic in nature.[66] What is easily treated as routine, the frequent descent into underground shafts and prolong exposure to rock blasting, mineral-ore quarrying or waste dumps, including acid mine drainage (AMD) and tailings, are extremely hazardous to workers, nearby communities and biodiversity.

Occupational illnesses, injuries and fatalities arising from extractive processes create numerous health and social cost implications for workers and members of their families.[67] In South Africa, for example, occupational lung diseases,

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62 M Friedman 'Legitimacy and responsibility: The social responsibility of business is to increase its profits' in RF Chadwich & D Schroeder (eds) *Applied ethics: Critical concepts in philosophy* Vol 5 (2002) 57 (an extract from the *New York Times Magazine* 13 September 1970).

63 KM Leisinger 'On corporate responsibility for human rights' (2006) *Novartis Foundation for Sustainable Development* 1 7.

64 C Roelofs 'The extractive industries: Asserting their place in global health pedagogy' (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 431 432.

65 N Watt 'Mining for gold: Inside one of the most dangerous jobs' *Abcnews* 18 November 2008 <http://abcnews.go.com/Business/story?id=6284125> (accessed 10 September 2018).

66 L London & S Kisting 'The extractive industries: Can we find new solutions to seemingly intractable problems?' (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 421 422.

67 JM Kline 'MNCs and surrogate sovereignty' (2006) 13 *Brown Journal of World Affairs* 123 131.

tuberculosis, silicosis and HIV/AIDS infection contracted by miners resulted in 'the heavy toll death and disability in the gold mining industry.'[68] Unfortunately for mostly black mineworkers, racial clauses in its compensation legislation proscribed tort action against employers until a 2011 decision by the Constitutional Court called those clauses into question in the case of *Thembekile Mankayi v AngloGold Ashanti Limited*.[69] The aftermath of the Court's decision was the exposure of gold mining companies to a number of suits for tuberculosis and silicosis.[70]

Workplace hazards may extend well beyond the boundaries of the extractive operation, and its social repercussions for nearby communities can be enormous. According to London and Kisting:

> [v]isually obvious effects of mining activities include soil, water and air pollution; soil erosion and deforestation; extensive dumping of hazardous mine waste such as occurs with ore stockpiles, slag deposits, spoil heaps, mine tailings, and waste rock piles that generate potentially toxic and environmentally harmful trace elements; increased desertification and coastal erosion, which, in turn, impact air quality and agricultural production, creating health risks for those who live near mining operations, while turning others into environmental refugees.[71]

Nowhere are the horrifying human rights and environmental legacies of extractive corporations better exemplified than in Nigeria's Niger Delta region, where Shell became notorious for its brazen human rights and environmental violations. For instance, in 2008 and 2009, following the rupturing and explosion of a 55-year old Shell-owned oil pipeline, two massive spills of over 600 000 barrels of crude oil were discharged into the creeks and surrounding Bodo community of about 69 000 inhabitants.[72] The once lively farming and fishing community that was endowed with a rich tapestry of mangrove forests, swamps, arable land and

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[68] R Ehrlich & D Rees 'Reforming miners' lung disease compensation in South Africa – Long overdue but what are the options?' (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 451 453.

[69] [2011] ZACC 3 paras 113-114 (also see related citations 2011 (5) BCLR 453 (CC); 2011 (3) SA 237 (CC); [2011] 6 BLLR 527 (CC); (2011) 32 ILJ 545 (CC) (3 March 2011)) per Khampepe J.

[70] D Peacock & EN Keehn 'Justice is long overdue for the widows of South African mineworkers' *The Guardian* 25 October 2016 <https://www.theguardian.com/global-development/2016/oct/25/justice-long-overdue-widows-south-african-mineworkers-ruling-silicosis-gold> (accessed 20 October 2018); D Peacock, A Yawa & EN Keehn 'Miners seek justice over killer dust' 6 March 2015 <https://bhekisisa.org/article/2015-03-05-comment-miners-seek-justice-over-killer-dust> (accessed 20 October 2018).

[71] London & Kisting (n 66 above) 422.

[72] AD Morgan 'Long-term effects of oil spills in Bodo, Nigeria' *Aljazeera* 28 July 2017 <https://www.aljazeera.com/indepth/inpictures/2017/07/long-term-effects-oil-spills-bodo-nigeria-170717090542648.html> (accessed 24 March 2018).

waterways now lies polluted and devastated. Vidal paints a grotesque and graphic image of Shell's impact on Bodo, when he states that:

> [t]he air stinks, the water stinks, and even the fish and crabs caught in Bodo creek smell of pure "sweet bonny" light crude oil. The oil has found its way deep into the village wells, it lies thick in the mudflats and there are brown and yellow slicks all along the lengthy network of creeks, swamps, mangrove forests and rivers that surround Bodo in the Niger delta.[73]

Aside from these occupational and environmental health impacts, other cases abound where the corporate enterprise may not have been directly linked but has aided or triggered government-sponsored violations. Many extractive enterprises have been implicated for their role in fuelling violent conflicts, bribing corrupt government officials, killing environmental and human rights activists, and terrorising local populations in Africa.[74] Despite strong evidence of violations, the TNC operating in Africa has learnt to distance itself from legal liabilities for injuries with uncanny sophistry. It has a tendency to push the blame to third parties.[75] If it is not appropriating responsibility to recruitment companies to which the employment process had been sub-contracted or outsourced, it is attributing pollution to sabotage and vandalism by irate members of the community.[76] Shell, for

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[73] J Vidal 'Shell oil spills in the Niger delta: "Nowhere and no one has escaped"' *The Guardian* 3 August 2011 <https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo> (accessed 24 March 2018). Also see D Korsah-Brown 'Environment, human rights and mining conflicts in Ghana' in L Zarsky (ed) *Human rights and the environment: Conflicts and norms in a globalizing world* (2002) 79 83; R Thorton 'Environment and land in Bushbuckridge, South Africa' in L Zarsky (ed) *Human rights and the environment: Conflicts and norms in a globalizing world* (2002) 219-240.

[74] Global Witness 'Shell and Eni on trial' 17 October 2018 <https://www.globalwitness.org/en-gb/campaigns/oil-gas-and-mining/shell-eni-trial/> (accessed 19 October 2018); D Hess 'Business, corruption, and human rights: Towards a new responsibility for corporations to combat corruption (2017) *4 Wisconsin Law Review* 641 645; M Taka 'A critical analysis of human rights due diligence frameworks for conflict minerals: Challenges for the electronics industries' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 183 183-184; AB Spalding 'Corruption, corporations, and the new human right' (2014) 91 *Washington University Law Review* 1365 1381; H Slim 'Business actors in armed conflict: Towards a new humanitarian agenda' (2012) 94 *International Review of the Red Cross* 903 912; L Calvano 'Multinational corporations and local communities: A critical analysis of conflict' (2008) 82 *Journal of Business Ethics* 793 794-795; J Clough 'Punishing the parent: Corporate criminal complicity in human rights abuses' (2008) 33 *Brooklyn Journal of International Law* 899 901 & 924.

[75] E Gosden 'Shell to negotiate over Nigeria oil spill compensation' *The Telegraph* 6 September 2013 <https://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10290263/Shell-to-negotiate-over-Nigeria-oil-spill-compensation.html> (accessed 20 October 2018); British Broadcasting Commission 'Ogoniland oil spills: Shell admits Nigeria liability' *BBC* 3 August 2011 <https://www.bbc.com/news/world-africa-14391015> (accessed 20 October 2018); S Allison 'Two years too late, Shell takes blame for Nigerian oil spill' *Daily Maverick* 4 August 2011 <https://www.dailymaverick.co.za/article/2011-08-04-two-years-too-late-shell-takes-blame-for-nigerian-oil-spill/> (accessed 20 October 2018).

[76] R Chambers, T Van Ho & A Yilmaz-Vastardis 'Piercing the corporate veil: Can shell be held liable for oil spills in the Niger Delta?' *HRC Essex* 3 March 2016

instance, has frequently denied any wrong-doing for its massive oil spills in the Niger Delta, attributing them to oil theft and sabotage in order to reduce its reputational damage and avoid paying compensation.[77]

From all of this, it is crystal clear that the potential for risks to create damning human rights impact where precautions are not taken raises crucial questions of accountability for human rights abuses beyond just the state. If violations occur where imminent risks are deliberately ignored, should only the state be held accountable for convenient human rights breaches by extractive companies? Should victims harmed by corporations be left without remedies where the state is unable or unwilling to provide adequate regulations and safeguards?

2.3 Legal responsibility of extractive corporations for human rights

If the only threat to human dignity were the host state and if the state were dependable enough to effectively regulate the corporate tendencies that adversely impact individuals and communities in the developing world today, then attributing human rights obligations to the state alone would have been somewhat uncontentious. However, the reality is that making the state the only target of domestic and international human rights obligations is inadequate and unrealistic to protect human rights. While the international legal regime stipulates that states have *primary* obligation for human rights (that is, the 'main' or 'most important' obligation), it by no means laid down a golden rule that only states have human rights obligations. If this is true, then there is ground for knitting out a basis for conceptualising corporate responsibility and accountability for human rights.

In this section, I critically assess first the evolution of human rights norms in the effort to regulate the consequential conduct of corporate actors that impact human rights. To effectively highlight its progress, I take a brief but cursory look at the earliest standards of the UN, the developments in both international labour and

<https://hrcessex.wordpress.com/2016/03/03/piercing-the-corporate-veil-can-shell-be-held-liable-for-oil-spills-in-the-niger-delta/> (accessed 20 October 2018).

[77] T Bawden 'Shell "uses sabotage claims to avoid blame for Nigeria oil spills"' 18 June 2013 <https://www.independent.co.uk/news/business/news/shell-uses-sabotage-claims-to-avoid-blame-for-nigeria-oil-spills-8664202.html> (accessed 24 March 2018); J Vidal 'Shell accepts liability for two oil spills in Nigeria' *The Guardian* 3 August 2011 <https://www.theguardian.com/environment/2011/aug/03/shell-liability-oil-spills-nigeria> (accessed 5 September 2018).

environmental law, and the gradual push from 'soft' law to 'hard' law (including the on-going development of a legally binding instrument) on business and human rights.

2.3.1 Evolution of corporate human rights responsibility under international law

(a) The International Bill of Rights

In the aftermath of the Second World War, one of the key purposes of the UN's founding in 1945 was to proffer solutions to intractable international problems of an economic nature and protect as well as support the realisation of human rights for all.[78] Necessary for fulfilling that objective was the UN Charter's establishment of the Economic and Social Council (ECOSOC).[79] The ECOSOC was authorised to prepare draft human rights conventions, make recommendations targeted at promoting 'respect for, and observance of, human rights and fundamental freedoms for all' and set up commissions for that purpose.[80] Based on this mandate, the ECOSOC created the UN Commission for Human Rights (CHR) on 16 February 1946 'to weave the international legal fabric' for the protection of fundamental rights and freedoms and elaborate on human rights standards.[81]

However, the effect of the inclusion of human rights in the text of the UN Charter remained largely unclear. There was much uncertainty as to whether the reference to human rights created binding obligations for its member states or whether it was merely aspirational. Considering the mist surrounding this debate, the UN General Assembly in 1946 decided to draw up a human rights road map for the world.[82] To give flesh to the bonny human rights ideals of the UN Charter, a universal declaration on human rights was conceived as an ideal foundational framework upon which an international system of norms and mechanisms for the promotion and protection of human rights would be built.[83] After extensive

[78] UN Charter arts 1(3), 13(1)b, 55c, 62(2), 68 & 76c.
[79] UN Charter art 7.
[80] UN Charter art 62.
[81] UN Human Rights Council 'Introduction' <https://www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx> (accessed 28 October 2018); UN Human Rights Council 'Background information' <https://www.ohchr.org/EN/HRBodies/CHR/Pages/Background.aspx> (accessed 28 October 2018).
[82] United Nations 'History of the document' <http://www.un.org/en/sections/universal-declaration/history-document/index.html> (accessed 28 October 2018).
[83] C Flinterman 'The Universal Declaration of Human Rights at 60' (2008) 26 *Netherlands Quarterly of Human Rights* 481 483 ('the Universal Declaration of Human Rights can and should be seen as the foundation of the international and regional normative frameworks in the field of human rights').

deliberations, the draft declaration was completed and presented to the UN General Assembly by the CHR. On 10 December 1948, the Assembly adopted the Universal Declaration of Human Rights:

> 'as a common standard of achievement for all peoples and all nations, to the end that every *individual and every organ of society*, keeping this Declaration constantly in mind, *shall* strive … to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance….[84]

The Declaration covers an extensive catalogue of human rights and lays the basic foundation upon which the framework of subsequent human rights instruments has been articulated. It recognises the universality, indivisibility, interrelatedness and interdependence of rights by its copious recognition of all categories of rights in a single document.

Owning to ideological differences, however, between the West and East blocs – the former more favourably disposed to protect civil and political rights, and the latter in support of economic, social and cultural rights – a single binding document in which the human rights recognised by the Universal Declaration are codified, was unrealisable. At the direction of the General Assembly, the rights in the Declaration were split and two documents were accordingly developed. On 16 December 1966, the General Assembly adopted the two draft covenants – the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) - representing the two broad categories of rights. The Universal Declaration and the two Covenants are what are collectively known today as the International Bill of Human Rights.[85]

The notion that corporations have human rights responsibilities can reasonably be traced to the foundational provisions of the International Bill of Rights. The Declaration, interestingly, is phrased in a way that arguably was intended to not exclude any category of potential human rights violators from its grip. First, in the preambular paragraph, it makes explicit reference to, not just states but also, 'every individual and every organ of society', as the objects of which the general responsibility to respect the human rights in the Declaration – in the context and

[84] Preamble to the Universal Declaration [emphasis mine].
[85] United Nations 'Fact sheet 2 (Rev1), The International Bill of Human Rights' <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (accessed 12 October 2018).

choice of the phrase, 'shall strive' – are imposed. For this reason, Henkin strongly argues that '[*e*]*very individual* includes juridical persons. *Every individual and every organ of society* excludes no one, no company, no market, no cyberspace.'[86] It is now widely acknowledged that companies are part of the 'organs of society' referenced and therefore captured in the Declaration.[87]

Second, by attributing rights to 'everyone' and affirming that 'no one' should be denied rights, the Declaration adopts an obligatorily neutral norm that is unrestrictive in terms of those upon whom the responsibility to respect rights are entrusted. A scrutinous look at all the articles in the Declaration will show this - that it does not categorically limit the responsibility for human rights to the state alone with the expectation that this question would be subsequently resolved by political settlement. As Paust puts it, 'most duties are generally not limited to state actors and do reach private persons or entities. Moreover, violations of human rights recognized in particular treaties and customary international law often reach private perpetrators expressly or by implication.'[88]

Third, the provisions of articles 29(1) and 30 of the Declaration are such that suggest that everyone is contemplated to have correlative duties towards the protection of the rights and freedoms recognised in the Declaration. In the case of article 29(1), the Declaration affirms that everyone has duties to the community. In article 30, the Declaration affirms that its provisions may not be (mis)construed as permitting 'any state, group or person' the right to perform any act or engage in any activity the result of which violates the rights and freedoms guaranteed in the

[86] L Henkin 'The Universal Declaration at 50 and the challenge of global markets' (1999) 25 *Brooklyn Journal of International Law* 17 25; JE Alvarez 'Are corporations subjects of international law' (2011) 9 *Santa Clara Journal of International Law* (2011) 1 5; JL Černič 'Corporate human rights obligations at the international level' (2008) 16 *Willamette Journal of International Law and Dispute Resolution* 130 147-150; Zohadi (n 19 above) 74; RM Bratspies 'Organs of society: A plea for human rights accountability for transnational enterprises and other business entities' (2005) 13 Michigan State Journal of International Law 9 14-15 (states that organs of society 'refers to entities not captured by the terms "individuals" or "states."'); D Aguirre 'Multinational corporations and the realisation of economic, social and cultural rights' (2004) 35 *California Western International Law Journal* 53 77; S Deva 'UN's Human Rights Norms for transnational corporations and other business enterprises: An imperfect step in the right direction' (2003) 10 *ILSA Journal of International & Comparative Law* 493 498.

[87] G Mantilla 'Emerging international human rights norms for transnational corporations' (2009) 15 *Global Governance* 279 286; B Stephens 'The amorality of profit: transnational corporations and human rights' (2002) 20 *Berkeley Journal of International Law* 45 77-78.

[88] JJ Paust 'Human rights responsibilities of private corporations' (2002) 35 *Vanderbilt Journal of Transnational Law* 801 810.

Declaration. Read joint, these provisions imply the existence of private duties to respect and not violate human rights.[89] As Paust argues:

> Indeed, Article 30-like provisions in most major human rights instruments-contains an interpretive command that "[n]othing ... be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'"4 1 Because numerous human rights are set forth in the Declaration without any mention of "state" actors or any limitation to state actor duties or "color," the express and unavoidable interpretive command in Article 30 prohibits adding words or implying limitations that the drafters did not choose. Article 30 also should not be read so as to interpret particular human rights articles as if groups or persons can engage in any activity or perform any act aimed at the destruction of such rights, but state actors or those acting under "color"-and only such actors-cannot do so. The correlative reach of Article 30 is to "any" group or person.[90]

Much like the Declaration, the preambular paragraph of the ICCPR affirms that 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.'[91] This suggests that the ICCPR recognises the existence of horizontal human rights responsibilities. Although their recognition in the preamble can be read together with the prohibition in article 5(1) of 'any' state, group or person from undertaking any act that is capable of destroying the rights and freedoms enshrined in the Covenant. Paust references the provisions of article 30 of the Declaration, article 5(1) of the Covenants, article 17 of the European Convention on Human Rights and articles 27 to 29 of the African Charter on Human and Peoples' Rights 1981 in coming to the conclusion that 'duties of private individuals and groups exist under human rights law.'[92]

In as much as the Declaration and the Covenants provide a veritable backbone for articulating the human rights responsibility of corporations, businesses and a section of scholars have identified nuances intended to water down their applicability. The first argument advanced is that the Declaration is essentially non-binding and therefore unenforceable against corporations.[93] As a 'soft' law instrument, its language is considered exhortatory and too loose to create any legally binding obligations for state and non-state actors. While this is only correct about the general status of the Declaration as a standard for enforcing compliance, its provisions may be binding to the extent that they have attained the status of

[89] MS McDougal, HD Lasswell & L Chen *Human rights and world public order: The basic policies of an international law of human dignity* (2019) 103-104.
[90] Paust (n 88 above) 811-812.
[91] ICCPR preamble para 6.
[92] Paust (n 88 above) 813-814.
[93] A McBeth 'Every organ of society: The responsibility of non-state actors for the realization of human rights' (2008) 30 *Hamline Journal of Public Law & Policy* 33 38-40.

customary international law or been codified in treaty form.[94] As Dugard rightly argues, 'it is pointless to examine the UDHR as "law" without an examination of its legally binding offspring, the Covenants.'[95] Many of the Declaration's provisions have been given expression in the ICCPR and ICESCR as well as other international and regional human rights treaties, and therefore create binding legal obligations to the extent to which they have been accepted by states as representing international legal principles.

The second argument canvassed against the Declaration's applicability to corporate entities is that the textual reference to 'organs of society' in the preambular paragraph is not an authoritative part of its substantive provisions and therefore inapplicable. The rationale for this argument is that the preambular provision of a law is an unessential part of its normative provisions and, therefore, immaterial in its interpretation.[96] A puncturing response to this argument is that the obligation imposed on 'any State, group or person' by article 30 of the Declaration (not to violate the rights and freedoms recognised in the Declaration) creates legally binding obligations for non-state parties as organs of society to the extent that article 30 has been embedded in the Covenants. Article 5(1) of both the ICCPR and the ICESCR reiterates the provision of article 30 of the Declaration when it states that:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Besides, the UN, in 1998, corrected the omission in the Declaration by recognising *organ of society* as a variant of 'group' in the Declaration.[97]

The legal consequence of prohibiting 'any state, group or person' from engaging in any activity or action aimed at the violation of the rights and freedoms enshrined in the Covenants is that no one – whether state or non-state actor – is allowed to operate by act or omission in a way that could be harmful to human

94 Stephens (n 87 above) 81.
95 J Dugard 'The influence of the Universal Declaration as Law' (2009) 24 *Maryland Journal of International Law* 85.
96 McBeth (n 93 above) 39.
97 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998 art 18 (makes categorical reference to 'organs of society'). This Declaration was adopted by UN General Assembly resolution 53/144 9 December 1998.

rights.[98] Definitionally, a corporation is, according to Forcese, 'an amalgamation of persons.'[99] This author argues that corporations, being groups of people rather than abstract entities, fall squarely within the textual meaning of the phrase 'group or person', and are therefore not permitted by either article 30 of the Declaration or article 5(1) of the Covenants to act in a way that may infringe on the rights and freedoms that the Covenants guarantee. Dhooge corroborates this point when he argues that although 'individuals' and 'organs of society' are expressly undefined by either the Declaration or the Covenants, they are persons and groups to whom duties are ascribed. He states that:

> Nevertheless, they include transnational corporations to the extent such entities may be characterized as individuals or persons using real entity theory. Individuals and persons may also include corporations applying aggregate theory to the extent they are viewed as groups formed as a result of contractual relations.[100]

Alvarez makes a similar argument when he states that 'corporations are merely groups of persons and that what is illegal for one individual to do should be equally illegal for a group of them, even when this group is formed to make a profit.'[101] A similar thread of logic can be drawn to attribute corporations with human rights responsibilities under other provisions of existing UN[102] and ILO[103] treaties.

Despite these strong linkages between the normative stipulations of the International Bill of Rights and corporations, the loudest views are that corporations have no direct human rights obligations under international law. The lack of an express mention of private entities in the core human rights instruments of the UN

98 International Covenant on Civil and Political Rights 1966 (ICCPR) art 5; International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) art 5 [emphasis mine].

99 C Forcese 'Regulating multinational corporations and international trade law' in D Bethlehem, D McRae, R Neufeld & I Van Damme (eds) *Oxford Handbook on International Trade Law* (2009) 724.

100 LJ Dhooge 'Human rights for transnational corporations' (2007) 16 *Journal of Transnational Law & Policy* 197 209.

101 Alvarez (n 86 above) 4.

102 Convention on the Rights of Persons with Disabilities 2006; International Convention on the protection of the Rights of Migrant Workers 1990; Convention on the Rights of Children 1989; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; Convention on the Elimination of all forms of Discrimination against Women 1979 (CEDAW); International Convention on the Elimination of all forms of Racial Discrimination 1965 (ICERD).

103 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (182); Convention concerning Minimum Age for Admission to Employment 1973 (138); Convention concerning Discrimination in Respect of Employment and Occupation 1958 (111); Convention concerning the Abolition of Forced Labour 1957 (105); Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 1951 (100); Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively 1949 (98); Convention concerning freedom of association and protection of the right to organize 1948 (87); Convention concerning Forced or Compulsory Labour 1930 (29).

has been used by western scholars and businesses (and, to some extent, governments) to explain away the human rights obligations of business. Nolan argues, for instance, that most treaties refer more directly to the responsibility of states to address the human rights abuses of corporations. She argues that 'these treaties do not themselves create direct obligations for corporations but instead require states to regulate and adjudicate the acts of corporations in order to fulfil their duty to protect human rights as outlined in the treaties'.[104]

(b) International labour and environmental standards

Whilst disputations persist, recent developments in the realm of international labour law and international environmental law prove that corporate entities are progressively being attributed with direct obligations for their harmful human rights impacts.[105] It is my view that developments in international labour law and international environmental law, which have a strong bearing on human rights, cannot be isolated from the business and human rights discourse. The incorporation of social rights such as the right to work, right to a healthy environment, right to adequate remuneration for work, the right to associate with others and join trade unions into the International Bill of Rights also blurs the fine lines between human rights, environmental rights and labour rights. Compa states that human rights and labour rights are not an 'either-or' debate, rather they are mutually reinforcing.[106] And Kolben argues that framing labour rights in human rights language will make corporate employers more 'responsive to charges that they have violated human rights and labor rights.'[107]

In addition to the human rights guarantees in UN human rights instruments, ILO standards and the standards on international environmental law – which have strong human rights links - can be said to create human rights obligations for states as well businesses.[108] Kinley and Chambers argue that labour rights overlap with human rights not just in terms of their conceptual bases but also in their form as

[104] J Nolan 'Mapping the movement: The business and human rights regulatory framework' in D Baumann-Pauly & J Nolan *Business and human rights: From principles to practice* (2016) 32 34.
[105] JR Paul 'Holding multinational corporations responsible under international law' (2000) 24 *Hastings International & Comparative Law Review* 285 288.
[106] L Compa 'Solidarity and human rights: A response to Youngdahl' (2009) 18 *New Labor Forum* 38 39.
[107] K Kolben 'Labour rights as human rights' (2009) 50 *Virginia Journal of International Law* 449 465.
[108] Kolben (n 107 above) 452, argues that 'while human rights are primarily oriented towards limiting the power of the state, labor rights are primarily oriented towards limiting the power of private actors in the market.'

'labour rights are expressly included as human rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR).'[109] Even the UN Special Representative to the Secretary General on business and human rights (SRSG) acknowledges that '[l]abour rights enjoy greater business recognition than any other human rights.'[110] However, that recognition does not merely arise out of social expectation as the SRSG claims, but because companies consider themselves bound by international labour standards. Here is why. Extractive companies as employers of labour, it can be argued, have direct and indirect human rights *obligations* under ILO conventions with respect to such rights as the right to participate in union, the right to health, the right to good conditions of work and workplace safety, freedom from discrimination, the right to security, among other incidental core labour rights.

Under the ILO Right to Organise and Collective Bargaining Convention 1949 (No 98), for example, a worker has the right to adequate protection against acts of anti-union discrimination by an employer if the employment is 'subject to the condition that he [or she] shall not join a union or shall relinquish trade union membership' or calculated to cause a dismissal or other prejudice by reason of such membership or because of involvement in union activities outside working hours or within working hours, with the employer's consent.[111] While it is true that states assume a legally binding obligation to adopt laws and policies to ensure the protection of employees and compliance by employers, employers may equally automatically assume an international employment obligation to ensure that workers in their employ who join trade unions are not discriminated against or penalised by reason of their membership of such trade unions, if they do so outside working hours or during working hours with the employers' consent.

[109] D Kinley and R Chambers 'The UN Human Rights Norms for Corporations: The private implications of public international law' (2006) 6 *Human Rights Law Review* 447 472.

[110] UN Human Rights Council 'Report of the Special Representative of the Secretary General on the Issue of Human Rights and transnational corporations and other business enterprises [Addendum]: Business recognition of human rights: Global patterns, regional and sectoral variations' A/HRC/4/35/Add.4 (8 February 2007) 2 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/111/64/PDF/G0711164.pdf?OpenElement> (accessed 26 October 2018).

[111] ILO Right to Organise and Collective Bargaining Convention 1949 (98) art 1(1)(2)(a)&(b).

Given that an ILO treaty such as Convention No 98 can only take effect upon its ratification by a state party, the application of labour obligations to extractive corporations can apply in (either of) two ways – indirectly or directly. In the first situation, where a state ratifies but requires legislation to make the Convention domestically applicable (essentially a dualist state), the corporate employer will only have an indirect obligation to respect the labour rights of the employee to the extent that local laws and regulations adopted by the state require. This is the case in most dualist states. See the illustration provided in Figure 2-1 below.

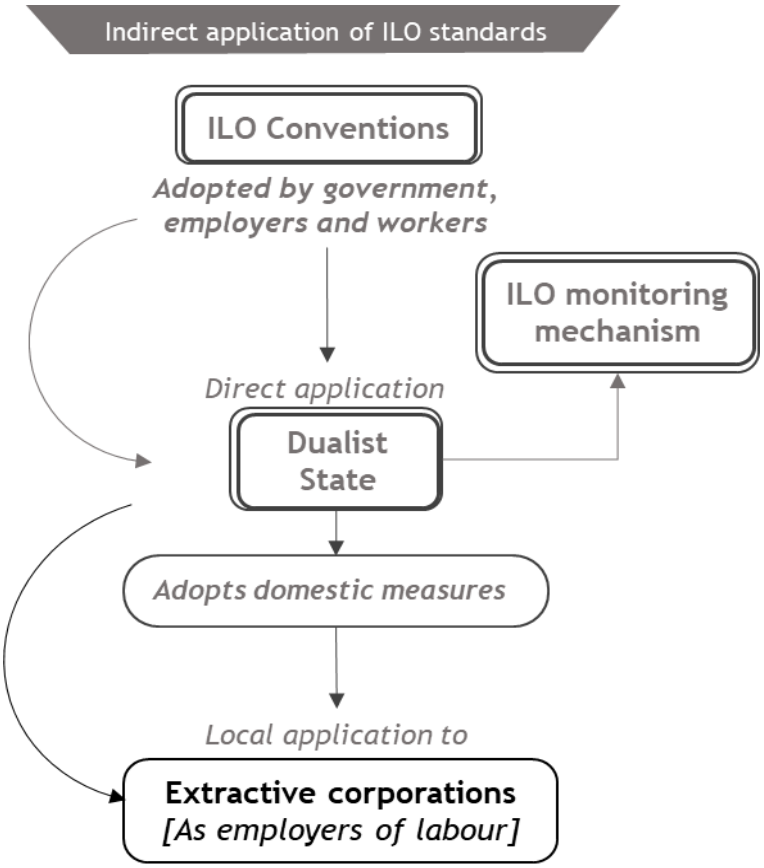

Figure 2-1: Indirect application of ILO standards to corporate employers.

In the second situation, where no domestic legislation is constitutionally required after ratification (as in a monist state), the Convention may be automatically applicable to state governments, employers and workers. This essentially means that the labour obligations imposed on employers will be equally enforceable against an extractive corporation as an employer of labour before municipal courts. This is because in a monist state, local legislation is not required beyond the constitution to operationalise Convention No 98 domestically.

Ideally, the domestic application of an ILO treaty to the corporate enterprise in a monist state can be conceptualised in either of two situations. In the first

scenario, the state becomes bound under international law as a collective – that is, comprising government, workers and private entities – upon the ratification of the treaty because ILO standards are negotiated by governments, workers and employers.[112] As Helfer alludes, 'the ILO has nearly always adopted conventions by large majorities of governments, workers, and employer delegates.'[113] Therefore, assuming without necessarily accepting that domestic application of ILO treaties is not automatic upon ratification by a monist state, a tenable argument is that, at the very least, a labour right is created for the mineworker and a 'responsibility' arises for the corporate employer once the treaty is ratified, even if it may not be immediately domestically enforceable.[114] Considering that employers and workers partake in ILO treaty development processes, it is doubtful whether corporate employers will be at liberty, in the eyes of equity, to contravene a treaty in which they fully participated, where no domestic legislation has been enacted for its implementation. In the second scenario, it is very arguable that in a monist state, ILO treaties outrightly apply to extractive companies directly upon ratification (or where the treaty is already ratified before the company's establishment, then upon the incorporation of the extractive company). See the illustration of these scenarios in Figure 2-2 below.

[112] ILO International Labour Standards Department *Handbook of procedures relating to international labour Conventions and Recommendations* (2012) 7-12; International Labour Organisation 'How international labour standards are created' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 28 October 2018); International Labour Organisation 'Conventions and recommendations' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 28 October 2018).

[113] LR Helfer 'Monitoring compliance with unratified treaties: The ILO experience' (2008) 71 *Law and Contemporary Problems* 193 197 (fn 23); LR Helfer 'Understanding change in international organizations: Globalization and innovation in the ILO' (2006) 59 *Vanderbilt Law Review* 649-726; N Valticos *International Labour Law* (2013) 29 (argues that '[b]y ensuring such a participation, on an equal footing, of representatives of employers and workers in the decisions which would apply to them…this principle aimed at inspiring confidence among employers' and workers' representatives, to entrust them with responsibilities and to associate, with a view to achieving social peace, these two parties – often opposed to each other – with governmental action.').

[114] P Alston '"Core labour standards" and the transformation of the international labour regime' (2004) 15 *European Journal of International Law* 457 513 (considers that the integration of employers (and workers) in ILO monitoring strictures has contributed to the 'privatisation of enforcement', because implementation of ILO standards are expected to ultimately be undertaken by private actors).

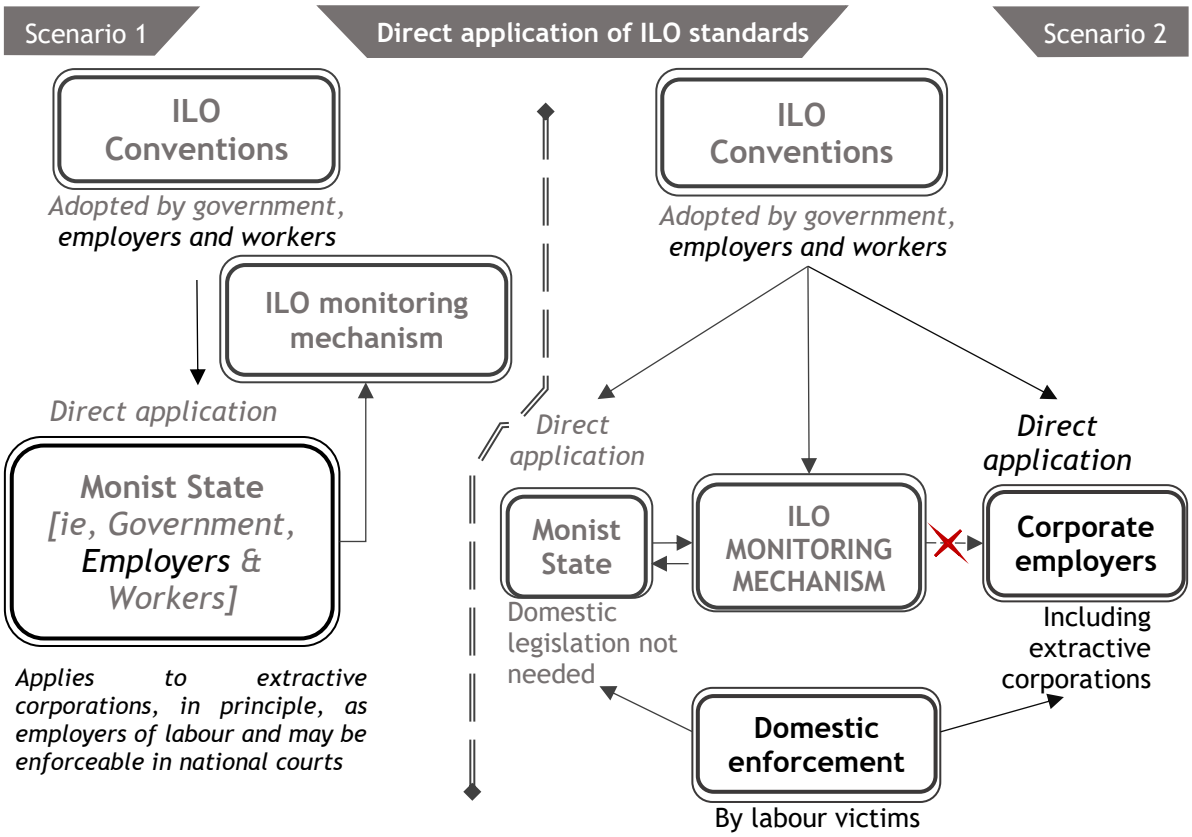

Figure 2-2: Direct application of ILO standards to corporate employers.

In conceptualising the labour and human rights responsibility of extractive corporations in relation to labour standards, two dynamics are worthy of mention. One is the dynamic that ILO standards do not merely impose responsibility on states; they also do so to employers, and extractive corporations as employers of labour, fall into this category.[115] Two, the dynamic that many states in the world are typically monistic or dualistic, in a very important way – and, sadly, very easily overlooked - fundamentally affects the interpretation, application and enforceability of international labour and human rights obligations locally.[116] Bossuyt suggests that the internal effects of a provision in an international human rights treaty would depend on the nature of the constitutional order (whether it allows for the direct or indirectly application of international instruments) and on the treaty itself (whether it is self-executing or requires domestic action).[117]

Similarly, increased concerns about the activities of corporate entities responsible for pollution and damages arising at sea and on land have beamed the

[115] As above.
[116] E Benvenisti & A Harel 'Embracing the tension between national and international human rights law: The case for discordant parity' (2017) 15 *International Journal of Constitutional Law* 36 38.
[117] M Bossuyt *International human rights protection: Balanced, critical, realistic* (2016) 103-114.

spotlight of accountability on corporations for environmental violations. Under international environmental law, extending direct human rights obligations to corporations whose activities negatively impact human lives and the environment is a rapidly evolving trend. For instance, the Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes 1999 (Protocol to the Basel Convention) affirms 'the need to provide for third party liability and environmental liability' for damage arising from the transboundary movement of hazardous wastes, but it does not stop there.[118] It goes on to impose strict liability on the 'person in possession or control' of corrosive, ecotoxic, explosive, flammable, infectious, poisonous or toxic wastes, who may be a natural or legal person.[119]

Furthermore, international organisations such as the International Maritime Organisation (IMO) and the Council of Europe (CoE) have similarly adopted civil liability treaties that impose direct obligations on extractive corporations responsible for damages and oil pollution at sea.[120] For instance, article 3 of the IMO International Convention on Civil Liability for Oil Pollution Damage 1992 imposes liability for any pollution caused by a ship on its owner. Article 1(2) and (3) defines 'owner' as the person or persons registered as owner of the ship and includes corporate persons. Similar rules apply to the CoE Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993. While these treaties purport to apply directly to corporations, the mechanism for enforcement remain those of the national courts of state parties. What this means is that although both civil liability conventions apply to corporations on the international plane, enforcement will be local.

[118] Preamble to the Protocol to the Basel Convention. The Protocol was adopted pursuant to article 12 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (Basel Convention).

[119] Protocol to the Basel Convention arts 4-7. Also see article 4(1) of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents 2003 (which provides that 'The operator shall be liable for the damage caused by an industrial accident.') adopted by member states of the Economic Commission of Europe.

[120] IMO International Convention on Civil Liability for Oil Pollution Damage 1992 arts 1(2), 3 & 9; Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993 arts 2(5) & (6), 6 & 25. Also see G Zyberi 'Ensuring the protection of the environment from serious damage: Towards a model of shared responsibility between international corporations and the states concerned?' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 67 73-77.

These treaties essentially restate the 'polluter-pay' principle which is to the effect that '[t]he costs of pollution prevention, control and reduction measures are to be borne by the originator.'[121] The *Institut de Droit International* (IDI) has also reiterated the liability of corporate entities responsible for environmental pollution in a resolution on Responsibility and Liability under International Law for Environmental Damage 1997.[122] In that resolution, the IDI declares that environmental damage arising from the activities of an operator engages the primary liability of that operator.[123] To the IDI, '[a]pportionment of liability under environmental regimes should include all entities that legitimately may be required to participate in the payment of compensation so as to ensure full reparation of damage.'[124] This position vividly captures the progressive evolution of norms directly imposing obligations on legal entities, even if no enforcement mechanisms against such entities are immediately established.

(c) The global regulation of corporate corruption and transnational crimes

Although international criminal law focuses on the criminal responsibility of individuals for serious human rights violations which are of grave concern to the international community, corporations have also recently come under indirect international scrutiny in the global fight against corruption and transnational organised crimes. For instance, in 2000, the UN General Assembly adopted the United Nations Convention against Transnational Organized Crimes 2000 and its supplementary Protocols. While the Convention imposes primary duties on states in terms of the prevention, prosecution and punishment of transnational organised crimes perpetrated by syndicates and individuals, it captures persons or entities that may be involved in corruption by benefitting from the promise, offering, solicitation or acceptance of an undue advantage by a public official.[125] Similarly, under the UN

[121] Draft International Covenant on the Environment and Development 1995 art 6; Draft International Covenant on Environment and Development 2014 48. Also see LA Duvic-Paoli *The prevention principle in international environmental law* (2018) 134.

[122] Institut de Droit International *Responsibility and Liability under International Law for Environmental Damage 1997* 4 September 1997 <http://www.idi-iil.org/app/uploads/2017/06/1997_str_03_en.pdf> (accessed 16 October 2018).

[123] Responsibility and Liability under International Law for Environmental Damage 1997 art 6.

[124] Responsibility and Liability under International Law for Environmental Damage 1997 art 11; Also see S Sucharitkul 'Responsibility and liability for environmental damage under international law' (1996) 1 8 Paper 664 <http://digitalcommons.law.ggu.edu/pubs/664> (accessed 29 October 2018).

[125] H Ivanhoe 'The next generation of "fair trade": A human rights framework for combating corporate corruption in global supply chains' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 157 172.

Convention against Corruption, state parties are obligated to adopt measures in accordance with domestic law to prevent corruption in the private sector that enhance auditing and accounting practices, impose proportionate administrative, civil and criminal penalties for non-compliance with standards, and promote transparency in the establishment and running of corporate entities.[126] The African Union (AU),[127] the CoE,[128] and the Organisation of American States,[129] have adopted similar treaties to criminalise the activities of corporations involved in bribery and corruption.

While these varied normative advances in relation to TNCs should be acknowledged in many respects, their relevance and applicability under international law generally and international human rights law in particular - it would seem - are somewhat incoherent. The incoherence is evident in two ways: first, while there is excessive emphasis on the duty of the state to protect individuals from the harmful activities of extractive corporations under international human rights law, that emphasis has not prevented the application of direct attribution of labour and environmental obligations to corporations as employers of labour and abusers of the environment. Second, again while the emphasis on the indirect regulation of corporate actors under the UN human rights system has prevented the adoption of any binding human rights treaty applicable to business, the same UN has spared no effort to regulate corporations involved in corruption and transnational organised crime at the global level through 'hard' law – albeit indirectly.

The challenge of incoherence emanates from the fragmentation of international law, which poses an inescapable danger of conflict and incompatibility

[126] United Nations Convention against Corruption 2003 arts 12, 14(1)(a) & 26(1)(4) (Covers the liability of legal persons, without excluding the liability of the natural person responsible for committing the crime).

[127] African Union Convention on Preventing and Combating Corruption 2003 arts 4(1)(a)(b)(e)(f) & 11 (which specifically lists 'a private sector entity' as one of the categories of private actors to which the Convention applies).

[128] Council of Europe Criminal Law Convention on Corruption 1999 arts 7, 8, 18(1)-(3) & 19(2) (Specifically requires state parties to adopt legislative and other measures 'to ensure that legal persons can be held liable for the criminal offences of bribery, trading in influence and money laundering…committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person', and does not exclude the liability of the natural person responsible for the offence).

[129] Inter-American Convention against Corruption 1996 art 6(a)(b) (which makes reference to 'person or entity' as a category of persons for whom offering, granting, solicitation or acceptance of any article of monetary value, favour, gift, promise or other advantage may be made).

of legal rules, principles, and institutional practices.[130] If international human rights law is based on the promises of protecting individuals from the agony of social injustices, incoherence in rule-making and rule-systems can lead to normative clashes on the nature and scope of corporate obligation for human rights in different branches of international law which can only in turn clog the individual's quest for social justice. As such, incoherence and fragmentation make corporate accountability not only unattainable, it also can sustain conceptual debates and scholarly divides, and thereby derail consensus on attributing corporate actors with direct obligation under international human rights law.

The dilemma of inconsistency posed by the fragmentation of international law is even more salient in the work of some institutions responsible for the clarification of international law. The International Law Commission (ILC), for example, has remained static in its articulation of responsibility for international wrongs despite the emergence of new global power brokers and the rapid transformations of the way we look at responsibility for international wrongs in the field. Since the adoption of the Draft Articles on the Responsibility of States for International Wrongful Acts 2001, the ILC has remained normatively stagnant – albeit to the detriment of victims of corporate violations – in its position that states have responsibility for internationally wrongly acts. In its draft articles and principles relating to damage and loss in cases of transboundary harm arising from hazardous activities and, more recently, crimes against humanity, the ILC adopts a weak language and an indirect approach to corporate entities in relation to the prevention, mitigation and remediation of such harms by reposing on states the responsibility for international wrongs even where states are neither directly responsible nor had effective control over the harmful conduct of extractive corporations.[131]

2.3.2 Treading gently: The transition from 'soft' to 'hard' law

Flowing from the disparate traces of norms applicable to corporate entities above and the seeming incoherence in responsibility-attribution for harm, two things are

[130] International Law Commission 'Conclusions of the work of the Study Group on the fragmentation of international law: Difficulties arising from the diversification and expansion of international law' (2006) para 246 <http://legal.un.org/ilc/texts/instruments/english/draft_articles/1_9_2006.pdf> (accessed 16 October 2018).

[131] ILC Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries 2006; ILD Draft Articles on the Prevention and Punishment of Crimes Against Humanity 2019.

considerably established. First, international law does contemplate and, in some categorical cases, recognise the obligations of companies for human rights, labour rights and environmental harms to a significant extent. Second, under international law, the breach of such responsibilities incurs the liability of the entity responsible, regardless of whether there is a suitable enforcement mechanism at the international level. What remains unclear, however, is the preparedness of the international community to monitor those responsibilities through international human rights mechanisms; what impact the establishment of such mechanisms would have on the legal status of corporations; and whether developed states, whose interests are likely to be affected by such regulatory regime, have any willingness to let that happen. Making this point is important because this is where there seems to be much political and economic interest as well as diplomatic stalemate.

While this thesis does not expressly argue that international corporate regulation and enforcement is stalled principally by developed states perceiving direct corporate obligation as a threat to the expansion of global capitalism and the free market economy, it does suggest that the lack of accountability by TNCs for human rights abuses is not isolated from the conflict of interests between states of the developed and developing worlds in global norm-setting institutions like the UN.[132] Since international law is driven by the pressures of dominant and hegemonic states – pressures emanating from key actors within the state like TNCs, politicians, scholars and institutions of influence - that conflict has, in many ways, sustained a lack of consensus on the nature and scope of corporate human rights responsibilities on the international arena.[133]

Consequently, rather than take a more direct approach, greater preference has been indicated towards 'soft' law as an evolutionary step in the development of legally binding human rights norms for TNCs. But that preference is by no means accidental. Ideological conflicts between the East and West and clashes of political as well as economic interests between the global North and South have historically

[132] SY Kim & B Russett 'The new politics of voting alignments in the United Nations General Assembly' (1996) 50 *International Organisation* 629

[133] JE Spero & JA Hart *The politics of international economic relations* 7th ed (2010) 200; JN Nair 'The growing role of developing countries in the creation of international law: Lessons from bribery and corruption in the WTO' (2004) 24 *Singapore Law Review* 169 173-176; P Hirst 'Democracy and governance' in J Pierre (ed) *Debating governance: Authority, steering, and democracy* (2000) 13 32.

tempered calls for a strong regime of international corporate regulation.[134] As I show below, the stiff opposition by the West against any effort targeted at the direct examination of transnational corporate entities as its agents of capitalism has seen the UN and other international institutions opt for a much softer approach to curbing corporate human rights abuses. Little wonder Cîrlig states 'one cannot help but wonder whether such soft law instruments aren't only a means to avoid binding regulations with sanctions attached.'[135]

Starting in the 1970s, a number of measures were initiated at the level of the UN, ILO and other intergovernmental organisations (IGOs) to address the rising adverse impacts of corporate activities on human rights and the environment.[136] In 1972, the convening of the United Nations Conference on the Human Environment led to the adoption of the Stockholm Declaration on the Human Environment 1972 (Stockholm Declaration). This was significant because it was arguably the first formal effort at the UN to bring the attention of the world to the increasing necessity to protect and improve environmental safeguards.[137] Particularly, it brought worldwide consciousness to the incalculable harm that the irresponsible exploitation of natural resources was causing to human beings and the human environment and demanded 'the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level.'[138] It set the tune for further engagements on the environment including the subsequent adoption of the UN Declaration on the Right to Development 1986 and the Rio Declaration on Environment and Development 1992.[139] However, while these instruments were merely exhortatory and had no prescriptive effect on corporations, they constituted important talking points on the impact of extractive industries on human rights and the environment.

[134] JG Ruggie 'The social construction of the UN Guiding Principles on Business & Human Rights' in S Deva & D Birchall (eds) *Research Handbook on Human Rights and Business* (2020) 63 67-68.

[135] RE Cîrlig 'Business and human rights: from soft law to hard law?' (2016) 6 *Juridical Tribune* 228 233.

[136] J Nolan 'With power comes responsibility: human rights and corporate accountability' (2005) 28 *University of New South Wales Law Journal* 581 582.

[137] United Nations documents 'Declaration of the United Nations Conference on the Human Environment' held in Stockholm, Sweden, from 5-16 June 1972 <http://www.un-documents.net/unchedec.htm> (accessed 14 December 2020).

[138] Stockholm Declaration para 7.

[139] United Nations 'Report on the United Nations Conference on Environment and Development 1992' 12 August 1992 <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (accessed 29 October 2017); United Nations 'Declaration on the Right to Development' UN Doc A/RES/41/128 4 December 1986 <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 28 October 2017).

Although the Stockholm Declaration was adopted at about the same time as the global food crises, it was the implication of TNCs in the political upheavals in Central and South America that generated deep concerns about their growing power and influence in developing countries. Revelations detailing the involvement of the International Telecommunications and Telegraph Company in the US-backed regime change in Chile in the 1970s and, previously, the involvement of the US-based United Fruit Company in the ouster of Guatemala's President Jacobo Arbenz in the 1950s unsettled developing states and only further precipitated calls for a 'harder' regime of international corporate regulation.[140] At the level of the UN, the push by powerful civil society organisations in the global North and developing states from the South led to the establishment of the UN Commission on Transnational Corporations (CTC) by ECOSOC.

The mandate of the CTC was to act as a forum for 'the comprehensive and in-depth consideration of issues relating to transnational corporations.'[141] In furtherance of its mandate, the CTC developed a draft UN Code of Conduct for Transnational Corporations with broad application to states and TNCs.[142] The CTC was intended as a multilateral framework to define, in a detailed and balanced way,

[140] S Russell 'A country for a company – The 1954 US backed Guatemalan coup to support United Fruit Company' 27 October 2015 <https://www.warhistoryonline.com/war-articles/country-company-1954-guatemalan-coup-support-united-fruit.html/2> (accessed 4 November 2018); E Shanahan 'CIA-ITT plans on Chile reported' *The New York Times* 21 March 1973 <https://www.nytimes.com/1973/03/21/archives/c-ia-i-t-t-plans-on-chile-reported-company-aide-says-agency-also.html> (accessed 3 November 2018); The New York Times 'Papers show ITT urged US to help oust Allende' 3 July 1972 <https://www.nytimes.com/1972/07/03/archives/papers-show-itt-urged-us-to-help-oust-allende-suggestions-for.html> (accessed 3 November 2018); United States Senate Committee on Foreign Relations 'Multinational corporations and United States foreign policy hearings before the Subcommittee on Multinational Corporations of the Committee on Foreign Relations United States Senate Ninety-Third Congress on the International Telephone and Telegraph Company and Chile, 1970-71' 519 Appendix I: Supplemental background material <https://archive.org/stream/MultinationalCorporationsAndUSForeignPolicyUSSenateHearings/1973_Multinationals_ITT-Chile-2_djvu.txt> (accessed 3 November 2018). Also see PM Plantamura 'Impacts of U.S. Foreign Policy and Intervention on Guatemala: Mid-20th Century' (2013) 10 unpublished Graduate thesis and dissertations University of South Florida <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?referer=https://www.google.co.za/&httpsredir=1&article=5942&context=etd> (accessed 4 November 2018).

[141] UN Economic and Social Council Res 1913 (LVIII) 'The impact of multinational corporations on the development process and on international relations' UN ECOSOC Res Supp (No 1A) UN Doc E/5570/Add 1 1836th Plen (28 July 1972) 3-4; H Hummel 'The United Nations and transnational corporations' (2005) Conference paper on Global Governance and the Power of Business, Wittenberg 8-10 December 2005 2 <https://www.world-economy-and-development.org/downloads/hummelunandtncs2005.pdf> (accessed 28 December 2017); S Coonrod 'The United Nations Code of Conduct for Transnational Corporations' (1977) 18 *Harvard International Law Journal* 273.

[142] Draft UN Code of Conduct for Transnational Corporations 1983 arts 2 & 3.

the responsibilities and rights of TNCs and host state governments in their relations with another and third party individuals.[143] In particular, the Code imposed human rights obligations on TNCs and constituted the CTC as the mechanism responsible for its implementation and monitoring.[144] However, following the vehement opposition from the US and other western countries, the final draft Code was never formally adopted. Cutler argues that although the draft Code of Conduct was anticipated to have a major influence in the development of an international regulatory framework, its efforts failed to reach a consensus. With no headway made on its mandate, the CTC was eventually dissolved in 1994.[145]

Meanwhile, in the US, claims that US-based corporations were actively complicit in the massive human rights violations and racial discrimination perpetuated by the Apartheid regime in South Africa and South West Africa (now Namibia) prompted the African-American preacher, Reverend Leon Sullivan, to speak out against the complicity of American corporations in the atrocities of the Apartheid regime. As the first African-American to be appointed into the Board of General Motors (GM), he leveraged on his unique position to speak against GM's industrial interests and investments in South Africa claiming that 'the system of apartheid is being underwritten by American industry, interests, and investments.'[146] On 1 August 1977, he launched the Principles of Equal Rights which were subsequently christened the 'Sullivan Principles' with twelve corporate signatories pledging to comply with human rights standards in their operations.[147] By 1987, the Principles had been subscribed to by 125 companies worldwide and its provisions were subsequently

[143] KP Sauvant 'The negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and lessons learned' (2015) 16 *The Journal of World Investment & Trade* 11.

[144] Draft UN Code of Conduct for Transnational Corporations 1983 arts 13 & 67.

[145] The CTC was replaced by the UNCTAD Commission on International Investment and Transnational Corporations and subsequently, the Commission on Investment, Technology and Related Financial Issues. See AC Cutler 'Critical reflections on the Westphalian assumptions of international law and organisation: A crisis of legitimacy' in A Bianchi (ed) *Non-state actors and international law* (2009) 19 32.

[146] V Nicolet 'The Sullivan-plus Principles: A cure for silent complicity by corporate actors' (2016) 25 *Minnesota Journal of International Law* 545 558-560; HJ Richardson III 'Reverend Leon Sullivan's Principles, race, and international law: A comment' (2001) 15 *Temple International & Comparative Law Journal* 55 57-60; M Roth 'Sullivan Principles' *The Encyclopaedia of Greater Philadelphia* <https://philadelphiaencyclopedia.org/archive/sullivan-principles/> (accessed 5 November 2018).

[147] University of Minnesota Human Rights Library 'The Global Sullivan Principles' <http://hrlibrary.umn.edu/links/sullivanprinciples.html> (accessed 27 October 2018). The 12 companies were: American Cyanamid, Burroughs, Chevron Oil (formerly, Caltex), Citibank, Ford, General Motors, IBM, International Harvester, Mobil, Otis Elevator, Union Carbide, and 3M. See Roth (n 146 above).

incorporated in the Anti-Apartheid Act of 1986 which prohibits US companies from supporting or practicing racial segregation anywhere they conduct business. In partnership with the United Nations, the Sullivan Principles were revised and expanded in 1999 away from South Africa to a more global focus when they were unveiled as the Global Sullivan Principles by Reverend Sullivan and UN Secretary-General, Kofi Annan.[148]

Almost simultaneously, a comparable initiative was established in 1989 by the Coalition for Environmentally Responsible Economies (CERES) in the US. CERES is a network of corporate investors and environmental as well as public interest stakeholders who are keen about business operating in an ethical, environmentally friendly and sustainable manner.[149] Under the platform of CERES, a set of ten-point principles were adopted focusing on the protection of the biosphere, the sustainable use of natural resources, reduction and disposal of wastes, energy conservation, risk reduction, the safety of products and services, environmental restoration, information disclosure, the commitment of management boards to its principles, and regular audits and reports.[150] An oil producing company, Sun Company, based in Philadelphia, US, was the first Fortune 500 company to subscribe to the CERES Principles in 1993. Since its establishment, many other Fortune 500 companies have joined the bandwagon of pro-environmental sustainability companies including GM and Apple.[151] Other similar non-governmental voluntary initiatives that affirm the responsibility of businesses to carry on business in a socially responsible way include but are not limited to the Caux Round Table Principles for Responsible Business 1994 (CRT Principles), the MacBride Principles 1984 (marking nine fair employment principles for US companies operating in Northern Ireland), and the International Stability Operations Association (ISOA) Code of Conduct 2001 for private security

[148] DB Thorne 'Coalition for Environmentally Responsible Economies' *Encyclopaedia Britannica* 24 October 2016 <https://www.britannica.com/topic/Coalition-for-Environmentally-Responsible-Economies> (accessed 30 October 2018); Csridentity.com 'Global Sullivan Principles' <http://csridentity.com/globalsullivanprinciples/index.asp> (accessed 30 October 2018); University of Minnesota Human Rights Library (n 147 above).

[149] The Global Development Research Centre 'The Coalition for Environmentally Responsible Economies (CERES) Principles <https://www.gdrc.org/sustbiz/ceres-principles.html> (accessed 1 November 2018).

[150] CERES Principles 1-10. See The Global Development Research Centre (n 143 above).

[151] Coalition for Environmentally Responsible Economies (CERES) 'CERES company network' <https://www.ceres.org/networks/ceres-company-network> (accessed 1 November 2018); International Institute for Sustainable Development (IISD) 'The CERES principles' <https://www.iisd.org/business/tools/principles_ceres.aspx> (accessed 1 November 2018).

companies associated with peace and stability operations in conflict and post-conflict environments.[152]

However, the spread of non-binding standards during the period did little to minimise or avoid major fatalities in the extractive industries. For instance, in Rhodesia (now Zimbabwe), the Wankie Mine explosion led to the deaths of 427 miners in 1972.[153] The collapse of the Alexander L Kielland rig in the Ekofisk oil field in Norway saw the death of 123 people.[154] In India, the Bhopal gas incident resulted in 5 295 deaths in 1984.[155] In Italy, the Val di Stava dam collapse had 268 casualties in 1985.[156] In South Africa, the Kinross mine disaster killed 177 miners in 1986.[157] The Piper Alpha disaster in the North Sea in the UK incurred 165 deaths in 1988.[158] Beyond these few but major fatal instances, several other colossal disasters like the Exxon Valdez crash which saw the leakage of over 11 million gallons of crude oil into Alaska's pristine wildlife in 1989 initially signalled that corporate self-regulation was antithetical to the prescriptive regime of international human rights law.[159] These

[152] Caux Round Table for Moral Capitalism 'Principles for business' <http://www.cauxroundtable.org/index.cfm?menuid=8> (accessed 1 November 2018); University of Minnesota Human Rights Library 'The Macbride Principles, by Father Sean McManus, President, Irish National Causus, December 1997' <http://hrlibrary.umn.edu/links/macbride.html> (accessed 1 November 2018); International Stability Operations Association 'ISOA Code of Conduct' <https://stability-operations.org/page/Code> (accessed 1 November 2018) (NB: ISOA was formerly known as the International Peace Operations Association (IPOA) and its traceable to Sierra Leone).

[153] Mine accidents and disasters 'Wankie No. 2 Colliery Explosion' 6 June 1972 <http://www.mineaccidents.com.au/mine-accident/178/wankie-no-2-colliery-explosion> (accessed 1 November 2018).

[154] Arnold & Itkin LLP 'Major oil rig disasters: Some of history's largest oil rig explosions & fires' <https://www.arnolditkin.com/oil-rig-explosions/major-oil-rig-disasters/> (accessed 29 October 2018).

[155] Hindustan Times 'Accident at NTPC plant: India's worst industrial disasters, Bhopal to Korba' 1 November 2017 <https://www.hindustantimes.com/india-news/boiler-explodes-at-ntpc-plant-india-s-worst-industrial-disasters-bhopal-to-korba/story-a60C113OGSSvbez8lDn7wM.html> (accessed 1 November 2018).

[156] GRID-Arendal 'Val di Stava dam collapse' (2017) <http://www.grida.no/resources/11426> (accessed 2 November 2018).

[157] South African History Online 'More than 170 mineworkers are killed at Kinross Mine, South Africa' 16 September 1986 <https://www.sahistory.org.za/dated-event/more-170-mineworkers-are-killed-kinross-mine-south-africa> (accessed 1 November 2018).

[158] S Rajeev *Accidents do not happen: Accidents do not happen* (2016) 58; The Press and Journal 'Piper Alpha: The 167 men who died in the disaster' 4 July 2018 <https://www.pressandjournal.co.uk/fp/news/aberdeen/1508442/piper-alpha-the-167-men-who-died-in-the-disaster/> (accessed 2 November 2018); Offshore Technology 'Piper Alpha platform, North Sea' <https://www.offshore-technology.com/projects/piper-alpha-platform-north-sea/> (accessed 2 November 2018)

[159] N Cunningham 'The 10 worst energy-related disasters of modern times' 4 October 2014 <https://oilprice.com/Energy/Energy-General/The-10-Worst-Energy-Related-Disasters-In-History.html> (accessed 29 October 2018).

incidents rekindled global calls for corporate businesses operating beyond the extractive industries to conduct business in a responsible and sustainable way.

In Africa, the environmental pollution in Nigeria's Niger Delta region that had generated massive protests in the 1990s and the brutality suffered by the inhabitants of Ogoniland at the hands of Shell's private security and government forces generated new questions about the human rights obligations of private security companies in the extractive industries. Particularly, it brought about public debates about the need for governments and companies engaged in the extractive sector to align their policies with their responsibility to protect human rights, promote development and reduce or avoid conflict altogether. From these debates came the development and adoption of the Voluntary Principles on Security and Human Rights 2000 (Voluntary Principles). Initiated by the Governments of the US and the UK, the Voluntary Principles were the result of a modest trialogue among these governments, companies and civil society organisations on security and human rights.[160]

At the turn of the new millennium, drawing from lingering concerns that the increased number of voluntary initiatives had done little to lessen the incidents of corporate abuses and the outrage expressed worldwide, the UN was spurred to take a little different shot at its engagement on responsible business.[161] The UN Secretary-General convened the UN Global Compact Leadership Summit in 2000 that brought together a large network of companies operating around the global to commit to conduct business in an ethically and socially responsible manner. A major consequence of the Summit was the adoption of the UN Global Compact comprising 10 core principles that are anchored on human rights (principles 1 and 2), labour (principles 3 to 7), the environment (principles 8 and 9) and anti-corruption (principle 10).[162] Today, the Compact is the largest CSR initiative supported by some 12 452 companies operating in 160 countries.[163] A major critique of the Global Compact, however, has been its use by companies as an image-making and

[160] B Freeman, MB Pica & CN Camponovo 'A new approach to corporate responsibility: The voluntary principles on security and human rights' (2001) 24 *Hastings International and Comparative Law Review* 423 425.
[161] G Kell 'The Global Compact: Origins, operations, progress, challenges' (2003) 11 *Journal of Corporate Citizenship* 35 36.
[162] UN Global Compact 'The Ten Principles of the UN Global Compact' <https://www.unglobalcompact.org/what-is-gc/mission/principles> (accessed 26 October 2020).
[163] UN Global Compact 'Home' <https://www.unglobalcompact.org/> (accessed 26 October 2020).

corporate-branding initiative to deflect public attention from their involvement or association with human rights abuses.

In 2003, the United Nations Sub-Commission on Human Rights adopted the draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (draft Norms). The draft Norms sought to attribute TNCs with direct human rights obligations only less to those of states. It states that TNCs 'have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law.'[164] For this reason, the draft has been described as a 'comprehensive, restatement of the international legal principles applicable to businesses with regard to human rights.'[165] However, the CHR, now the Human Rights Council (HRC), rejected the Norms on various grounds, including that the Norms had 'no legal standing' and was not expressly mandated by the CHR.[166] As such, no further action has been taken on the norms ever since.[167] Instead, the UN appointed a UN Special Representative to the Secretary General on Business and Human Rights (SRSG), Professor John Ruggie. The outcome of the SRSG's extended mandate was the development of the 'Protect, Respect and Remedy' framework 2008 (the 'Ruggie' Framework), and the UN Guiding Principles on Business and Human Rights 2011 (UNGPs).[168]

Although the UNGPs have been described as offering 'authoritative guidance' on business and human rights, they have done very little to stop or remedy abusive corporate actions on the ground in the extractive sector in Africa. As much as they are useful for the prescription of foundational and operational principles to guide states and business on human rights issues, they attribute no enforceable human

[164] Draft Norms para 1.

[165] D Weissbrodt & M Kruger 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) 97 *American Journal of International law* 901.

[166] PP Miretski & SD Bachmann 'The UN norms on the responsibility of transnational corporations and other business enterprises with regard to human rights: A requiem' (2012) 17 *Deakin Law Review* 5 17.

[167] Only a few years later, the UN-backed Principles for Responsible Investments 2006, and the UN Declaration on the Rights of Indigenous Peoples 2007 were adopted.

[168] UN Human Rights Council 'Protect, respect and remedy: A framework for business and human rights – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' A/HRC/8/5 7 April 2008; UN Human Rights Council 'Report of the Special Representative of the Secretary-General on the Issue of human rights and transnational corporations and other business enterprises, John Ruggie – Guiding principles on business and human rights: Implementing the United Nationals "Protect, Respect and Remedy" Framework' A/HRC/17/31 21 March 2011.

rights obligations or impose sanctions on corporations. Hence, the UNGPs have drawn widespread criticisms for their silence on corporate accountability for human rights, and lack of enforceable remedies against corporations.[169] Amnesty International has stated that the reason the UNGPs enjoy extensive support from corporations is because 'they require little meaningful action by business.'[170] Although the Human Rights Council (HRC) established an Open-ended Intergovernmental Working Group on TNCs in 2014 to develop 'an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises,'[171] its promises have been sharply opposed by western states whose corporations benefit immensely from the status quo.[172]

Besides these measures are other long-standing complementary initiatives by other multilateral institutions. For instance, the Organisation for Economic Co-operation and Development (OECD), in 1976, adopted the OECD Guidelines for Multinational Corporations (OECD Guidelines). The OECD Guidelines have been revised regularly up to 2011,[173] and accompanied by supplementary standards recently adopted to give practical guidance on their implementation in the extractive and other sectors.[174] The OECD has also adopted the OECD Principles on Corporate Governance 2004 and OECD Guidelines on Corporate Governance on State-

[169] Okoloise (n 32 above) 217.

[170] W Brown 'Stronger UN draft on human rights abuses needed' *Financial Times* 20 January 2011 <https://www.ft.com/content/a3101700-2439-11e0-a89a-00144feab49a?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2Fa3101700-2439-11e0-a89a-00144feab49a.html&_i_referer=#axzz1BZxOCRWY> (accessed 28 November 2016).

[171] UN Human Rights Council Res 26/9 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' 14 July 2014 UN Doc para 1 <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement> (accessed 2 January 2018).

[172] NR Tuttle 'Human Rights Council Resolutions 26/9 and 26/22: Towards corporate accountability?' (2015) 19 *ASIL Insights* <https://www.asil.org/insights/volume/19/issue/20/human-rights-council-resolutions-269-and-2622-towards-corporate> (accessed 2 May 2019); T Deen 'EU aims to scuttle treaty on human rights abuses' <http://www.ipsnews.net/2014/06/eu-aims-to-scuttle-treaty-on-human-rights-abuses/> (accessed 2 May 2019).

[173] OECD *OECD Guidelines for Multinational Enterprises* (2011) 1-95.

[174] OECD *OECD due diligence guidance for meaningful stakeholder engagement in the extractive sector* (2017) 1-116; OECD *OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas: third edition* (2016) 1-122; OECD *Practical actions for companies to identify and address the worst forms of child labour in mineral supply chains* (2017) 1-56 <https://mneguidelines.oecd.org/Practical-actions-for-worst-forms-of-child-labour-mining-sector.pdf> (accessed 27 December 2017); OECD *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises* (2017) 1-64 <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf> (accessed 27 December 2017).

Owned Enterprises 2005 (both revised in 2015).[175] In 1997, the OECD went a step further to adopt a binding treaty to curb bribery in international business transactions.[176] China, not being a member of the OECD but enjoys considerable investment from OECD member states, also seems keen to play by the rules of responsible business practices. In 2015, the Chinese Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC) adopted two responsible business standards based on the normative propositions of the UN Framework and the UNGPs: the CCCMC Guidelines for Social Responsibility in Outbound Mining Investment 2014 which call for Chinese corporations involved in outbound mining to strictly observe the UNGPs, and the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains 2015 which has the basic objective of operationalising the CCCMC Social Responsibility Guidelines.[177]

As a specialised agency of the UN, the ILO has similarly adopted complementary non-binding standards in support of its existing conventions that reaffirm its normative stance and give appropriate guidance on social policy and responsible, inclusive and sustainable workplace conditions. As far back as 1977, it adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977 (Tripartite Declaration), the Declaration on Fundamental Principles and Rights at Work 1998 (amended in 2010), and the Declaration on Social Justice for a Fair Globalization 2008, which are particularly relevant to the labour practices of extractive companies.[178] However, based on the trends on global corporate governance since that time (especially the emergence of such important standards as the 2008 UN Framework, the UNGPs, the OECD Guidelines, the 2030 Agenda for Sustainable Development (2015), the Paris Agreement 2015, the Addis Ababa Action Agenda 2015 on Development Financing), the provisions of the

[175] OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris.
[176] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997.
[177] China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC) 'Guidelines for Social Responsibility in Outbound Mining Investments (GSRM)' 24 October 2014 <http://www.cccmc.org.cn/docs/2017-08/20170804141709355235.pdf> (accessed 29 November 2018); CCCMC 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains' 2015 <https://www.globalwitness.org/documents/18138/201512_Chinese_Due_Diligence_Guidelines_for_Responsible_Mineral_Supply_Chains_-_En_K83fxzt.pdf> (accessed 29 November 2018).
[178] Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (revised with a 'Follow-up' annexure, 15 June 2010).

Tripartite Declaration were amended in 2017 to recognise these standards 'taking account of developments' specifically relevant to the Declaration.[179]

Beyond the constellations of standards adopted under the auspices of the UN, ILO and OECD, international financial institutions have also recognized the need to apply similar standards, not so much for the protection of human rights but, to insulate themselves from the potential risks associated with development financing. Consequently, they have undertaken voluntary commitments to reduce the social, environmental and human rights risks associated with financing project in the extractive and other sectors. In 1998, the World Bank Group developed the Environmental, Health and Safety Guidelines ('EHS Guidelines') and a Pollution Prevention and Abatement Handbook to evaluate risks associated with prospective projects before investments.[180]

Similarly, the International Finance Corporation (IFC), an arm of the World Bank Group, has equally adopted guidelines for its financing of development projects in the extractive industries in developing countries. This is known as the IFC Sustainability Framework, released in 2006 and revised in 2012. The Framework requires clients to conduct business in a socially and environmentally sustainable way. The Framework details 'performance standards' that impose responsibilities on clients to manage social and environmental risks, and the IFC's commitments to environmental and social sustainability, as well as transparency.[181] Although these

[179] Adopted by the Governing Body of the International Labour Office at its 204th Session (November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017).

[180] International Finance Corporation 'Former environmental and social safeguards and supporting materials' <http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/safeguards-pre2006#ehsppah> (accessed 27 December 2017).

[181] International Finance Corporation 'IFC Sustainability Framework: Policy and Performance Standards on environmental and social sustainability: Access to information policy' (2012) <http://www.ifc.org/wps/wcm/connect/d0db8c41-cfb0-45e9-b66a-522c88f270a5/ESRP_Oct2016.pdf?MOD=AJPERES> (accessed 27 December 2017); International Finance Corporation 'International Finance Corporation's Guidance notes: Performance Standards on environmental and social sustainability' (2012) <http://www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Document.pdf?MOD=AJPERES> (accessed 27 December 2017); International Finance Corporation 'International Finance Corporation's policy on environmental and social sustainability' 1 January 2012 <http://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES> (accessed 28 December 2017). Also see the International Finance Corporation 'Environmental and social review procedures manual: Environment, social and governance department' (2013) <http://www.ifc.org/wps/wcm/connect/d0db8c41-cfb0-45e9-b66a-522c88f270a5/ESRP_Oct2016.pdf?MOD=AJPERES> (accessed 27 December 2017), which guides the IFC on its environmental and social assessment procedures during a project cycle.

standards reiterate the UN Framework and the UNGPs normative proposition of business responsibility to respect human rights, they do not expressly allude to those documents but affirm that they will be guided by the International Bill of Rights and the ILO's eight core conventions. The World Bank has sustained the momentum by its own recently adopted Environmental and Social Framework 2016 to regulate its involvement in natural resource development projects that may have adverse human rights and environmental impacts on individuals and communities.[182]

Other multi-stakeholder initiatives that promote financial transparency, probity and accountability in the extractive and financial sectors are the Extractive Industries Transparency Initiative (EITI) Standards,[183] Social Accountability 8000 Standard,[184] and the Equator Principles III 2013.[185] These sets of frameworks are voluntary standards that have been adopted to guide extractive corporations and financial institutions in the determination, evaluation and management of human rights risks and transparency issues associated with projects in the extractive industries.[186]

2.4 The problematic conceptualisation of 'corporate responsibility'

If it is considered that corporate human rights violations have been rampant when binding human rights obligations and enforcement mechanisms were either limited or out-rightly lacking, then it is easy to see that the UN Framework, the UNGPs and the other abovementioned voluntary initiatives as 'soft' law instruments have been totally ineffective against the abusive tendencies of extractive corporations. Voluntary standards, plainly speaking, operate merely to substantiate the idea of CSR (which is the voluntary responsiveness of corporate entities to social concerns) rather than the human rights accountability of corporations engaged in violations in

[182] World Bank 'World Bank environmental and social framework' (2017) 1-121 <http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework.pdf> (accessed 27 December 2017). Also relevant is the draft Guidance Notes for the Environmental and Social Standards proposed for release in 2018.

[183] Extractive Industries Transparency Initiative 'How we work: working together to improve the governance of the extractive sector' <https://eiti.org/about/how-we-work> (accessed 27 December 2017).

[184] Social Accountability International 'SA8000 Standard' <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1689> (accessed 15 January 2018).

[185] Equator Principles 'Equator Principles III, June 2013' <http://www.equator-principles.com/resources/equator_principles_III.pdf> (accessed 27 December 2017).

[186] Other standards and initiatives exist that have been adopted as tools for curbing the impact of extractive corporations on human rights and the environment.

the extractive sector (which is based on human rights law and its consequences).[187] Typically, being non-binding, these standards elicit only discretionary commitments of companies that are unenforceable when breached. Mullen states that a vague promise that business will comply with human rights is nothing but 'a dead end'.[188] As much as these standards validate the idea that corporations should be responsive to human rights issues, they do not resolve the burning question whether companies that violate human rights can be held accountable under human rights law where and when they fail to abide by their own commitments.[189]

More importantly, the UN Framework and the UNGPs are laced with latent flaws that make them an unideal and unrealistic standard for the human rights accountability of corporate businesses. To briefly clarify, the 'Ruggie' Framework is hinged on three archetypal 'pillars' – the state duty to protect human rights, the corporate responsibility to respect human rights, and access to remedies by victims of violations.[190] Attempting to define the contours within which the relationship between business and human rights should be appraised, the pillars of the Framework make a decent effort to clarify that connection, but in doing so, leave many important questions unresolved. For instance, does the state duty to protect extinguish the duty to promote and fulfil human rights in relation to business? How does the corporate responsibility to respect result in corporate accountability? To what extent can victims of corporate human rights abuses hold corporations accountable? As a follow-up measure to the Framework, the UNGPs also fail, in every material respect, to answer these probing questions, as they merely provide

[187] F Wettstein 'CSR and the debate on business and human rights: Bridging the great divide' (2012) 22 *Business Ethics Quarterly* 739 746 ('human rights have played a very peripheral role overall for the conceptualization of CSR'. For a detailed analysis on the dissimilarities between corporate human rights responsibility (CHRR) and corporate social responsibility (CSR), see Okoloise (n 32 above) 211-216.

[188] M Mullen 'The pursuit of substantive corporate human rights policies' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 209 210.

[189] I Apter 'Corporateliability for human rights: Effective remedies or ineffective placebos?' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 39 56-57.

[190] J Ruggie 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) 29 *Netherlands Quarterly of Human Rights* 224 225; J Ruggie 'Protect, respect and remedy: A framework for business and human rights' (2008) *Innovations* 190-191 <https://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.189> (accessed 26 October 2018).

guidance for 'implementing the United Nations "Protect, Respect and Remedy" Framework.[191]

Note that the Framework was the outcome of what was originally a mandate to, among other things, 'identify and clarify standards of corporate responsibility and accountability' for TNCs and allied enterprises with regard to human rights.[192] While much endeavour was put into appraising the 'responsibility' of corporate entities, that mandate did very little – if any – to delineate the context within which the 'accountability' of corporations may be realised, falling short, in a big way, of accomplishing it. For this reason, the Framework and the UNGPs have been criticised by a good number of scholars and prominent international non-governmental organisations for their weak language and non-authoritative approach to corporations.[193]

Given that the subject of business and human rights arose against the backdrop of human rights abuses by businesses, the Framework and the UNGPs can be said to have done everything but address the most salient issue of accountability of corporate businesses for violations. To appeal to businesses, they tamper down the legal roots of human rights, and touts 'social expectation' as the defining factor for businesses' responsibility to respect human rights.[194] They tend to beg the soulless conscience of businesses rather than reaffirm their legal responsibility under international human rights law, and use such carefully deployed semantics as 'should' rather than 'have a responsibility to', 'responsibility' rather than 'obligation', and 'adverse impacts' rather than 'violations'. And they relegate the living words of international human rights law to mere reference points or precision tools only relevant for businesses to know the social expectations of society.[195] For this reason, Deva attributes the weakness in language to 'the blind obsession with

[191] See the title of the UNGPs.

[192] UN Commission on Human Rights 'Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises' E/CN.4/RES/2005/69 20 April 2005 https://www.refworld.org/docid/45377c80c.html (accessed 16 January 2019).

[193] D Bilchitz & S Deva 'The human rights obligations of business: A critical framework for the future' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect* (2013) 1 20.

[194] UN Human Rights Council (n 168 above) para 54.

[195] S Deva & D Bilchitz 'Response of Surya Deva and David Bilchitz to comments of Professor John Ruggie on "Human rights obligations of business: Beyond the corporate responsibility to respect" (Cambridge University Press, 2013)' 15 January 2014 2-3 <https://www.business-humanrights.org/sites/default/files/media/documents/surya-deva-david-bilchitz-re-ruggie-15-01-14.pdf> (accessed 26 October 2018); JG Ruggie 'Business and human rights: The evolving international agenda' (2007) 101 *The American Journal of International Law* 839.

achieving consensus',[196] and López loses faith in the corporate responsibility to respect as a normative proposition because the parameters against which companies are to be held accountable remain largely unclear.[197]

The conflations that arise from the conceptual shifts and definitional adjustments not only lockdown many aspects of the Framework and the UNGPs for constructive criticism, they tend to erode, in many fundamental ways, the original intent of human rights responsibility under international law – which is, the liability of violators for infractions.[198] For instance, by making a distinction without a difference between *duty* and *responsibility*, the Framework and the UNGPs attempt to furtively introduce into the lexicon of international human rights law new notions of responsibility, which have no foundation in law or legal consequence. The Framework declares that states have duties, while businesses have responsibilities. According to this logic, the state's duty to protect human rights emanates from the obligatory language found in treaties, which are mostly directed at the state; whereas the responsibility of corporations to respect human rights 'is defined by social expectation – as part of what is sometimes called a company's social licence to operate'.[199] Not only is this logic unsupported by any theories and applications of international law, there is yet no indication of such distinction.

Quite literally, *duty* and *responsibility* have the same dictionary and conceptual meaning at law.[200] The draft UN Declaration on Human Social Responsibilities[201] states that the words '"responsibilities" and "duties" will be used

[196] S Deva 'Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the Guiding Principles' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect* (2013) 78 91.

[197] C López 'The "Ruggie process": From legal obligations to corporate social responsibility?' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect* (2013) 58 72. Also see E Durojaye 'The viability of the Maastricht Principles in advancing socio-economic rights in developing countries' in Andreassen & Vinh (n 16 above) 141.

[198] See, for example, UN Human Rights Committee 'General Comment No 31' para 8; Committee on Economic, Social and Cultural Rights 'General Comment No 15' para 33.

[199] UN Human Rights Council (n 162 above) para 54; G Aras 'The business case for taking human rights obligations seriously' in BA Andreassen & VK Vinh (eds) *Duties across borders: Advancing human rights in transnational business* (2016) 91 105 (defines the 'licence to operate' as '*the ability of a company to conduct its business operations without special hindrance – in particular, hindrance from government or local communities neighbouring its business operations*').

[200] See *Black's Law Dictionary* (2009) 580, 1179 & 1427 for the definition of 'duty', 'obligations' and 'responsibility,' respectively.

[201] Pre-draft UN Declaration on Human Social Responsibilities' art 1 annexed to 'Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the Study requested by the Commission in its resolution 2000/63, and submitted pursuant to Economic and Social Council decision 2002/277' <https://digitallibrary.un.org/record/491708/files/E_CN.4_2003_105-EN.pdf> (accessed 1 May 2019).

interchangeably'. Even the Committee on Economic, Social and Cultural Rights (CESCR) attributes human rights 'obligations' and 'responsibilities' to corporations as it does states without appropriating any conceptual variance to the terms. In fact, the CESCR uses the terms in respect of both states and businesses.[202] Therefore, López questions the accuracy of the SRSG's unsubstantiated distinction thus:

> Whether or not the distinction of duties or obligations on the one hand and responsibilities on the other is an accepted UN terminology is questionable. There is evidence to suggest that the opposite may be more accurate: in UN parlance, the term 'responsibilities' is usually taken as equivalent or derivative of duties and obligations.[203]

Also, after a close examination of the Framework and the UNGPs, one will easily notice that there is a fundamental conflation in the definition of 'respect' in both documents in a way that departs from its classical understanding in international human rights law.[204] While the Framework defines *respect* as 'not to infringe on the rights of others – put simply, to do no harm', the UNGPs defines it as '[to] avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.'[205] The Framework offers a rather simplistic and narrow exposition of the term in that it articulates restraint from wrongdoing, whereas the UNGPs - more expansive in their ambit – require that action be taken to prevent or address adverse human rights impacts. Under established international human rights law, the obligation to respect requires state parties to refrain from infringing on a right, directly or indirectly, and the obligation to protect enjoins states to take active steps to prevent third parties from infringing the right.[206]

The implication of the UNGPs' definition is that while it derives its conception of *respect* from established notions of *protect* under international law, it fails to credit its basis to the legal foundation of the international human rights corpus.

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[202] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' UN Doc E/C.12/GC/24 (10 August 2017) paras 5, 32. Also see the ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001 which alludes to the *responsibility* of states.

[203] C López 'The "Ruggie process": From legal obligations to corporate social responsibility?' in Deva & Bilchitz (n 197 above) 65.

[204] R Mares '"Respect" human rights: Concept and convergence' in RC Bird, DR Cahoy & JD Prenkert (eds) *Law, business and human rights: Bridging the gap* (2014) 12.

[205] UNGPs Principles 11 & 13(a).

[206] UN Committee on Economic, Social and Cultural Rights 'General comment No 21: Right of everyone to take part in cultural life (article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/21 (21 December 2009) para 48.

Mares observes with utmost scrutiny that 'the way in which the GPs use *respect* in GP 13b covers responsibility for third parties' conduct, which is precisely what IHRL [international human rights law] covers with its use of *protect*.'[207] By requiring businesses to prevent or mitigate adverse human rights impacts with which they are involved, the UNGPs draw on established notions of 'protect' in international human rights law to articulate the corporate responsibility to respect without recognising its legal foundations as the basis for that responsibility.[208] This creates a broken link between these documents' reference to the International Bill of Rights (including free-standing international environmental treaties) and the ILO's core conventions as a baseline, on the one hand, and the corporate responsibility to respect as a voluntary standard of conduct, on the other.

Below, I provide a diagrammatic matrix (Figure 2-3) laying out the complex relationship between binding (the UN and ILO) and non-binding (the Framework, the UNGPs and others) standards in the development of the corporate responsibility to respect, to illustrate the broken link between it and international human rights law and how that creates a lack of accountability for corporations.

[207] R Mares '"Respect" human rights: Concept and convergence' in Bird et al (n 204 above) 12.

[208] As far back as 2000, UN human rights mechanisms have legally recognized the responsibility of business actors to respect human rights. See UN Committee on Economic, Social and Cultural Rights 'General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/23 (27 April 2016) para 75; UN Committee on Economic, Social and Cultural Rights 'General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/21 (21 December 2009) para 73; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 20: Non-discrimination in economic, social and cultural rights (article 2(2) of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/20 (2 July 2009) para 40; UN Committee on Economic, Social and Cultural Rights 'General comment No. 18: The right to work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/GC/18 (6 February 2006) para 52; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15 paragraph 1(c) of the Covenant)' E/C.12/GC/17 (12 January 2006) para 55; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4 (11 August 2000) para 42.

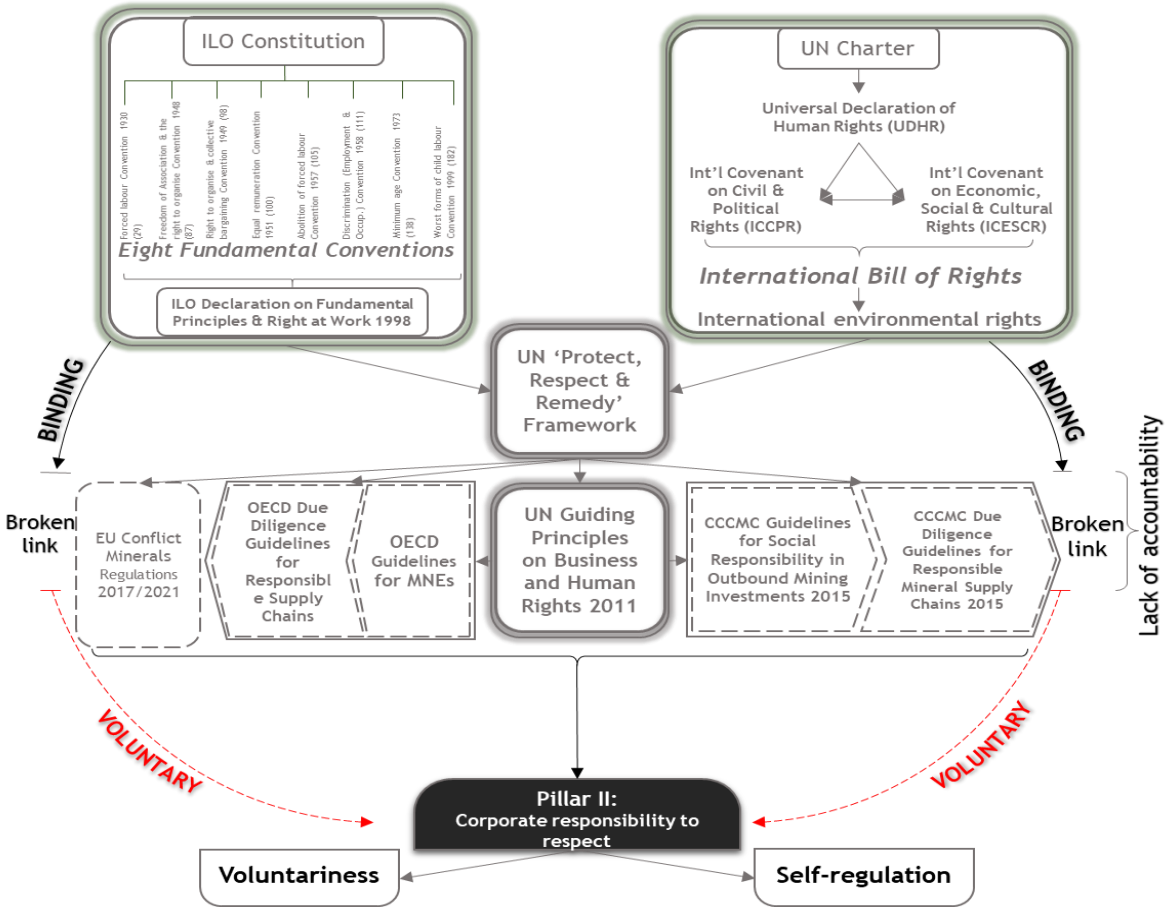

Figure 2-3: The disconnect between the bindingness of human rights law and the voluntariness of the corporate responsibility.

Importantly, the discrepancy in the definition of respect, it must be acknowledged, is not completely implausible. It was necessary to chip in the signature requirement of due diligence in the UNGPs. Human rights due diligence requires companies to 'identify, prevent, mitigate and account' for the way they remedy their adverse impacts. Unlike the definition in the Framework that simply stipulates that companies *do no harm*, the additional requirement that companies take action for early identification, preventive, mitigation and accountability measures in the UNGPS cave into the existing legal understanding of 'protect' under international law.[209] Hence, despite the plausibility of introducing the due diligence requirement, the incoherence in pegging the responsibility to *respect* on the same 'protect' standard as that set by international human rights law without actually grounding its basis on law remains conceptually mystifying. If the responsibility to respect is 'a global standard of expected conduct… [that] exists independently of

[209] UNGPs Principles 17; *Cf* UN Human Rights Council (n 168 above) para 24. Also see JG Ruggie 'Protect, respect and remedy: The United Nations Framework for business and human rights' in M Baderin & M Ssenyonjo (eds) *International human rights law: Six decades after the UDHR and beyond* (2010) 519 530.

States' abilities and/or willingness to fulfil their own human rights obligations' and if that responsibility 'exists over and above compliance with national laws and regulations', as the SRSG claims, then to what do we attribute its abstract, undefined and non-normative basis?[210]

The SRSG pegs the responsibility to respect human rights on *social expectations* the source and character of which were never explicitly clarified. In a 2017 academic paper, he adjusted that position when he declared that '[t]he responsibility is based on *social norms*, a term that he defines as 'shared expectations' of how specific actors should act in certain situations.[211] Social norms are not merely social expectations but standards in a given society by which specific conducts are governed. Standards are not merely expectations of behaviour; they are levels of conduct accepted at a bare minimum. By likening *social expectations* – a term used in the Framework - to *social norms* which does not appear anywhere in the Framework and the UNGPs but only surfaces in the former SRSG's 2017 academic paper, it is not difficult to see the continuing effort to hook the extremely anomalous term of social expectation to any convenient concept. Consequently, one cannot but query whether non-prescriptive social norms or expectations without more can create an obligation *over and above* the prescriptions of national and international law. For the same reason, López, like this author, observes that although the SRSG ascribes social expectation with normative value in the Framework, it 'does not appeal to any source, ethical or moral system or religion-based ethics.'[212] The introduction of *social norm* is perhaps an afterthought.

On their own, *social expectations* alone are conceptually problematic as a basis for business compliance with human rights law. Social expectations are manifestly multifaceted, incoherent and starkly diverse.[213] In the developing world where there are complex interactions between various competing political and socio-economic interests among various stakeholders and groups, the expectations of each group or stakeholder can be difficult to measure, let alone those of all groups and

[210] UNGPs Principle 11 commentary.
[211] JG Ruggie 'The social construction of the UN Guiding Principles on Business and Human Rights' Corporate Responsibility Initiative Working Paper No 67 (June 2017) 13 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_0.pdf> (accessed 4 November 2018).
[212] C López 'The "Ruggie process": From legal obligations to corporate social responsibility?' in Deva & Bilchitz (n 197 above) 65.
[213] Okoloise (n 32 above) 208.

societies across the globe. While they could be indicative of concerns and may be important for shaping normative action, social expectations are an immeasurable and uncertain standard for guaranteeing compliance. Without legal support, they cannot ensure corporate compliance. Even the former SRSG recently acknowledged this when he wrote that '[s]ocial norms do not inevitably lead to changes in *lex lata*: law as it is.'[214]

Social expectations are also weak because failure to comply with the responsibility can, according to the SRSG, subject corporations to the courts of public opinion.[215] In human rights practice, remedies more than public naming and shame are what are required to redress human rights violations. Pointing this out in this analysis is extremely important to show that predicating the responsibility to respect on the abstract idea of social expectations, without more, robs the debate on business and human rights of the focus on the accountability of corporations.

If there were still any doubts as to the difficulties associated with the normative proposition of the responsibility to respect, then one should look no further than the subsequent publication of the 'Interpretive Guide' to the UNGPs. That is, a guide to a guide.[216] The Interpretive Guide, one can safely assume, is nothing short of a genuine effort to clear the air on the thickening mist underlying the obfuscating foundation of the responsibility to respect. However, it does little more than nothing to essentially re-echoe the logic that the corporate responsibility to respect human rights 'exists over and above legal compliance, constituting a global standard of expected conduct applicable to all businesses in all situations' without substantiating its basis.[217] Its publication therefore suggests a lingering cornucopia of conceptual conundrums associated with the responsibility to respect idea in the Framework and the UNGPs that need constant clarification.

The efforts to make straight the crooked path of the Framework and the UNGPs are still ongoing through continuing academic debates and constructive criticisms. However, such intellectual engagements cannot be with a blind allegiance

[214] Ruggie (n 211 above) 14.
[215] UN Human Rights Council (n 168 above) para 54.
[216] No pun intended.
[217] UN Office of the High Commissioner for Human Rights 'The corporate responsibility to respect human rights: An interpretive guide' (2012) 3-4 HR/PUB/12/02 <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf> (accessed 5 November 2018).

to non-Southern or non-African perspectives on the contentious issues. For scholars from the global South, especially Africa, many postulations in both documents fall short of the legal and social realities on the ground. For example, in the constitutions of many African states, the responsibility for human rights is not entirely a state affair. It extends to state and non-state actors, including private commercial actors.[218] As such, stripping the responsibility to respect human rights of its legal foundations has elicited conceptual clashes and, sometimes, outright disagreement in Africa and elsewhere in the global South.[219]

Due to ever more rousing objections, there is a temptation to see dissenting academic opinions on these issues as an effort to sabotage the Framework and the UNGPs, rather than as a genuine contribution to take the accountability debate forward. In a few past instances, the former Special Representative, it would seem, has at the slightest objection gone on the defensive and sometime on an all-out offensive - accusing dissenting views of attempting to derail progress on the UNGPs.[220] Specifically, following Deva and Bilchitz's extrapolations on some of the most salient flaws of both documents in their edited book, *Human rights obligations of business: Beyond the corporate responsibility to respect* in 2013 (which articulates the 'obligations' rather than responsibility of business), Ruggie noted that he was 'having real problems with the co-editors' own chapters'.[221] He accused both authors of making derisive *ad hominem* attacks, of being legal formalists working to undermine the normative legitimacy of the UNGPs, and of finding him 'morally obtuse and unworthy of carrying the human rights torch.'[222] These responses, far from striking the mark of the core points raised by the authors and short of encouraging the debate, tend to suggest that the UNGPs should be seen as scripture and that any legitimate objections raised by scholars from the global South are totally unacceptable.

[218] Constitution of the Republic of South Africa sec 8(2); Constitution of the Federal Republic of Nigeria 1999 (as amended 2010) sec 46.

[219] S Deva & D Bilchitz (eds) *Human rights obligations of business: Beyond the corporate responsibility to respect* (2013) 58.

[220] JG Ruggie 'Comment on new book published by Surya Deva and David Bilchitz' 17 December 2013 1 https://www.business-humanrights.org/sites/default/files/media/ruggie-comment-surya-deva-david-bilchitz.pdf> (accessed 4 November 2018). Also see JG Ruggie 'Hierachy or ecosystem? Regulating human rights risks of multinational enterprises' in C Rodriguez-Garavito (ed) *Business and human rights: Beyond the end of the beginning* (2016) 46 55 57.

[221] Ruggie (n 220 above) 1.

[222] As above.

Considering the infinitesimal contribution, if at all, of Africa to the pre-1981 human rights era, it is quite unfortunate that this latest attempt to stifle the voices of southern scholars came from an academic of repute. Constructive academic engagements must not be misconstrued as vitriolic attacks in order to skew the debate, and disagreements on the direction of work done by the office of the SRSG – rather than the person - should not be taken personally.[223]

Today, there is no doubt that a major irony of the Framework and the UNGPs is that while claiming to *strengthen* human rights protection, they are more clearly understood as a 'voluntary platform'.[224] Although they have commendably bolstered more business awareness of their human rights responsibilities, it is doubtful that they have led to greater corporate compliance and accountability for human rights. According to a 2018 report by the UN Working Group on Business and Human Rights, the majority of companies considered by benchmarking and rating assessments 'do not demonstrate practices that meet the requirements set by the Guiding Principles.'[225] Companies continue to perceive risks as those facing the business rather than rights holders, conduct impact assessment as a 'tick-box' exercise without meaningful and representative stakeholder engagement, and adopt reactive rather than a proactive approach to curtailing potential human rights harms.[226] For these reasons, developing states and international civil society organisations (CSOs) have persisted in their calls for a legally binding instrument (LBI) to regulate TNCs on a global scale.

2.5 A lightweight treaty on business and human rights?

Notwithstanding the celebration of the Framework and the UNGPs, and despite the stark defeat of the CTC and the draft Norms, the pursuit of legally binding standards to control and limit the abusive tendencies of TNCs has largely remained unfaded. In 2014, three years after the unanimous adoption of the UNGPs, the HRC caved in to demands by developing states and international CSOs to immediately put in place a

[223] See the authors' response to Ruggie: Deva & Bilchitz (n 195 above) 1-4.
[224] RC Bird 'Preface: Human rights and business at the indeterminate crossroads' in RC Bird, DR Cahoy & JD Prenkert (eds) *Law, business and human rights: Bridging the gap* (2014) x.
[225] UN General Assembly 'Working Group on the issue of human rights and transnational corporations and other business enterprises: Note by the Secretary-General' UN Doc A/73/163 (16 July 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/224/87/PDF/N1822487.pdf?OpenElement> (accessed 7 November 2018).
[226] As above, para 25(a)-(d).

process to commence the development of a treaty to regulate TNCs and other businesses. On the motion of Bolivia, Cuba, Ecuador, South Africa and Venezuela, the HRC adopted Resolution 26/9 on 26 June 2014 that established the Open-ended Intergovernmental Working Group (OEIGWG) with a mandate 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'[227] Interestingly, the resolution passed with 20 votes in favour (ten of which were African states), 14 against (made up mostly of developed state) and 13 abstentions (including Botswana and Sierra Leone).[228]

The OEIGWG commenced its first session in 2015 and has since then used the occasions of its second and third sessions to conduct extensive deliberations on the nature, scope, content and form of the proposed treaty on TNCs and other businesses. At the vanguard of this journey is Ecuador, which undertook four open informal consultations preparatory to the presentation of a draft instrument at the fourth session of the OEIGWG in October 2018.[229] In July and September of 2018, Ecuador circulated the zero draft LBI and the zero draft Optional Protocol to the LBI, respectively, for consideration at the fourth session of the OEIGWG in Geneva.[230] In 2019 and 2020, the zero draft was revised to address some of the concerns that have been voiced by states, including with respect to its scope, prevention and legal liability.[231]

[227] UN Human Rights Council 'Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' UN Doc A/HRC/26/9 (26 June 2014) para 1. See the draft resolution: UN Human Rights Council 'Bolivia (Plurinational State of),* Cuba, Ecuador,* South Africa, Venezuela (Bolivarian Republic of): Draft resolution' UN Doc A/HRC/26/L.22/Rev.1 (25 June 2014) <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement> (accessed 5 November 2018). NB – The draft motion was preceded by an expression of intent by Ecuador on behalf of the African group, the Arab group, Bolivia, Cuba, Kyrgyzstan, Nicaragua, Pakistan, Peru, Sri Lanka and Venezuela – Republic of Ecuador to Geneva 'Statement on behalf of a Group of Countries at the 24rd[SIC] Session of the Human Rights Council' 1 September 2013 <https://www.business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf> (accessed 7 November 2018).

[228] UN Human Rights Council (n 227 above) page 3.

[229] As above, page 3.

[230] See the Notes Verbale by Ecuador's Permanent Mission to the UN and other international institutions in Geneva releasing the zero draft LBI and its Optional Protocol <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx> (accessed 18 November 2018).

[231] Business and Human Rights Resource Centre 'Binding treaty: A brief overview' (2020) <https://www.business-humanrights.org/en/big-issues/binding-treaty/> (accessed 19 December 2020).

Substantively, the draft takes a skeletal shot at the dissymmetry between the rights and responsibilities of businesses by offering to attach legal consequences for human rights violations, which will be fleshed out as negotiations mature.[232] In the preamble, which is only relevant to guide its interpretation, the draft Convention underlines that all businesses 'shall' respect all human rights by avoiding activities that cause or contribute to adverse human rights impacts and address such impacts whenever they arise. The purpose of the Convention is, among other things, to 'strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities of transnational character' and to 'ensure an effective access to justice and remedy to victims of human rights violations… and to prevent the occurrence of such violations.'[233] The Convention encapsulates all human rights covered by international and domestic law and apply to violations involving any business activity of a transnational character.[234] The Convention intuitively avoids the traps that its interpretation and practical application may potentially run into by proffering, from the outset, explicit definitions to such terms as 'victims', 'business activities of a transnational character' and 'legal person'.[235]

More importantly, it defines the rights of victims to prompt, effective and fair access to justice and remedies in accordance with international law. Remedies include compensation, restitution, satisfaction, rehabilitation, guarantees of non-repetition to the victims, on the one hand, and ecological restoration or environmental remediation (where applicable), on the other.[236] The Convention imposes obligations of an extraterritorial nature on state parties to regulate and monitor through domestic legislation the due diligence obligations of transnational businesses domiciled in their territories; and also prescribes civil, criminal and administrative liability for violations of human rights by such businesses.[237] To ensure

[232] S Deva 'The zero draft of the proposed business and human rights treaty, part I: The beginning of an end?' 2018 <https://www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-i-the-beginning-of-an-end> (accessed 15 November 2018); S Deva 'The zero draft of the proposed business and human rights treaty, Part II: On the right track, but not ready yet' 2018 <https://www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-ii-on-the-right-track-but-not-ready-yet> (accessed 15 November 2018).

[233] Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (Zero Draft LBI) arts 2 & 3.

[234] Zero draft LBI art 2.

[235] Zero draft LBI arts 4 & 5. See relevant improvements in the revised and second versions of the zero draft.

[236] Zero draft LBI art 8.

[237] Zero draft LBI art 10.

domestic monitoring, the draft Optional Protocol provides for the establishment of a competent, credible, gender-balanced, well-resourced and independent National Implementation Mechanism (Implementation Mechanism) responsible for monitoring compliance with and implementation of the treaty.[238] The Implementation Mechanism may be granted the competence to investigate allegations of human rights violations and to receive and consider individual complaints alleging violations by individual or corporate businesses operating in transnational context.[239]

While the draft Convention absorbs and reinforces some salient principles of the UN Framework and the UNGPs, it departs from those more likely to stir up controversy.[240] For instance, the Convention adopts the conceptual proposition of the due diligence requirement, but goes further to incorporate such concepts as: prevention; legal liability; public and periodic reporting by companies on human rights and environmental issues, including policies, risks, indicators and outcomes; meaningful consultations and representative participation by affected groups and other relevant stakeholders, especially those at heightened risk of violations like women, children, persons with disabilities, and indigenous communities; and the establishment and maintenance of financial guarantees to cover the cost of potential claims of damages.[241]

To address the jurisdictional challenges faced by victims in their quest for justice and remedies, the draft Convention resolves the right of victims to choose the law of the home state as the applicable law for the resolution of their claim, other than the law of the place where the violations occurred which has been a major challenge for victims from Africa seeking justice in the courts of the home states of

[238] Zero draft Optional Protocol to the Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (draft Optional Protocol) arts 1-4.

[239] Draft Optional Protocol arts 6-8.

[240] N Bernaz 'The draft UN treaty on business and human rights: the triumph of realism over idealism' 15 November 2018 <https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism> (accessed 8 November 2018); S Jabarin & M Abdallah 'The "Zero Draft" treaty: Is it sufficient to address corporate abuses in conflict-affected areas?' <https://www.business-humanrights.org/en/the-"zero-draft"-treaty-is-it-sufficient-to-address-corporate-abuses-in-conflict-affected-areas> (accessed 15 November 2018).

[241] Zero draft LBI art 9; Revised draft LBI art 5; Second revised draft art 6. Also see C Holt, S Stanton & D Simons 'The zero draft Legally Binding Instrument on business and human rights: Small steps along the irresistible path to corporate accountability' <https://www.business-humanrights.org/en/the-zero-draft-legally-binding-instrument-on-business-and-human-rights-small-steps-along-the-irresistible-path-to-corporate-accountability> (accessed 15 November 2018).

American and European companies.[242] Unlike the UNGPs, however, the draft Convention strikes at the heart of liability and accountability of corporations for human rights violations in no uncertain terms, thereby trashing the idea of social expectations or social norms as the defining basis of the corporate responsibility to respect human rights.[243]

Despite these important normative advances, however, the draft LBI is nevertheless laden with weaknesses which, from a bird's eye view, can subvert accountability in three major ways. First, the draft Convention does not affirm the human rights obligations and accountability of businesses in a definitive way. The treaty outrightly fails to address the issue of direct corporate obligations for human rights, leaving unresolved one of the most burning issues fuelling the debate for a stronger global governance regime for TNCs.[244] The two revisions to the zero draft have not departed from this course. The direct accountability of abusive corporations before an international monitoring mechanism is dependent on the existence and enforceability of corporate obligations for human rights under international law.[245] The absence of this key feature, which is fundamental to a comprehensive and effective regime of accountability and access to justice for victims potentially characterises the treaty journey as an exercise in futility.

Second, and directly correlative of the absence of corporate obligations, is the lack of direct international enforceability against abusive corporations by victims, who have been deprived of available, effective and sufficient remedies domestically. Considering that the primary essence of an accountability mechanism is 'to promote due regard by the accounter for the interests, concerns, and rights of the account holder',[246] the failure of the treaty to impose obligations on TNCs and

[242] Zero draft LBI art 7(2); R Meeran 'The "zero draft": Access to judicial remedy for victims of multinationals' ("MNCs") abuse' <https://www.business-humanrights.org/en/the-"zero-draft"-access-to-judicial-remedy-for-victims-of-multinationals'-"mncs"-abuse> (accessed 15 November 2018).

[243] M Zorob 'New business and human rights treaty takes shape' <https://www.business-humanrights.org/en/new-business-and-human-rights-treaty-takes-shape> (accessed 15 November 2018).

[244] Bernaz (n 240 above).

[245] P Thielbörger & T Ackermann 'Treaty on enforcing human rights against business: Closing the loophole or getting stuck in a loop?' (2017) 24 *Indiana Journal of Global Legal Studies* 43-79; N Carrillo-Santarelli 'Corporate human rights obligations: Controversial but necessary' <https://www.business-humanrights.org/en/corporate-human-rights-obligations-controversial-but-necessary> (accessed 16 November 2018).

[246] RB Steward 'Remedying disregard in global regulatory governance: Accountability, participation and responsiveness' (2014) 108 *American Journal of International Law* 211 249.

other businesses is multiplied by its omission to make them accountable to the proposed monitoring Committee. A cursory look at the provisions of the revised drafts shows a replication of the normative and procedural structure of the International Covenants and their Optional Protocols where only states are accountable either in the form of state reporting to the treaty-monitoring mechanism or a state defending allegations of corporate violations in communications filed by victims. Given that existing UN mechanisms are considered to possess weak monitoring and oversight powers, applying the same structure of accountability to states for abuses committed by corporate actors detracts from the very idea of corporate accountability.

With this in view, there is no indication that victims, who are unable to get justice at the proposed National Implementation Mechanism or before local courts, will be able to claim directly against corporations at the international level. What this means is that corporations will continue to be left to the (in)effectiveness of local institutions and regulations and the vagaries of the marketplace. For victims living in weak governance zones, the impact of focusing on only the state is that corporations operating in such areas may never be held accountable for the actual violations themselves and justice never ultimately achieved. This is a sad reiteration of the same old state-centric international normative and monitoring structure where states remain the only targets of accountability.

Lastly, the draft LBI is also laced with weak and ambiguous language that potentially diffuse its regulatory power over corporations. No doubt, the treaty has been carefully phrased to perhaps dispel any early friction between those in favour and those against a 'hard' normative regime on business and human rights, but this has been done at a risk of weakening it altogether.[247] For instance, in the earlier version of the draft, the treaty did not clearly apply to TNCs and other business enterprises but to human rights violations occurring 'in the context of any business activities of a transnational character'.[248] By taking the treaty's spotlight off TNCs and other business enterprises and placing it only on violations arising from their activities, the drafters fatally limited the triggering of the treaty to only violations and excluded businesses from its normative governance. This meant that until violations occur, it would have remained debatable whether the provisions of the

[247] Bernaz (n 240 above).
[248] Zero draft LBI art 3(1).

treaty can be invoked to proactively regulate business conduct. However, opposition from states saw this issue addressed in the second revised draft through the adoption of a more expansive language that now applies to 'all business enterprises'.[249]

Also, the treaty purports to apply to 'all international human rights', a term which could be problematic if not properly characterised.[250] Besides, the revised versions do not quite address issues of scope and scale of applicability to supply chains, especially with respect to companies whose distant but critical involvement in the supply chain may continuously fuel 'downstream' violations. For example, mobile tech giants or electric auto manufacturers may not themselves be extractive companies that are directly involved in the human rights abuses going on in the DRC but their demand for cobalt, lithium and other rare earth elements extracted in the DRC can reinforce down-the-line violations.[251]

Based on these weaknesses, there is reason to seriously doubt the normative contributions of the draft treaty and its Optional Protocol to the effort of making corporations accountable for human rights violations.[252] Despite the initial optimism generated by its announcement, the proposed treaty fails to materially bridge the governance gaps between the weak enforcement of domestic law and the absence of strong international corporate regulation, because it relies on weak states to do what they could not do in the absence of binding norms. Despite revising the treaty to apply to 'all businesses', it nonetheless does not activate a critical aspect of accountability where states fail – supplementary procedural accountability of

[249] Second revised draft LBI art 3(1); Revised draft LBI art 3(1). Also see C López 'The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects' 2 October 2019 <https://www.iisd.org/itn/en/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez/#:~:text=The%20revised%20draft%20treaty%20is,its%20complementary%20character%20in%20relation> (accessed 15 December 2020).

[250] JG Ruggie 'Comments on the "Zero Draft" treaty on business and human rights' <https://www.business-humanrights.org/en/comments-on-the-"zero-draft"-treaty-on-business-human-rights> (accessed 15 November 2018).

[251] M Schwartz 'DRC cobalt: A potential Achilles heel of electric vehicles' 5 October 2018 <https://globalriskinsights.com/2018/10/drc-cobalt-a-potential-achilles-heel-of-electric-vehicles/> (accessed 16 November 2018); J Conca 'Blood batteries - Cobalt and the Congo' 26 September 2018 <https://www.forbes.com/sites/jamesconca/2018/09/26/blood-batteries-cobalt-and-the-congo/#630dc909cc6e> (accessed 16 November 2018); KU Leuven 'Hidden costs of cobalt mining in DR Congo' *ScienceDaily* 20 September 2018 <www.sciencedaily.com/releases/2018/09/180920102107.htm> (accessed 16 November 2018).

[252] G Kletzel, AL Cabello & D Cerqueira 'A toothless tool? First impressions on the Draft Optional Protocol to the Legally Binding Instrument on business and human rights' <https://www.business-humanrights.org/en/a-toothless-tool-first-impressions-on-the-draft-optional-protocol-to-the-legally-binding-instrument-on-business-and-human-rights> (accessed 15 November 2018).

corporations at the UN level. For victims from the developing world, the treaty fails to inspire confidence that access to justice will be realisable at the supranational level where local systems fail to do so. Even if the treaty were to be rephrased with a more direct language of obligations and enforcement directed at corporations, a practical hurdle that may abound is the likelihood of it not receiving the required support of developed states whose corporations are major culprits in human rights and environmental abuses in Africa.

Although these factors stoke some level of pessimism about the current direction of the treaty debate, the potency of its deliberations to challenge developed states to do more to control the abusive tendencies of corporations domiciled in their territories should not be underestimated. Already there are signs that since the treaty process was initiated, the US, the UK, Denmark, France, and Norway that have been quite opposed to the treaty, have been spurred to act by establishing National Action Plans on Business and Human Rights (NAPs) as against dragging their feet on the UNGPs.[253] Such actions notwithstanding, there is a legitimate case to be made for the mutual reinforcement of both 'soft' and 'hard' law with respect to corporations, if access to justice and remedies must be achieved. Given the slow progress made in the implementation of the UNGPs, binding norms can only be a useful supplement to existing soft law initiatives. As Carrillo-Santarelli states, '[v]oluntary and binding strategies are complementary and can both contribute to promoting human rights.'[254]

2.6 Conclusion

In the final analysis, it needs to be stated that there is no particular evolutionary paradigm that global normative developments must take before states and scholars can agree that corporations have, or can be attributed with, direct human rights obligations under international law. As illustrated above, there is already incontrovertible proof showing clearly that corporations have some direct

[253] P Bloomer 'Unity in diversity: The advocates for the Guiding Principles and binding treaty can be complementary' <https://www.business-humanrights.org/en/unity-in-diversity-the-advocates-for-the-guiding-principles-and-binding-treaty-can-be-complementary> (accessed 16 November 2018); US Department of State 'Responsible business conduct: First National Action Plan for the United States of America' 16 December 2016 <https://www.state.gov/e/eb/eppd/csr/naprbc/265706.htm> (accessed 15 November 2018); National Action Plans on Business and Human Rights 'Countries' <https://globalnaps.org/country/> (accessed 15 November 2018).

[254] Carrillo-Santarelli (n 245 above).

responsibilities under international law. It is immaterial that such responsibilities are momentarily unenforceable because the international mechanisms responsible for their monitoring are yet to be constituted. Importantly, this chapter has gone to great lengths to show that corporations do not have to be recognised as 'subjects' or be privy to international human rights treaties before they can be held accountable under international law. As with the development of international criminal law which moved sharply away from states to individuals as the objects of accountability – who were neither party to treaties on international crimes but are accountable to its procedural mechanism, corporations can equally be the objects of accountability domestically and internationally. Already, the treaties on labour, the environment and corruption create direct obligations for corporations, while at the same providing for (indirect) local enforcement. This chapter therefore lays a critical foundation not only for delineating the contours of corporate accountability in international human rights law, but also for interrogating and understanding the notion of corporations accountable at other spheres of transnational governance.

3.1 Introduction

One of the major factors that have prevented the United Nations Guiding Principles on Business and Human Rights (UNGPs) from gaining traction in developing countries has been the limited or near absence of the pluri-versality of perspectives in the business and human rights debate.[1] Although the events that spurred calls for corporate human rights accountability have mostly emanated from the global South, the trajectory of the business and human rights discourse has been largely framed and defined by states, scholars and actors from the global North.[2] Yet, it is the framing of the discourse, especially as it relates to the content and scope of the human rights responsibility of corporations that have generated more contentions, than solutions. As Ginther notes, the dominant position of developed countries is not just to control international legal institutions but that they have 'created the modes of thought and figures of speech by which these institutions are understood and discussed and by which international law as a whole is operated and developed.'[3] Hence, the manner in which the corporate accountability discourse has been

1 O Abe 'The feasibility of implementing the United Nations guiding principles on business and human rights in the extractive industry in Nigeria' (2016) 7 *The Journal of Sustainable Development Law and Policy* 137 151.

2 C López 'The "Ruggie process": From legal obligations to corporate social responsibility?' in S Deva & D Bilchitz (eds) *Human rights obligations of corporations: Beyond the corporate responsibility to respect* (2013) 58 58-59; J Bauer 'What good is a NAP for developing countries? A preliminary assessment of achievements and prospects for National Action Plans on Business and Human Rights in the Global South' (2016) 7 <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3221052_code2438528.pdf?abstractid=3221052&mirid=1> (accessed 8 December 2020).

3 K Ginther 'Re-defining international law from the point of view of decolonisation and development and African regionalism' (1982) 26 *Journal of African Law* 49 59.

formulated and the approach adopted has been in neglect of the different perspectives to the debate.

In this chapter, I seek to articulate an African approach to the conversation on the human rights accountability of corporations because the business and human rights discourse is overly state-centric, and non-reflective of Southern perspectives on the human rights responsibility of non-state actors.[4] I say so for two reasons. Firstly, considering that the original mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG), Professor John Ruggie, was to elucidate standards of human rights *responsibility and accountability* applicable to corporations, the conceptual dilution of the 'responsibility' of corporations as explained in the previous chapter is hardly accidental. In prizing consensus at-all-cost over the ambitious goal of international corporate regulation, the SRSG has been rightly accused of considerably watering down the language of the UNGPs to the point that they are too soft, weak and non-authoritative.[5] For sceptics and critics of the SRSG's work, the framing of the human rights responsibility of business 'unreasonably restricts the scope of corporate human rights responsibilities' and reduces the legal standards to which corporations must be held.[6] By attributing the corporate responsibility to respect human rights with a voluntary rather than a legal character, the SRSG's work may have been fundamentally shaped by the interests, doctrines and ideologies of wealthy capitalist countries and corporations of the global North.

Secondly, considering that developing countries – especially from Africa - have historically had a marginal say in the evolution of the international legal order, the prevailing direction of the business and human rights discourse has not been proportionately inclusive of perspectives from the global South. For one, the obfuscation of victims' voices during the development of the UN Framework and the UNGPs in favour of the interests of powerful business entities and the marginal

4 R Murray 'International human rights: Neglect of perspectives from African institutions' (2006) 55 *The International and Comparative Law Quarterly* 193 196. Also see B Meyersfeld 'Business, human rights and gender: A legal approach to external and internal considerations' in S Deva & D Bilchitz (eds) *Human rights obligations of corporations: Beyond the corporate responsibility to respect* (2013) 193 208.

5 D Bilchitz & S Deva 'The human rights obligations of business: A critical framework for the future' in S Deva & D Bilchitz (eds) *Human rights obligations of corporations: Beyond the corporate responsibility to respect* (2013) 20.

6 Bilchitz & Deva (n 5 above) 15.

involvement of state and civil society actors from developing countries have in many ways limited their appeal in the global South.[7] More so, there is good reason to believe that normative location and the ideological predispositions of Ruggie may have impacted the ultimate outcome of the SRSG's work. As Mutua states, whilst objectivity is a cherished ideal in human rights scholarship, 'true objectivity is an academic fiction'.[8] Deva argues that the SRSG's measurement of the UNGPs' success on the barometer of consensus is a façade that is 'hollow on closer scrutiny' as it was based on managing objections.[9] Therefore, the SRSG's call for a global implementation of the UNGPs is akin to a 'forced universalisation of Western ideology that does not resonate in the third world.'[10]

To locate the non-reflected voices of African countries in conceptualising and understanding corporate accountability, new legal perspectives and theoretical justifications for crediting corporations with human rights obligations and demanding accountability of abusive extractive corporations at the domestic and international levels are imperative. As Ribera states:

> [n]ew perspectives are required to ensure that the law can effectively regulate the phenomena that international reality poses on human rights, since classic approaches on which the foundations of international law are based seem to be insufficient to address them nowadays.[11]

Such legal and theoretical perspectives on corporate accountability are required for three reasons. First, they are needed to demystify the unsettled accountability questions with respect to corporations under international human rights law that emanate from both the UN Framework and the UNGPs. In the Framework, the SRSG

[7] GlobalNAPs 'National action plans on business and human rights' <https://globalnaps.org/> (accessed 8 November 2020); European Parliament 'Study: Implementation of the UN Guiding Principles on Business and Human Rights' (2017) 46 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf> (accessed 6 December 2020).

[8] M Mutua 'Human rights in Africa: The limited promise of liberalism' (2008) 51 *African Studies* 17 18.

[9] S Deva 'Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the Guiding Principles' in S Deva & D Bilchitz (eds) *Human rights obligations of corporations: Beyond the corporate responsibility to respect* (2013) 78 81.

[10] C Okoloise 'Contextualising the corporate human rights responsibility in Africa: A social expectation or legal responsibility in Africa?' (2017) 1 *African Human Rights Yearbook* 191 209.

[11] HC Rivera 'Developments in extraterritoriality and soft law: Towards new measures to hold corporations accountable for their human rights performance?' (2014) 14 *Mexican Yearbook of International Law* 727 729.

claims that the responsibility to respect is defined by social expectations.[12] Pursuing a set of principles that are only recommendatory, the SRSG reiterates in the UNGPs that '[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement.'[13] These conceptual twists can be taken for granted that the corporate obligation to respect human rights is one for which companies may not be held accountable.

Second, theoretical perspectives are relevant to establish the unique application of rules within different levels of a legal system. Considering that the opportunities for a wide-ranging system of accountability for human rights exist at different levels of normative governance – at the national and international (which, in turn is made up of the global, regional and sub-regional) levels, the application of human rights standards to corporations may vary from system to system.[14] For instance, while corporations are attributed with human rights under the European regional human rights system, same cannot be said of the African human rights system. Similarly, the imposition of duties on individuals and the recognition of peoples' rights as obtainable under the African human rights system does not find similar expression in other systems. As such, theoretical perspectives can be relevant to assess the relationship between corporations and human rights within a given system of human rights law. In the case of the African human rights system, theories are relevant to make a dispassionate assessment of whether corporations have human rights obligations for which they can be held accountable.

Lastly, theorising the basis of corporate accountability in Africa is relevant to evaluate the state of the law on the human rights obligations of companies and offer a solution to the problem of corporate abuses in the extractive industries. As the concept of accountability of companies seeks to respond to normative rather than descriptive or explanative issues, a theoretical approach will attempt to establish

[12] UN Human Rights Council 'Protect, respect and remedy: A framework for business and human rights – Report of the Special Representative of the Secretary-General on the Issue of human rights and transnational corporations and other business enterprises, John Ruggie' A/HRC/8/5 7 April 2008.
[13] UNGPs Principle 12 commentary.
[14] F Viljoen *International human rights law in Africa* (2012) 563.

the linkages between the normative framework of the human rights obligations of corporations and the violations in the extractive industries.[15]

This chapter therefore takes a critical look at the unique potential for making horizontal linkages between individuals or groups and corporations under African human rights instruments. It does this firstly by assessing the cultural, conceptual and ideological differences between Western and African social and legal conceptions of responsibilities for human rights and the environment to fully appreciate the historical context for corporate accountability in Africa. Secondly, it uniquely develops an African theoretical approach to international corporate regulation through the basic correlations between rights and duties, on the one hand, and power and responsibility, on the other. Thereafter, the chapter will attempt to conceptually clarify the fundamental underpinnings of 'corporate accountability' and its theoretical significance in the quest for human rights and environmental justice in Africa.

3.2 The corporate 'obligation to respect human rights' in Africa

In the particular context of Africa, where the post-colonial state is systemically and institutionally weak, making the state the only target of domestic and international human rights duties is inadequate to effectively protect human rights. Unlike in the West where the state is typically strong and cultural, legal and institutional structures have been historically aligned with individualism – the idea of the separateness of the individual from the state, Africa presents a rather different reality.[16] Its approaches to norm-making have been influenced by its historical trajectory, including traditions and cultures predating colonialism that place emphasis on the collective over the individual.

More so, the historical collaboration between corporations and the European powers in executing the slave trade, colonialism and Africa's continued economic exploitation present shared challenges, common value-systems and insights across states on conceptions of right-holders or duty-bearers differently from those of the West. This naturally necessitates a more tailored approach – an African approach, of

[15] S Taekema 'Theoretical and normative frameworks for legal research: Putting theory into practice' (2018) 2 <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2018/02/lawandmethod-D-17-00010.pdf> (accessed 28 May 2018).

[16] N Birdsall 'Do no harm: Aid, weak institutions and the missing middle in Africa' (2007) 25 *Development Policy Review* 575 580.

sorts – to understanding responsibility for human rights violations. As such, a blind acceptance that the state is the only focus of human rights accountability is prone to fundamental conceptual clashes between the West and Africa.[17]

Clarifying the potential conceptual misalignment stemming from the differences in political and cultural philosophies between western and African societies should mark the point of departure in any discourse on corporate responsibility for human rights in Africa. This is because the individual is the epicentre of western liberal ethos. The rights to personal property and privacy are a major hallmark of the individual's wellbeing and considered essential for his or her autonomy from the state. Fuchs argues that as much as these rights positively fuel the political economy of capitalism, they have equally become ideological tools for advancing 'possessive individualism that harms the public good'.[18] With no moral compass to which it is held bound from trespassing against society, the TNC is an unbridled vehicle running on the wheels of privacy and property rights to advance the individual's economic interests even to the detriment of those of society. Therefore, the notion that human rights are inherently individualistic and that obligations for their protection are perpetually only a state affair essentially favours the cultural and political bias of the West.[19]

In support of this view, Mutua eloquently argues that the unrelenting focus on individualism by the Westphalian system of international human rights law arises from the ashes of Western liberal tradition presupposing the abstract autonomy of the individual in a way that disparages non-European perspectives. He explains:

> The human rights corpus views the individual as the center of the moral universe, and therefore denigrates communities, collectives, and group rights. This is a particularly serious problem in Africa, where group and community rights are both deeply embedded in the cultures of the peoples and exacerbated by the multinational nature of the postcolonial state.[20]

In other words, the international human rights corpus – in which there was very minimal African input, if at all - is cataleptically disengaged from the traditional and historical normative value systems of African peoples and the effect of Western

[17] Okoloise (n 10 above) 201.
[18] C Fuchs 'Towards an alternative concept of privacy' (2011) 9 *Journal of Information, Communication and Ethics in Society* 220 231; DJ Glancy 'The invention of the right to privacy' (1979) 21 *Arizona Law Review* 1 21-25.
[19] Mutua (n 8 above) 20.
[20] Mutua (n 8 above) 34.

domination on the continent. It is numb to the imbalances in political and economic power and institutions between them and the impact of those imbalances on the effective protection of human rights in Africa. If anything, it tends to be in favour of a continuous erosion of those value systems. It anticipates that its normative propositions should ride on the normative legacies of colonialism; that African value systems must genuflect to those superimposed by colonialism and collectivism to individualism. Such a contraption being consistent with Western political and cultural philosophy, it is not difficult to understand why the international legal system slumbers on the ruthless activities of TNCs in Africa or why powerful developed states are unwilling to support a strong regime of corporate accountability at the global level.

In contrast, the African communitarian philosophy is not antagonistic to the idea of individualism. It is predicated on the ideal that the pursuit of individual interests must be harmonious – rather than opposed - with those of the community. In the context of human rights, this ideal encompasses the notion that human rights are not entirely individualistic but also communitarian. Ake conveys the point more clearly in arguing that unlike the presupposition in Western societies that human rights are atomised and individualistic, the consciousness that individuals are separate from the society is alien to those of traditional African societies.[21] He emphasises that:

> We put less emphasis on the individual and more on the collectivity, we do not allow that the individual has any claims which may override that of the society. We assume harmony, not divergence of interests, competition and conflict; *we are more inclined to think of our obligations to other members of our society rather than our claims against them*.[22]

Here, Ake identifies two major fabrics of African societies: the emphasis on the collective of which the individual is a fundamental part; and the importance of harmony rather than competition. That harmful 'individual' competition must give way to overriding social concerns imply that individual interests - in whatever way they are manifested, whether through the corporation or other economic entity - are not exclusive of the wellbeing of the broader society. Rather, they are to be advanced with a sense of obligation towards those of other members of the society based on respect. In this way, Ake highlights a fundamental sense of horizontal

[21] C Ake 'The African context of human rights' (1987) 34 *African Today* 5.
[22] Ake (n 21 above) 5 (emphasis mine).

responsibility among individuals in the society which does not fade away merely by the individual's establishment of a corporation.

The horizontal relationship of individuals – natural and juridical - are concretised in the binding provisions of African human rights norms and standards. In the African Charter, for example, every individual is considered to owe duties to the society, communities and the world at large.[23] In particular, the rights and freedoms of each individual are conditioned on having 'due regard' for the rights of others.[24] Although the Charter goes as far as recognising the converse duties of the individual to state, its recognition of correlative obligations are consistent with the idea that corporations have corresponding responsibilities towards individuals. This confirms the communitarian ideal articulated by Ake and Mutua in that they espouse the vertical and horizontal relationship of rights and duties in Africa.

In the Charter's preamble, the need for 'the virtues of [Africa's] historical tradition and the values of African civilisation' to be reflected on African conception of human and peoples' rights is particularly emphasised.[25] Amoah states that the recognition of human and peoples' rights and the imposition of corresponding obligations are not just 'a reminder that the African conception of rights carries corresponding obligations', they also 'portray one of the unique characteristics of the African Charter'.[26] This distinct but entrenched appreciation of the relationship of rights and duties aligns with the widely held idea in Africa that rights are expressed not only by individuals, but also by groups or communities of individuals, and that only by deriving corresponding duties can harmony be maintained in the community.[27] Figure 3-1 below illustrates how the philosophical and cultural divergences between the West and Africa affect the appreciation of rights and duties in the context of corporate human rights responsibility).

[23] African Charter art 27(1).
[24] African Charter art 27(2).
[25] African Charter preamble para 5.
[26] P Amoah 'The African Charter on Human and Peoples' Rights – An effective weapon for human rights?' (1992) 4 *African Journal of International and Comparative Law* 226 227;
[27] In *Gunme & others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 176 (the African Commission held that '"peoples" rights are equally important as are individual rights. They deserve, and must be given protection. The minimum that can be said of peoples' rights is that, each member of the group carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity').

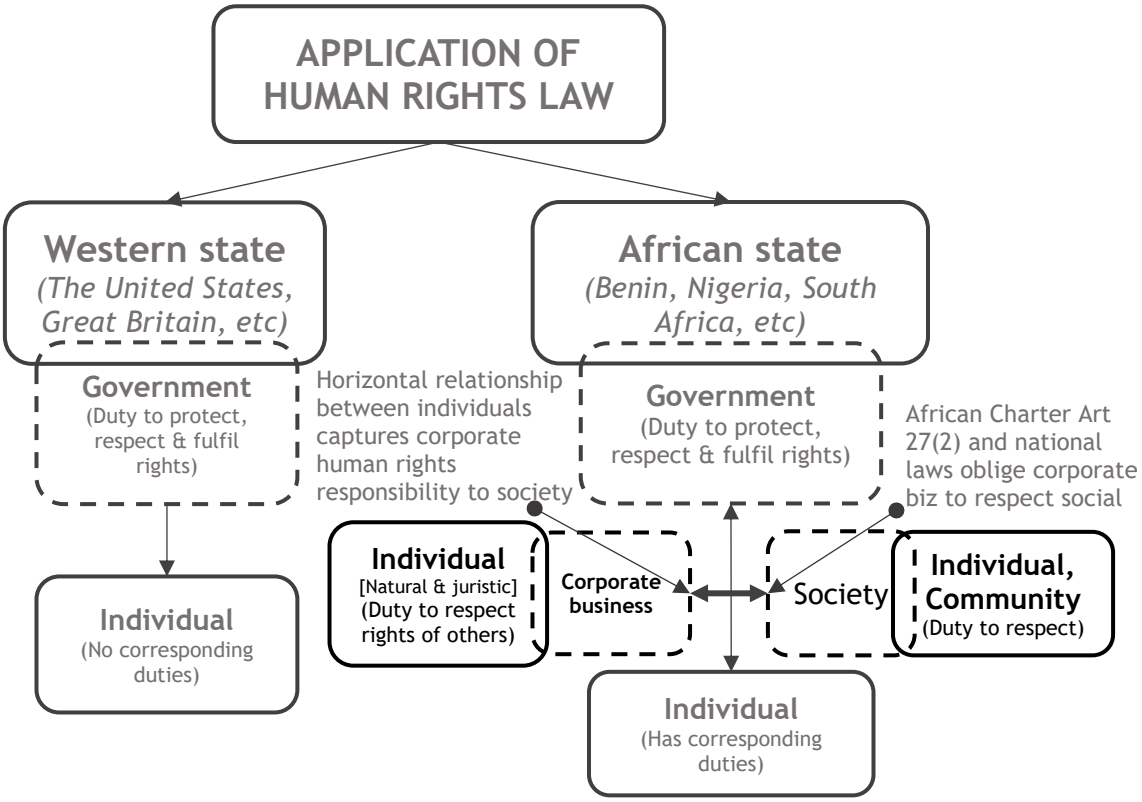

Figure 3-1: Application of human rights law in Western and African countries.

3.2.1 Corporate duties implied under the African Charter

Although the African Charter does not expressly impose human rights obligations on corporations, it makes ample room for such obligations to be imputed in one of two ways. First, the Charter's recognition of duties in articles 27 to 29 at the same time as it recognises human and peoples' rights does not foreclose the imputation of individual duties to juristic persons.[28] If the conceptualisation of *individual* in human rights instruments is considered to include juridical persons, as argued by Henkin, then there is a logical basis to claim that corporations are bound by the duties imposed in the Charter.[29] Based on Figure 3-1 above, the respect obligation categorically imposed on individuals is scalable to corporate entities. In the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter

[28] African Charter arts 27-29.

[29] L Henkin 'The Universal Declaration at 50 and the challenge of global markets' (1999) 25 *Brooklyn Journal of International Law* 17 25. Corporations may claim the rights to equality, non-discrimination, fair hearing, property, receive and impact information, movement, join associations or assemble under the African Charter in the same way they can be sued before domestic courts for human rights violations, eg, under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act in Nigeria.

relating to Extractive Industries and the Environment 2018 (State Reporting Guidelines and Principles or SRGPs), the African Commission confirms that:

> Under the African Charter, obligations of such entities towards rights holders have a clear legislative basis. Article 27 of the African Charter provides for the duties of individuals and its sub-provision 2 lays down the obligation to exercise rights 'with due regard to the rights of others'. Clearly, if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies.[30]

The Commission enunciates two broad categories of corporate obligations based on article 27 thus:

(a) Negative obligations

This entails the responsibility of corporations to abstain from doing harm or, in the least, ensure due care in the course of its operation. This obligation is two-fold – direct and indirect negative obligations.

Corporations have *a direct negative obligation* to ensure that their operations neither occasions harm nor curtails or deprives the enjoyment of the rights guaranteed in the Charter. This duty proscribes corporate policies or acts that intentionally fuel violations and demands that they 'ensure continuously that their acts or operations are in full compliance with internationally accepted human and peoples' rights, labour and environmental standards to avoid any incident producing harm or curtailment of rights of people.'[31]

Extractive corporations are also responsible for the conduct of those who act on their behalf. This *indirect negative obligation* pertains to the actions of company boards and senior management officials. It implies that corporations retain responsibility for the decisions and actions of management officials, if official actions impinge on the rights and freedoms enshrined in the Charter.[32]

(b) Positive obligations

Whilst the Commission particularly attributes a 'higher level of duty of due diligence and care' to TNCs, it does not provide a rational basis for doing so.[33]

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[30] African Commission 'State Reporting Guidelines and Principles on Articles 21 and 24 relating to Extractive Industries and the Environment' (2018) para 68 <http://www.achpr.org/files/news/2017/10/d312/state_reporting_guidelines_and_principles_on_articles_21_and_24.pdf> (accessed 15 November 2018).

[31] African Commission (n 30 above) para 69.

[32] As above, para 73.

[33] As above, para 69.

However, one can rationalise that it is not unconnected to the controlling power of parent TNCs over their subsidiaries in Africa. This 'higher' standard includes the responsibility to be vigilant to the nature and scope of their activities and the potential adverse impacts they may have on third parties. It also warrants companies to ensure that their decisions and actions do not result in down-the-line violations in their supply chains.[34]

The Commission affirms that corporations have 'certain positive obligations' specifically under articles 21 and 24. These include, firstly, the obligations entail fiscal and transparency responsibilities to –

- Disclose shareholders' and local partners identity
- Disclose the financial terms of agreement regarding the licensing fees for operating a mine, royalties, taxes, custom duties and government's share
- Declare the profits emanating from their operations in the host country, and
- Adopt measures against illicit financial outflows.[35]

Secondly, the obligations imply economic and social responsibilities of extractive corporations to prevent, mitigate or remedy potential adverse impacts on local communities by –

- Providing adequate information
- Ensuring substantive consultations with (potentially) affected people in order to obtain their free, prior and informed consent on decisions regarding any aspect of the corporation's activities
- Executing such activities having due regard to the communities' concerns and required cautionary measures to mitigate adverse impacts, and

[34] As above, para 69.
[35] As above, para 74.

- Ensuring that they undertake, with the participation and representation of affect populations, the required environmental, social and human rights impact assessments before commencing extractive operations.[36]

Lastly, the obligations require companies to contribute to the developmental needs of host communities.[37]

In expatiating on the effect and scope of these obligations under the Charter, the Commission clarifies that '[t]hese obligations are legal obligations rather than just matters of social responsibility of companies.'[38] They include offering community-focused support in the areas of education, employment, health, agricultural or pastoral development.

Heralding the above position of the State Reporting Guidelines and Principles was an equally radical declaration in Commission Resolution 367(LX)2017 '[a]ffirming that extractive industries have the legal obligation to respect the rights guaranteed in the African Charter.'[39] In the Resolution, the Commission was alarmed by the largescale environmental and social impacts of extractive corporations on local communities and the trivial respect for human and peoples' rights leading to extensive violations.[40] Acting under article 45(1), the Commission seized upon its interpretive mandate to progressively advance the protective aspirations of the Charter.

Second, unlike other international instruments, the Charter does not allow for a vacuum or derogations in the protection and application of human and peoples' rights in Africa.[41] Enunciating the responsibility of corporations to respect human and

[36] As above, para 75; African Commission 'Final communique on the national dialogue on the rights of indigenous peoples and extractive industries 7 to 8 September 2017, Yaoundé, Cameroon' 8 September 2017 <http://www.achpr.org/news/2017/09/d300/> (accessed 15 November 2018).

[37] African Commission (n 30 above) para 76.

[38] As above, para 76 [Underlining mine].

[39] African Commission 'Resolution 367(LX)2017: Resolution on the Niamey Declaration on ensuring the upholding of the African Charter in the extractive industries sector' (2017) preamble 60th Ord Sess, Niamey, Niger 22 May 2017 <http://www.achpr.org/sessions/60th/resolutions/367/> (accessed 15 November 2018) [Underlining mine].

[40] African Commission Resolution 367(LX)2017 (n 39 above).

[41] *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41; *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2001) AHRLR 66 (ACHPR 1995) para 21; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 67; General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) para (7); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) para R.

peoples' rights in Africa, the Commission declares that TNCs have legal obligations towards right-holders under the Charter because '[a] lack of such obligations may result in the creation of a human rights vacuum in which such entities operate without observing human rights.'[42] To ensure there is no vacuum that could be exploited by corporations, the Charter's provisions are considered elastic enough to incorporate rights and recognise corresponding duties which are not explicitly provided in it. This is commendably enabled by the Commission's ability under article 45 to clarify grey areas, imply rights not expressly provided and expound on responsibilities under the Charter.

In *Socio-Economic Rights Action Centre (SERAC) and Another v Nigeria*,[43] the African Commission held that the right to adequate housing was implicit in the Charter through a community reading of articles 14, 16 and 18(1). Also, in *Huri-Laws v Nigeria,*[44] the Commission found that the expression 'cruel, inhuman or degrading treatment or punishment' could be interpreted in a manner that extends the widest protection possible against violations. In this way, the African Charter reflects its innovativeness, adaptability and uniqueness compared to other international and regional human rights instruments.[45]

In all this, there is a categorical declaration that the responsibility of corporations to respect human rights is a *legal* one. By recognising and repeatedly affirming the legal basis of the responsibility of corporations under international law, the Commission puts to rest the contestations on the basic of the corporate responsibility for human rights at least in Africa.

3.2.2 Corporate duties implied under allied African instruments

Beyond the Charter, similar African instruments are laced with the language of horizontal legal duties. In the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2018 (Disability Rights' Protocol), Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons 2016 (Older Persons' Protocol), African Youth Charter 2006

[42] African Commission (n 30 above) para 68.
[43] (2001) AHRLR 60 (ACHPR 2001) paras 60-62.
[44] (2000) AHRLR 273 (ACHPR 2000) para 40; *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) para 37; *Purohit & Anor v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 58.
[45] *Centre for Minority Rights Development (Kenya) & Anor v Kenya* (2009) AHRLR 74 (ACHPR 2009) para 149.

and African Charter on the Rights and Welfare of the Child 1990 (African Children's Charter), duties and responsibilities are recognised as an integral part of the continental human rights corpus.[46] Also, the African Peer Review Mechanism includes the requirement of corporate human rights accountability as one of its corporate governance indicators.[47] Therefore, the reproduction of duties in these important instruments shows clearly that the interactions between rights and duties in the corporation responsibility discourse can be neither overemphasized nor ignored in African scholarship.

3.2.3 Corporate criminal accountability recognised by the AU

Importantly, at no other centre of international normative governance has the concept of corporate criminal responsibility been more readily defined, accepted, and grounded as a standard of accountability than in Africa. The idea of holding corporations accountable for violations of international law – specifically, international criminal law - has been the subject of protracted debate. Although it was initially penned down for deliberations during the treaty-negotiation process of the Rome Statute of the International Criminal Court 1998, it was abandoned midway because of its contentiousness.[48] While disputations continue to derail universal acceptance, Africa seems to be making the most concrete progress in this regard.

However, that progress has been the result of a rather messy process of establishing a continental judicial body vested with a comprehensive spectrum of jurisdiction on issues of Union matters, human rights and international crimes.[49] The effort to fuse the existing African Court on Human and Peoples' Rights with the African Court of Justice under the AU Constitutive Act 2000 saw several untidy

[46] Disability Rights Protocol Art 31, Older Persons Protocol art 20, African Youth Charter art 26 & African Children's Charter art 31.

[47] Objectives, standards, criteria and indicators for the African Peer Review Mechanism 2003 sec 4.1 A(b)(c)(d).

[48] J Kyriakakis 'Article 46C: Corporate criminal liability at the African Criminal Court' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 793 794.

[49] KM Clarke, CC Jalloh & VO Nmehielle 'Introduction: Origins and issues of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Development and challenges* (2019) 1-54; CC Jalloh 'The place of the African Criminal Court in the prosecution of serious crimes in Africa' in CC Jalloh & I Bantekas (eds) *The International Criminal Court and Africa* (2017) 289 303-309; A Abass 'Historical and political background to the Malabuo Protocol' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2017) 11-28.

amendments to the fusing instruments.[50] It was, however, the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) and its annexed amended Statute of the African Court of Justice and Human and Peoples' Rights (amended Statute) by the AU that saw the recognition of *corporate criminal responsibility* at the African regional level.

In the amended Statute, the criminal liability of natural persons as perpetrators of or accomplices in international crimes will not exclude the criminal liability of corporate entities.[51] A corporation will be considered to be criminally responsible for an act constituting an offence under the Statute if the act is the result of an official policy that reasonably explains the conduct of the company.[52] To satisfy the *mens rea* element, it will suffice to prove that that corporation possessed actual or constructive knowledge of the relevant information showing that 'it was the policy of the corporation to do the act [or omission] which constituted the offence.'[53] For a policy to be credited to the company, the Statute requires that the policy should provide the most reasonable explanation for the corporations' conduct.[54] Knowledge is also imputable to the corporation even where the information constituting the crime resides with different personnel or aspects of the company.[55] What these legal postulations mean is that the issue of whether a corporate entity can have knowledge of a crime will be determined as an issue of law rather than as a matter of physical possibility. Indeed, only the Courts – when it comes into fruition – will be well-positioned to determine whether a corporate entity had knowledge of a crime.

[50] NB: The African Human Rights Court was established under the defunct Organisation of African Unity (OAU) by virtue of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights in 1998 before the establishment of the AU in 2000. The African Court of Justice was established under the AU Constitutive Act art 5(1)(d) and the Protocol of the Court of Justice of the African Union 2003. The Court of Justice was yet to be operational when it was sought to the merged with the existing African Human Rights Court in 2008 by virtue of the Protocol on the Statute of the African Court of Justice and Human Rights. While the 2008 Protocol was yet to come into force, further amendments where introduced in 2014 in the form of the Malabo Protocol and its annexed Statute.

[51] Amended Statute art 46C(6).

[52] Amended Statute art 46C(2).

[53] Amended Statute art 46C(2)&(4).

[54] Amended Statute art 46C(3).

[55] Amended Statute art 46C(5).

To establish the *actus reus* of the crime, it is sufficient to show a clear nexus between the corporation's conduct occasioning the offence in question and its corporate policy. According to the African Commission, doing any of the following acts will result in the criminal liability of a corporation under articles 21 and 24 of the African Charter:[56]

(a) Concluding an agreement to exploit natural resources –
    i. in breach of the legal and regulatory conditions of the state concerned,
    ii. in breach of the peoples' sovereignty over their natural resources,
    iii. through corrupt practices,
    iv. that is plainly one-sided;
(b) Exploiting natural resources without –
    i. the consent of the state concerned,
    ii. compliance with standards regarding the protection of the environment, and the security of the people and staff; and
(c) Violating the legal and regulatory obligations imposed by the appropriate supervisory body responsible for natural resources governance in a state.

It is noteworthy that the amended Statute importantly clarifies any mists surrounding the concept of legal personality under international law that may pose a stumbling block to prosecuting corporations before the future Court. It does this by defining 'person' as 'a natural or legal person'.[57] The implication of this is that when the Court comes into operation, there will be no basis for disputing the '*prosecutability*' of corporations for international crimes in Africa. This effectively provides a sound basis for rationalising a corporate governance regime on the continent.

3.2.4 Corporate duties at the domestic level

At the domestic level, the Bill of Rights of many African countries similarly evidence the horizontal relationship between individuals and between individuals and corporations. From Nigeria in West Africa to Kenya in East Africa, to Zimbabwe and South Africa in Southern Africa, all persons are bound by the provisions of the Constitution and the Bill of Rights enacted under it. More importantly, individuals

[56] African Commission (n 30 above) paras 70-72.
[57] Amended Statute art 1.

and communities can lawfully institute claims against corporations for human rights and environmental violations in accordance with the Constitution.[58] This fundamentally aligns with the idea that no one is above the law and that corporations as juristic persons are effectively capable of violating human rights.

In the following section, I will consider the theoretical justifications for international corporate regulation in Africa.

3.3 The African approach to international corporate regulation

Despite the normative advances in Africa, the stalemate at the global level between the states in favour of a treaty and those against remains real. To dilute the deluge of biased opinions, it is even more relevant to evaluate - through theories - the significance of corporate liability on the international plane. A theory is a provisional insight, system of contemplative ideas, or reasonable or scientifically acceptable principle of a generalised nature used to explain certain phenomena or facts.[59] At law, it is a conceptual proposition that attempts to explain the significance of principles or norms in relation to a given conduct.[60] In the realm of business and human rights, arguments in favour of or against the legal regulation of corporations at a supranational level – in this case, at the African regional level - are at risk of crumbling if unsupported by strong theoretical justifications. Therefore, it is no wonder that while the corporate responsibility to respect human rights is claimed to be defined by the amorphous idea of social expectation, it gravely suffers from a poverty of theoretical justification in both the UN Framework and the UNGPs.

To avoid falling in the cesspit of advancing an idea of normative consequence without theory, it is necessary for the legal and conceptual postulations and delineations in this thesis to be predicated on solid theoretical basis. As Ratner rightly explains:

[58] Constitution of the Federal Republic of Nigeria 1999 sec 46(1); The Constitution of Kenya 2010 secs 2(1), 20(1); Constitution of the Republic of Zimbabwe 2013 sec 2(2); Constitution of the Republic of South Africa 1996 sec 8(2). See *Gbemre v Shell Petroleum Development Company of Nigeria* (2005) AHRLR 151 (NgHC 2005) para 5; *Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97 (para 58.3).

[59] BA Garner (ed) *Black's law dictionary* (2009) 1616.

[60] OC Okafor 'Critical third world approaches to international law (TWAIL): Theory, methodology, or both?' (2008) 10 *International Community Law Review* 371 372.

> both the corporate entity's potential impact on human rights, and theoretical understandings of the nature of human rights and of business enterprises, render corporate responsibility practically necessary and conceptually possible.[61]

In this section, I identify two theories that are in alignment with Africa's approach to international human rights law – a theoretical subset of the Third World approach to international law (TWAIL)[62] and critical legal approaches - to support the case for an international legal regime of direct corporate regulation. These are: the *right-duty correlation* theory, and the *power-responsibility* theory. Each of these theories are consistent with the narrative of African and global South scholars that international law should be more reflective of the multiverse of cultures, perspectives and norms in the world rather than a universe of foisted western value-systems. However, before delving into these theories specifically, it is only apt that I briefly treat the *Third World approach* as an important beacon of African human rights scholarship and how it connects with the pursuit of corporate accountability in the extractive industries in Africa.

The TWAIL hypothesis is a counter-hegemonic approach to the study of international law. It illustrates how the disparities in cultural, political, and socio-economic structures between developed and developing states shape the normative paradigm of international law and development.[63] It is anti-hegemony because it advances counter-discourses that critique and confront the vision of dominant states that influence global affairs, including the development trajectory of the so-called 'Third World'. TWAIL seeks to concretely analyse 'particular international law regimes and practices' in order to engage strategically in global affairs.[64] It challenges the legitimacy of the regime of international law, by questioning its immoral contributions to the expansion, subjugation and continued exploitation of

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[61] SR Ratner 'Corporations and human rights: A theory of legal responsibility' (2001) 111 *Yale Law Journal* 443 461; EK Nartey 'MNCs and human rights violations – Litigation in the intersection of national and international law' (2015) 43 <https://www.researchgate.net/profile/Emmanuel-Nartey-2/publication/326548293_MNCS_AND_HUMAN_RIGHTS_VIOLATIONS-LITIGATION_IN_THE_INTERSECTION_OF_NATIONAL_AND_INTERNATIONAL_LAW/links/5b54eb9e45851507a7bffaa7/MNCS-AND-HUMAN-RIGHTS-VIOLATIONS-LITIGATION-IN-THE-INTERSECTION-OF-NATIONAL-AND-INTERNATIONAL-LAW.pdf> (accessed 6 December 2020) – 'there is a need for new legal theoretical concept that could enforce and impose legal obligations on MNCs in regards to human rights violations'.

[62] Or developing world approach to international law.

[63] M Mutua 'What is TWAIL?' (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law)* 31 31.

[64] BS Chimni 'Third World approach to international law: A manifesto' (2006) 8 *International Community Law Review* 3 6; U Baxi 'What may the "Third World" expect from international law?' (2006) 27 *Third World Quarterly* 713 714-716.

non-Europeans by the West to date. Mutua argues that the international legal system 'is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.'[65]

Third World is a political expression for that part of non-European society which, though has a significant share of vital natural resources, has little or no power over the global order that shape their economic affairs.[66] It is a metaphor of sorts for societies that were conquered, subjugated, plundered and colonised by imperial European powers.[67] Although there is currently a preference in the West for the substitution of the term with 'developing world' to niftily fade away the 'complexes of superiority' that characterised classical international law, its taxonomy is principally based on the long-standing belief that the supremacy of white Europe necessitated a duty to civilise and dominate the rest of the 'non-sovereign' uncivilised world.[68]

From an instrumentalist view, the TWAIL is also a counter response to the unfair hierarchy embedded in the architecture of international law.[69] International law can be seen as a global governance tool for the continuous ordering of existing racialised hierarchies and the domination of developing countries.[70] It is the conduit by which European imperialism and superiority has mutated.[71] Chimni argues that the Third World is haunted not only by the threat of recolonization but also by the deleterious effect of globalisation made possible by the pursuit of neo-liberalism through global political and financial institutions, and that the international human rights corpus is being manipulated to actualise that agenda. For Chimni, key identifiers of the perpetuation of the global structure of dominance through international law include amongst others:[72]

65 Mutua (n 63 above) 31.
66 Mutua (n 63 above) 35.
67 Baxi (n 64 above) 716 (to prove the racialised hierarchical structure, argues that while there is consistence reference to First World and Third World, no mention is ever made to the Second World at all).
68 Mutua (n 63 above) 36.
69 Mutua (n 63 above) 36-38.
70 Mutua (n 63 above) 31, 36, 38-39.
71 JD Haskell 'Trail-ing TWAIL: Arguments and blind spots in Third World approaches to international law' (2014) 27 *Canadian Journal of Law and Jurisprudence* 383 387 & 409.
72 Chimni (n 64 above) 8-14.

(a) the internationalisation of the property rights of corporations through the instrumentality of the World Trade Organisation and the enabling of their international enforcement against states;[73]

(b) the regulation of the conditions for trade and investment, including the exchange of currencies, market access, and the settlement of disputes;

(c) the deregulation of the labour market through conditionalities imposed by international financial institutions that disfavours the working class in developing states and impoverishes their peoples;

(d) the complexification of the concept of jurisdiction that increasingly makes access to justice difficult for communities that have been damaged by the abusive tendencies of corporations from developed states; and

(e) the creation of TNCs as new centres of power without accountability.

Arising from this system of global ordering are overlapping structural changes in the relationship between the state and international norms and institutions that create, what Chimni describes as, a 'differential impact' for Third World countries and their peoples.[74] To gain a proper understanding of this *differential impact* and the continuing economic exploitation of the continent by the West, one – firstly - need not look any further than the historical relationship between international law and colonialism.[75] The scramble for and partition of Africa at the Berlin colonisation conference of 1884-1885 were based on the classical international legal order regulating the relationship among European states. The acts of aggression, the genocides, the despoliation of historical cultural and spiritual sacramentals and artefacts, and the torture and application of forced labour against the native African populations, that followed, were sanctioned by the League of Nations and sustained by the UN.[76]

[73] WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).
[74] Chimni (n 64 above) 8.
[75] Mutua (n 63 above) 33; Baxi (n 64 above) 713; B Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' (2006) 27 *Third World Quarterly* 767 768.
[76] A Anghie *Imperialism, sovereignty, and the making of international law* (2001) 10.

The economic and developmental problems emanating from the colonial (dis)order did not simply disappear. Rather they continued with the advancement of international law and institutions as vehicles for managing the benefits and chaos that followed the colonial episode. There is good reason to note with suspicion the immediacy between the establishment of a new global economic order through the GATT of 1947 (revised in 1994) and the international human rights order with the UDHR's adoption in 1948 in respect of which much of Africa was neither heard nor represented.[77] While the GATT legally activated less regulation and recognised the protection of the property rights of transnational investors, the International Bill of Rights that followed omitted to specifically recognise TNCs as violators of human rights even though, based on the Nuremberg Trials, it had become obvious by 1948 that TNCs were gravely complicit in the holocaust committed by Nazi Germany and were egregious violators of international law.[78] This seemingly choreographed adoption of the GATT before the International Bill of Rights, in my view, outs the benignity of the international human rights corpus as a colonial tool for furthering the neo-liberal agenda of the West.[79] And it is for this reason that Rajagopal argues that 'the human rights discourse is part of the problem of global hegemony and the absence of global justice.'[80] Much like Rajagopal, Moyn's expository deep dive on *how* the initial evolution of international law did not envisage contemporary understanding of international human rights accountability shows that until the anti-colonial and self-determination forces arose from colonial societies, 'human rights were not to be more than paper promises in the postwar era.'[81]

For Africa, in particular, the impact of the protracted weakening of pre-colonial societies and institutions as against the strengthening of European and American ones manifest most unfavourably in the language of human rights

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77 Chimni (n 64 above) 11.

78 V Nerlich 'Core crimes and transnational business corporations' (2010) 8 *Journal of International Criminal Justice* 895 903; International Law Commission 'Corporate complicity and legal accountability, Volume 2 - Criminal law and international crimes' (2008) 5 <https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf> (accessed 13 November 2018); A Ramasastry 'Corporate complicity: From Nuremberg to Rangoon - An examination of forced labor cases and their impact on the liability of multinational corporations' (2002) 20 *Berkeley Journal of International Law* 91 104, 110 & 122.

79 M Mutua 'Savages, victims and saviors: The metaphor of human rights' (2001) 42 *Harvard International Law Journal* 201 204-205.

80 Rajagopal (n 75 above) 768 ('the human rights discourse has also turned out to be a core part of hegemonic international law, reinforcing pre-existing imperial tendencies in world politics'); OA Badaru 'Examining the utility of Third World approaches to international law for international human rights law' (2008) 10 *International Community Law Review* 379 383.

81 S Moyn *The last utopia: Human rights in history* (2010) 178.

obligations. International human rights treaties impose primary obligations for human rights on states for all rights. However, such norms are blind to the structural, economic and political differences among states.[82] By ignoring the developmental imbalances between developed and poor as well as weak states, and placing them on the same normative pedestal, the obligations arising from such treaties activate the dynamics of economic and political differences between them with respect to implementation. For the host African state, every new treaty subscribed to only increases its socio-economic burden. And the fact that human rights treaties are more often than not ratified at the behest of Western governments as a conditionality for foreign investments, aids or loans from the IMF and the World Bank makes this logic on the relationship between human rights and colonisation an irrefutable one.

At the same time as host states were being trapped in the snares of international human rights obligations, TNCs were let off the scrutinous hook of international law. In possession of rights without responsibilities, they were licenced by omission under international law to violate human rights without accountability. In comparison to the strong structural and economic position of the West, the international obligations for the elimination of barriers to trade and investment, most-favoured nation obligations, anti-discrimination obligations, obligations against the sequestration or expropriation of the investment of foreign nationals, including international human rights obligations, all operate to weigh down the development trajectory of Third World states. By manipulating host states to acquire international law obligations through the conditionalities attached to foreign aid, investment and loans, the West has continued to surreptitiously deploy its dominant position in perpetuating the colonial legacy on the continent.

With the expanding power of TNCs and the lack of corresponding obligations, the typical host African state is often handicapped in its ability or willingness to exert effective regulatory power over TNCs on its territory.[83] The acquisition by

[82] Anghie (n 76 above) 71-74. Also see G Simpson *Great powers and outlaw states: Equal sovereigns in the international legal order* (2004) 57, 63-68; EA Posner 'Do states have a moral obligation to obey international law?' (2002) 55 *Stanford Law Review* 1901 1909-1910; P Nervo 'State responsibility (A/CN.4/106)' (1957) 1 Yearbook of the International Law Commission 154 155; RP Anand 'Attitude of the Asian-African states towards certain problems of international law' (1966) 15 *The International and Comparative Law Quarterly* 55 61.

[83] JS Migdal *Strong societies and weak states: State-society relations and state capabilities in the Third World* (1988) 100.

Western TNCs of so much power without responsibility and the African state's possession of too many international law responsibilities without commensurate power and systems creates, what Anghie aptly describes as, a 'dynamic of difference' that needs to be corrected.[84] Anghie more succinctly alludes that the deep and enduring differences that distress our planet is attributed to nothing other than the disparities in power: 'the strong dictate and the weak must comply.'[85] It is my argument that for there to be an efficient regime of accountability domestically, these structural imbalances between host states and TNCs must be addressed. Until that happens, and it is not likely that this will occur soon, there needs to be developed a strong global governance regime that directly addresses the international human rights obligations of corporations. To justify this call for a shift in the international legal order towards corporate accountability beyond the level of the host state, I will now proceed to explain the two theories I outlined above.

3.3.1 Right-duty correlation theory

For legal scholars, the idea of corporate responsibility for human rights is based on the notion that human rights protection is fundamentally predicated on law. It is not based on the fiction of social expectation that rights will be protected. To *protect* literally means to guard against infringement and where there is an infringement, to ensure that remedies and justice are accorded to the injured.[86] Law is a rule for ordering conduct in society. As such, its recognition of a right is a declaration prohibiting its violation by requiring restraint or a particular action from another. It reposes some equivalent responsibility on a potential violator to refrain from so doing or to act in a particular way. Henkin asserts that 'to say one has a legal right against another is to say that one has a valid legal claim upon him, and that the addressee has a corresponding legal obligation, in the relevant legal system.'[87] Henkin clarifies that the international law of human rights:

> provides a recognized and institutionalized legal remedy to the right-holder to compel the performance of the obligation or otherwise vindicate the right. It may

[84] Anghie (n 76 above) 4; JT Gathii 'TWAIL: A brief history of its origins, its decentralized network, and a tentative bibliography' (2011) 3 *Trade Law & Development* 26 31.

[85] Anghie (n 76 above) 317.

[86] S Gruskin, K Plafker & A Smith-Estelle 'Understanding and responding to youth substance use: The contribution of a health and human rights framework' (2001) 91 *American Journal of public health* 1954 1956. Also see JJ Silk 'International criminal justice and the protection of human rights: The rule of law or the hubris of law?' (2014) 39 *The Yale Journal of International Law Online* 94 96; A McBeth 'Privatising human rights: What happens to the state's human rights duties when services are privatised' (2004) 5 *Melbourne Journal of International Law* 133 135.

[87] L Henkin 'International human rights as rights' (1979) 1 *Cardozo Law Review* 425 438.

> imply also that the right claimed is, in fact, commonly enjoyed (and "as of right," not by grace), and the corresponding duty is, in fact, generally carried out (and from a sense of legal obligation).[88]

This logic suggests that the legal protection of rights and freedoms elicits correlative duties.

International human rights treaties, however, do not recognise rights merely by scribbling them on the treaty text. They also impose specific obligations mostly on the state. More often than not, a treaty will provide that states recognise the rights and freedoms enshrined in its text and undertake to adopt domestic measures to give effect to them.[89] In more specific cases, the treaty will impose duties on the state in respect of each right – duties to promote, protect and fulfil human rights on its territory. What does this mean in substance? Does this mean that only states have duties for human rights or that non-state actors have a carte blanche licence to violate human rights? By no means. For a state party to a treaty, the obligation assumed has two implications. The implications are best understood by noting that international human rights law is created primarily by states voluntarily ratifying human rights treaties. In every treaty ratified, states assume obligations that have wide-ranging consequences for the benefit of individuals and groups who are non-party to it.

In the first case, when a state ratifies a treaty, it acts as 'legislator' by agreeing with other states to give recognition and legal status on the international plane to human rights as enforceable claims that every individual can make against his or her society.[90] The undertaking to recognize the human rights and fundamental freedoms of its inhabitants at the international level creates law and, at the same time, an obligation in relation to other states, which if violated domestically will give rise to the breach of international law – and its international obligation as per other states.[91] In this sense, the obligation assumed is not necessarily correlative of the rights recognised in the treaty. However, in the second case, by voluntarily recognizing and guaranteeing at law the rights and freedoms of its inhabitants (even though such inhabitants are not party to the treaty), the state not only becomes an

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[88] Henkin (n 87 above) 438; S McFarland 'Human rights 101: A brief college-level overview' December 2015 3 <https://www.aaas.org/sites/default/files/content_files/AAAS%20Coalition%20Human%20Rights%20101_0.pdf> (accessed 15 November 2018).

[89] ICCPR art 1; ICESCR art 1; African Charter art 1.

[90] Henkin (n 87 above) 442.

[91] ILC Draft RSIWA art

obligor, it creates vast legal consequences for all inhabitants in its territory. In essence, the state recognises that the individual has rights *against his or her society* that are recognised under international law in additional to any other rights he or she may have in the domestic constitutional order.[92]

By recognising the rights and freedoms of its inhabitants '*against society*', the state creates interdependent and corresponding horizontal obligations for every individual to *respect* the rights and freedoms of others. Although enforceable by the government, human rights and their correlative duties exist for everyone against those who make up the rest of society. Corresponding or correlative duties should be distinguished from *converse* duties.[93] *Converse* duties are duties owed to the state. They are duties running vertically against those of the state and which can potentially undermine human rights because they can be relied on by government to offset the obligations owed individuals and groups. Correlative duties, however, are 'private duties to respect the human rights of others.'[94]

Normatively, there is nothing uncanny or new about the idea that human rights create correlative duties. The Universal Declaration recognises the 'duties' of everyone to the community as well as to exercise 'respect for the rights and freedoms of others'.[95] At the time of negotiating the UDHR, its drafters had come close to christening the document as the 'Universal Declaration of Human Rights and Duties', but for the potential contestations and borderline counter-balancing of rights that this would have occasioned.[96] Hence, reference is made, not to the state but, to the *community* and *others*.[97]

Beyond the UDHR, the right-duty correlation is iterated in the International Covenants on Human Rights and repeatedly reaffirmed by the UN and UN treaty bodies. In the fifth paragraph of the Covenants' preamble, the horizontal application of duties is declared thus:

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92 Henkin (n 87 above) 440-442.
93 JH Knox 'Horizontal human rights law' (2008) 102 *American Journal of International Law* 1 1-2.
94 Knox (n 93 above) 2.
95 Universal Declaration art 29(1)(2); E Brems *Human rights: Universality and diversity* (2001) 440-442.
96 M Malila 'The place of individuals' duties in international human rights law: Perspectives from the African human rights system' Unpublished LLD Thesis, University of Pretoria, 2017 94-95.
97 J Morsink *The Universal Declaration of Human Rights: Origins, drafting, and intent* (1999) 241-242; J Morsink *Inherent human rights: Philosophical roots of the Universal Declaration* (2009) 43-45.

> the individual, having duties to other individuals and to the community to which he [or she] belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

In the *travaux préparatoires* on the draft International Covenants on Human Rights, the Drafting Committee 'agreed that rights and duties were correlative and that every right carried with it a corresponding duty.'[98]

Interpreting article 29 of the UDHR and the fifth paragraph of the Covenants, the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Erica-Irene Daes, clarifies that many rights in the Covenants possess corresponding responsibilities, and it is the duty of every individual and organ of society to comply with international law, including the UN Charter, the Covenants and other instruments pertaining to human rights. Daes explains that the duty to resist violations of human rights contained in article 30 of the UDHR and article 5 of the Covenants gives credence to the understanding of the right-duty correlation in international law.[99]

In this way, the UN recognises that it is impossible to think about rights without their connection with duties. In a 2003 report, the UN Special Rapporteur on the Study of Human Rights and Responsibilities, Miguel Alfonso Martinez, stated that '[e]very right, in one way or another, is linked to some obligation or some responsibility, and every time that a duty is fulfilled, it is very likely that the violation of some right is prevented.'[100] Essential to the human rights corpus is the notion of equal respect of rights, and only by recognising that individuals and establishments owe greater responsibilities to those with whom they closely interact can real protection be guaranteed. McGregor argues that it is only when responsibilities are assumed and applied amongst people and to the local, regional

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[98] MJ Bossuyt *Guide to the "travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987) 12; UN General Assembly Official Records 'Document A/2929: Annotations on the text of the draft International Covenants on Human Rights' (1 July 1955) para 11 <https://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/a-2929.pdf> (accessed 15 November 2018).

[99] E Daes 'The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights: A contribution to the freedom of the individual under law' UN Doc E/CN.4/Sub.2/432/Rev.2 (1983) paras 242-247 <https://digitallibrary.un.org/record/52410/files/E_CN.4_Sub.2_432_Rev.2-EN.pdf> (accessed 15 November 2018).

[100] UN Commission on Human Rights (UNCHR) 'Human rights and human responsibilities: Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the study requested by the Commission in its resolution 2000/63 and submitted pursuant to Economic and Social Council decision 2002/277' UN Doc E/CN.4/2003/105 20 (17 March 2003) para 43 <https://digitallibrary.un.org/record/491708/files/E_CN.4_2003_105-EN.pdf> (accessed 17 November 2018).

and global community can human rights be better protected or ensured.[101] In agreement with this principle, the UN Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies 2011 (Poverty Reduction Principles and Guidelines) confirms that '[r]ights imply duties, and duties demand accountability.'[102]

To put all this in perspective, it is clear that rights give rise to not only a variety of responsibilities but also a diverse list of duty-bearers.[103] The correspondence of responsibilities between individuals as right-holders and horizontal duty-bearers towards *others* imply that the corporate enterprise is captured in the reference to (a) 'individual or organs of society', and (b) 'groups or person', in the International Bill of Rights and other international instruments.[104] As a group or collection of individuals carrying on business for profit, the enterprise is a vehicle of service in the social value chain and, therefore, a vital *organ of society* driving development. Being vested with a personality that differentiates it from its members, it is not absolutely insulated from the horizontal duties arising from the legal recognition of rights in international law. As the primary shield of its members against liability for risks and losses, it is more so not absolutely exonerated from liability for crimes and human rights violations.

However, a claim that the corporation possesses human responsibilities for which it can be held accountable is not an averment that it is accountable in international law. Those responsibilities are yet to be enforceable before international mechanisms. The CESCR lends concrete support to this line of argument in its general comments, when it clarifies of the Covenant that while only states are:

> ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the *private business sector - have responsibilities regarding the realization of [human rights]*.[105]

[101] SLT McGregor 'Augmenting human rights with human responsibilities' (2013) 6 *Global Education Magazine* 45 46.

[102] Office of the High Commissioner for Human Rights 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' para 24 <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (accessed 17 November 2018).

[103] Ratner (n 61 above) 468.

[104] Universal Declaration preamble, art 29; ICCPR art 5(1); ICESCR art 5(1); Poverty Reduction Principles and Guidelines (n 102 above) para 24.

[105] Committee on Economic, Social and Cultural Rights 'General Comment 14: The right to the highest attainable standard of health' UN Doc.E/C.12/2000/4 (2000) para 42 22nd session 11 May 2000 [emphasis mine].

In, at least, five other General Comments issued between 2006 and 2017, the CESCR firmly establishes that private business enterprises 'have responsibilities' for the realisation of human rights, notwithstanding that there are no mechanisms for enforcement against such enterprises under the ICESCR.[106]

Moreover, the recognition of corporate duties for employee welfare in international labour law, for public health, safety and the environment in international environmental law, and for the fight against corruption in international anti-corruption – as established in section 2.3.1 – also goes to show the extent to which international law recognises the duty of non-state actors like corporations to the community, the society and to respect the rights of other individuals. Ratner puts it more aptly when he states that if states and the international community can recognise the rights and duties of corporations in some areas, 'there is no theoretical bar to recognizing duties more broadly, including duties in the human rights area.'[107]

Despite this strong normative evidence, persistent objections to the right-duty correlation by Western scholars indoctrinated in the neo-liberal tradition have, on many other occasions, prompted the UN's reaffirmation of this principle. In its official website, the UN declares that 'human rights simultaneously entail both rights and obligations from duty bearers and rights owners'.[108] Even the General Assembly adopted the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998* to reiterate the over 50 year international principle that human rights and fundamental freedoms elicit corresponding obligations from individuals, groups and organs of society.[109] By expressly recognising 'organs of

[106] Committee on Economic, Social and Cultural Rights 'General comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/GC/23 (2016) para 75 44th session 7 April 2016; Committee on Economic, Social and Cultural Rights 'General Comment No 21: Right of everyone to take part in cultural life (Art 15(1)(a) of the Covenant on Economic, Social and Cultural Rights)' E/C.12/GC/21 (2009) para 73 43rd 21 December 2009; Committee on Economic, Social and Cultural Rights 'General Comment No 20: Non-discrimination in economic, social and cultural rights (Art 2(2) of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/GC/20 para 40 42nd session 2 July 2009; Committee on Economic, Social and Cultural Rights 'General Comment No 18: The Right to Work (Art 6 of the Covenant)' E/C.12/GC/18 (2006) para 52 35th 6 February 2006; Committee on Economic, Social and Cultural Rights 'General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Art 15(1)(c) of the Covenant)' E/C.12/GC/17 para 55 35th session 12 January 2006.

[107] Ratner (n 61 above) 488.

[108] United Nations 'The foundation of international human rights law' <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (accessed 2 November 2018).

[109] n 108 above; Okoloise (n 10 above) 198-199.

society' as a category to which human rights responsibilities apply, the UN rests any doubt whether the duty to respect human rights is applicable to juridical entities.

Flowing from this analysis, the right-duty connection credibly provides a clear legal basis for embossing the responsibility of TNCs to respect human rights in international law. Doing so in the form of a treaty, as is being contemplated, will neither be new, nor erode the primary responsibility of the state for human rights under international law nor undermine the legitimate interests of business. The principal duty of the state to secure human rights does not preclude the extension to others of the consequential responsibility to respect rights.[110] This is because the peculiar role of the state to protect particular rights (such as the right to life) does not preclude the duty of corporations to respect the rights of others (such as the rights to life, health and environmental safety of employees and communities situated nearby industrial operations). This does not simply ignore the differences in the nature and functions between states and corporations. While there can be no transference of the responsibility of states to corporations, it must be explicitly acknowledged that the very rights that create duties for states may impose correlative responsibilities for corporations. The rights to freedom of expression and privacy, for example, create differential responsibilities for both corporations and states. This is consistent with extant legal principles on state responsibility and the horizontal relationship between corporations and individuals in international human rights law.

In relation to TWAIL, the right-duty connection provides a useful legal as well as conceptual anchor for levelling the governance deficits between weak states overburdened by international legal obligations and corporations empowered by the international economic order without collateral responsibility. Although scholarship and analytical depth on how that connection can impact the horizontal relationship between business engaged in the extractive industries and human rights is yet lacking,[111] the fact that there is plentiful normative basis of this connection in domestic and international principles and norms offers a strong foundation for its articulation in this research and elsewhere.

[110] Ratner (n 61 above) 493
[111] Ratner (n 61 above) 491.

3.3.2 Power-responsibility theory

In the corporate accountability discourse, a major dilemma for business and ethics scholars is how to, more properly, define and manage the relationship between TNCs and the broader society where they operate. Should TNCs be considered co-subjects of the state alongside individuals (and communities) and therefore *equally* under the suzerainty of the state? If so, what impact does such a categorisation have on liability for their adverse human rights impacts on third parties? By themselves, these questions do not just challenge the linear conceptions of human rights responsibility between individuals (as well as communities) and the state. They instead probe the horizontal relationship and consequential interactions between individuals and corporations by assessing the engagements and impacts of that relationship in order to peg culpability on a proportionate scale by inquiring whether the disproportionate power and influence between TNCs and individuals (as well as communities) should elicit commensurate responsibilities.

As an individual, the corporation is regarded as a juridical or artificial 'person' in law entitled to protection on the same terms as the natural person.[112] Only that, unlike the natural person, the corporation has a personality separate from that of its shareholders. According to the separate personality doctrine in both civil and common law jurisdictions, shareholders in a corporation are not personally responsible for the obligations and liabilities of the corporation beyond their share of capital contribution.[113] This means that unless in cases of wrongdoing, fraud or malpractices against third parties - conditions necessary for piercing the corporate veil - liability for any loss, debt, injury, tax evasion, terrorism or adverse human rights impacts that arise in the normal course of running the corporations will not shift to its individual shareholders, directors or managers.[114] This is significant in the context of corporate accountability because it is the corporate person itself that is the first wall of culpability. The fact that potential liability does not fall on members

[112] S Bottomley 'Taking corporations seriously: Some considerations for corporate regulation' (1990) 19 *Federal Law Review* 203 214.

[113] DK Millon 'Piercing the corporate veil, financial responsibility, and the limits of limited liability' (2007) 56 *Emory Law Journal* 1305 1307; RB Thompson 'Piercing the corporate veil: An empirical study' (1990) 76 *Cornell Law Review* 1036 1039; FA Gevurtz 'Piercing piercing: An attempt to lift the veil of confusion surrounding the doctrine of piercing the corporate Veil' (1997) 76 *Oregon Law Review* 853 856-857.

[114] TK Cheng 'The corporate veil doctrine revisited: a comparative study of the English and the US corporate veil doctrines' (2011) 34 *Boston College International & Comparative Law Review* 329 343-374; JM Dobson '"Lifting the Veil" in four countries: The law of Argentina, England, France and the United States' (1986) 35 *International & Comparative Law Quarterly* 839-863.

of the corporation, Thompson argues, 'shifts some costs of doing business away from the corporation to other parts of society.'[115] More often than not, it falls on the victim.

The problem with viewing businesses as only co-subjects is the corporation's tendency to view its harmful human rights impacts on individuals and communities as mere 'risks' that need to be managed. Businesses often talk in the language of environmental and social risks rather than human rights violations. This shifts the focus away from people to profits.[116] Corporations and business scholars regard victims – actual or potential - as external 'stakeholders' with whom business relations should be managed. For this reason, a *stakeholder theory* was conceptualised in the 1990s as an integrative perspective for actualising both stakeholder and managerial ends.[117] It was offered to describe how business organisations function and help forecast their behaviour for the benefit of its shareholders.[118] Consequently, the often touted descriptive precision, instrumental potency, and normative validity of the stakeholder approach with regard to risks was inherently detached from how to manage the adverse impacts of the corporation's activities on third parties.[119]

To the victim, the society and the human rights lawyer, risks associated with the extractive industries that are improperly managed do not merely occasion adverse impacts. They result in actual violations - violations of human dignity, fundamental rights and core social interests - and sometimes deaths. For these, there is a demand not only for accountability and justice for infringements, but assurances that systems and measures would be in place to enable recourse to justice. To such fundamental demands, the business case for free market principles to dictate industry rules must fall down flat if such rules do not prioritise norms that seek to preserve the dignity of the human being or limit the impunity of corporations to violate rights, destroy subsistence property and undermine the spiritual and cultural sentiments of communities. There is no longer any doubt that the corporation has power to influence economic and political action to mitigate social justice responses. However, its ability to inflict immeasurable harm whenever it is profitable to do so

[115] Thompson (n 113 above) 1039-1040.
[116] T Donaldson & LE Preston 'The stakeholder theory of the corporation: Concepts, evidence, and implications' (1995) 20 *Academy of management Review* 65 75.
[117] RE Freeman 'The politics of stakeholder theory: Some future directions' (1994) 4 *Business ethics quarterly* 409 410.
[118] Donaldson & Preston (n 116 above) 69.
[119] T Jensen & J Sandström 'Stakeholder theory and globalisation: The challenges of power and responsibility' (2011) 32 *Organization studies* 473 483-484.

mirrors that of the state and points to a rising disproportionate relationship between it and individuals that can no longer be ignored. This calls for a balance between the state duty to protect and the corporate obligation to respect human rights, that cannot be left in the turf of the state alone.

Ordinarily, attributing responsibility to a state for the harmful conduct of corporations can be traceable to the historical position of disproportionate power between the state and its citizen. A revisionist look at the Hobbesian and pre-globalisation eras suggests that the duty to protect was an effort that evolved to curtail the arbitrary use of state power. Then, the nation state possessed a monopoly of power over individuals within its territory and life for the ordinary citizen was 'solitary, poor, nasty, brutish and short'.[120] To put that power in check, international human rights law has over time evolved with the aim of preserving the dignity and worth of human beings by limiting its arbitrary use against individuals. In this era of globalisation and universal democratisation, that reality has drastically changed. Not only has the sovereign power of states greatly diminished, it has also seen TNCs step in as new centres of power, authority and influence.

Gone are the days when it was the exclusive preserve of government to provide the structures and services necessary for individuals to fulfil their basic needs. The advancement of corporations in the domain of providing public goods and services results in the suppression of public regulation in some of the most essential areas of societal life and public wellbeing. Wettstein argues that TNCs' incursion into more and more public sectors edges out governments of their fundamental role, diminishes their sphere of authority and influence, strengthens corporations' bargaining power and weakens the obviating force of government.[121] With individuals increasingly depending almost entirely on corporate-rendered public goods and services such as jobs, healthcare, food, financial services, transportation, education and leisure, the interaction between corporate actors and individuals is increasingly one evidencing an uneven relationship necessitating an additional stream of protection beyond the state.

The power-responsibility theory hypothesizes that the expanding lopsided relationship between corporations and individuals evokes a rational basis for

[120] T Hobbes *Leviathan; Or the matter, form, and power of a commonwealth, ecclesiastical and civil* 21 3rd edition (1886) 64. This book was originally published in 1651.

[121] F Wettstein *Multinational corporations and global justice: Human rights obligations of a quasi-governmental institution* (2009) 238-239.

establishing a stream of accountability additional to that of the state. Since human rights is fundamentally focused on safeguarding human dignity rather than merely protection against the state, the increasing exercise of corporate power in civil spaces must be balanced against the fundamental concerns of individuals and groups in society. Weeramantry argues that the economic power which corporations now wield over developing state negates a fundamental axiom of democracy that with power comes responsibility and that 'power without responsibility is anathema to the democratic ideal.'[122] To block or mitigate the arbitrary use of power in an open and democratic society, checks and balances must exist. Accordingly, the cascading relationship of dominance between corporations and individuals reasonably demands that the human rights corpus should adapt to the evolving threats that corporations pose or the actual violations they commit.

In the context of the extractive industries, corporations - in many ways - share similar power characteristics with governments that blur the lines of responsibility. The corporate entity's involvement in harnessing a state's natural resources and contributing to the social value chain places it in a major position to significantly influence the development trajectory of the host state and affect the lives of ordinary individuals. With access to advanced technology, technical expertise, and financial resources, corporations have become so closely linked with governments in their actions (through development partnerships and joint ventures) and violations such that it is almost impossible to hold a state liable for violations of international law without finding complicity on the part of the corporation. Corporations act, in some sense, as *de facto* or *de jure* agents of (or under) the control of states. By aiding and abetting government violations or by beneficial inaction or silence in the face of government violations, they may be complicit in conduct constituting a breach of international law. They may also be liable for acts or omission carried out by their agents, employees, privies or subsidiaries under the doctrine of superior command or vicarious liability.[123] These may blur the line of responsibility for the actual harm, but do not absorb the corporate entity of blame.[124]

[122] CG Weeramantry *Universalising human rights* (2004) 161-162; CG Weeramantry 'Human rights and the global marketplace' (1999) 25 *Brooklyn Journal of International Law* 27 41.
[123] A Clapham & S Jerbi 'Categories of corporate complicity in human rights abuses' (2001) 24 *Hastings International & Comparative Law Review* 346; Ratner (n 61 above) 504-505.
[124] Ramasastry (n 78 above) 142.

In sum, the right-duty correlation theory and the power-responsibility theory, as enunciated above, provide a sound basis for articulating international corporate regulation in Africa. Although they are by no means touted here as an all-or-nothing affair or as the sole basis for engaging on the discourse of corporate responsibility for human rights in Africa, they offer interesting perspectives for appraising the legal significance of abusive corporate conduct in Africa.

Having established the context of corporate violations in the extractive industries and the legal basis for corporate human rights responsibility, the reader might be curious about how all this ties up with accountability. In the next section, I will show that accountability is the ultimate pursuit of victims and communities in the quest for justice.

3.4 Conceptualising 'corporate accountability' based on the African approach

Violations of human rights by companies engaged in the extractive industries are often clearly met with crashing demands of accountability. However, not often are its legal essence and consequence appreciated. For business and ethics scholars, on the one hand, and human rights activists and civil society organisations (CSOs), on the other, accountability can be the many shades of grey lurking in-between black-and-white. For instance, who should be accountable for violations committed in the context of the extractive industries - the state or corporation or both? What does accountability even mean for these categories of actors? How should it be applied? In truth, the lines are often blurred. This section, therefore, attempts to conceptualise *accountability* in the context of corporate violations in the extractive industries sector rather than undertake a broad-based analysis with respect to all actors.

3.4.1 Defining 'corporate accountability'

'Accountability' is a nebulous concept whose meaning remains elusive, whose contours are unclear, and whose applicable mechanism is obfuscating.[125] Yet its attractiveness lies in its breadth. In the world of business, the term has been ascribed with many different connotations, including sustainability reporting, environmental,

[125] A Schedler 'Conceptualising accountability' in A Schedler, LJ Diamond & MF Plattner (eds) *The self-restraining state: Power and accountability in new democracies* (1999) 13-14. Also see N Bernaz *Business and human rights: History, law and policy – bridging the accountability gap* (2017) 8; R Mulgan '"Accountability": An ever-expanding concept?' (2000) 78 *Public administration* 555-573.

financial and social responsibility reporting, and corporate disclosures and transparency. In other material respects, it has been associated with ensuring stakeholder participation in the corporation's decision-making processes, undertaking community consultations, or voluntarily paying compensation to victims of corporate breach.[126] Although these corporate activities brush through an important aspect of accountability, they fall in the web of simplistically reducing the demands of social justice to an expectation of transparency by society. Such conceptions of accountability only favours business, lack the enforcement element of the concept and have no real impact for victims of human rights violations in the extractive industries.[127]

Accountability is a wholistic concept that rests on the twin-pillars of *answerability* and *enforcement*.[128] For any form of power to be accountable, it must not only be obliged to be exercised in transparent ways, it must be capable of being forced to justify its actions and be subject to sanctions in the event that it fails to comply.[129] Firstly, in the sense of answerability, accountability implies the obligation of one actor to respond to hard questions asked by another based on a set of rules, be adjudged on its actions in relation to such rules and be cleared or sanctioned. In this way, Grant and Keohane define answerability as a regime that allows one category of actors to hold another to a set of standards, determine whether such standards and the obligations they prescribe have been complied with, and demand reward or sanctions for breach.[130] Secondly, enforcement is underpinned by the prescription of a set of obligations defining standards of conduct and on the basis of which one category of actors may demand explanation from another, challenge the latter's responses or seek reward or sanctions.

It follows, therefore, that in an accountable relationship, there are four major elements: a set of standards, a right-holder who can question, a duty-bearer who must respond, and a mechanism of interpretation and enforcement. In the context of the extractive industries in Africa, the recognition that corporations have human

[126] WS Laufer 'Social accountability and corporate greenwashing' (2003) 43 *Journal of Business Ethics* 253-261.

[127] G Michelon, S Pilonato & F Ricceri 'CSR reporting practices and the quality of disclosure: An empirical analysis' (2015) 33 *Critical Perspectives on Accounting* 59-78; SM Coopera & DL Owen 'Corporate social reporting and stakeholder accountability: The missing link' (2007) 32 *Accounting, Organisations & Society* 649-667.

[128] Schedler (n 125 above) 14.

[129] As above.

[130] RW Grant & RO Keohane 'Accountability and abuses of power in world politics' (2005) 99 *American Political Science Review* 29.

rights obligations implies that they are answerable not only to their stockholders but also to affected segments of society and can be held accountable before domestic (and, in the future, the African regional court). In this thesis, corporate accountability may be defined as the ability of right-holders to hold corporations to the obligations and standards imposed by human rights instruments to determine whether they have acted in accordance with such obligations and, in the event of a violation, seek reward or sanctions. This means that accountability goes beyond the loose conceptualisations of the term by business and ethics scholars.[131]

Corporate accountability may be substantive or procedural. The recognition that corporations have legal obligations under African human rights instruments is an affirmation of the substantive accountability of corporations for their human rights impacts in the extractive industries. Procedurally, they are still not accountable before the regional human rights system. However, in states where the African Charter have been domesticated, corporations have been held accountable for human and peoples' rights violations under the Charter. Equally interesting is that in many other African countries, which though have not expressly domesticated the African Charter but have progressive human rights provisions in their constitutions, corporations are procedurally accountable for human rights violations before local courts as shown in section 3.2.4 above.

In light of this, what implication does the accountability of corporations have for the state duty to protect human rights?

3.4.2 Corporate accountability versus the state duty to protect

A state's responsibility to safeguard individuals or groups from the harmful conduct of private actors is often attributed to its treaty duty to protect human rights.[132] This is so even where there is no agency or relationship of control between it and such actors. Control or agency (or the lack thereof) - often overlooked - is an important factor to consider in pegging blame or ensuring accountability and justice for the actual injury.[133] However, neither defrays the state's ultimate responsibility for the

[131] A Kolk 'Sustainability, accountability and corporate governance: Exploring multinationals' reporting practices' (2008) 17 *Business Strategy and the Environment* 1-15.

[132] *Socio-Economic Rights Action Centre (SERAC) & Anor v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case) para 57; *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2001) AHRLR 66 (ACHPR 1995) para 18; *Velasquez Rodriguez v Honduras* (Rodriguez case) Judgment of 29 July 1998 Inter-Am Ct HR (Ser C) No 4 (1988) paras 172, 176-177.

[133] *Cf* ILC Draft RSIWA arts 5-9.

human rights violations of persons present in its territory. That responsibility arises from the point of ratifying a human rights treaty.

By voluntarily undertaking to guarantee rights and freedoms, and to adopt legislative and other measures to domestically implement their human rights obligations, states accept an ordinarily awkward but fundamental duty to safeguard human rights at all cost. However, more awkward is the ascription of responsibility to the state for conduct over which it did not direct, had no control or was realistically incapable of preventing. This raises important questions: Does the duty to protect exclude the liability of corporations themselves for violating the rights of individuals and local communities proximate to extractive operations? Are there any clearly delineated limits to the duty to protect human rights and does the duty anticipate the accountability of actors other than the state?

There are no quick answers to these queries. A rather provocative claim to make is that the duty to protect is a speculative one.[134] It does not actually attribute liability to a state for the wrongful conduct of third parties per se but the consequence of such conduct, if no reasonable measures were taken to prevent its occurrence.[135] Ideally, the obligation requires a state to not only adopt legislative, regulatory, administrative and judicial measures to protect the rights and freedoms of individuals, it also requires it to take action to prevent violations from occurring. However, human rights treaties do not set clearly defined criteria for measuring the sufficiency and good faith regarding measures adopted to determine whether a state has done everything reasonably possible on its part to protect human rights or prevent their violation. Little wonder De Schutter cautions that when states are accused of failing to prevent abuses to individuals, it is speculative to assume that the state's intervention would have been effective in the first place in ensuring that the violations will not occur.[136]

Considering that the ability of states to act is relative to their power and capacities, a measure taken by a state to protect human rights must be assessed commensurately to its capacity, institutions and resources. For instance, the

[134] A De Jonge *Transnational corporations and international law: Accountability in the global business environment* (2011) 167.

[135] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 210 ('The fact that all the allegations could not be investigated does not make the state liable for the human rights violations alleged to have been committed by non-state actors. It suffices for the state to demonstrate that the measures taken were proportionate to deal with the situation').

[136] O De Schutter *International human rights law: Cases, materials, commentary* (2010) 415.

capacity of the Republic of the Gambia, a less than US$1 billion economy with weak state institutions and enforcement agencies, to respond to violations of a US TNCs operating in the Gambia cannot be equated to the USA that has strong institutions, effective law enforcement agencies and is an economic powerhouse of over US$19 trillion. Even so, the US does not bear responsibility for the human rights abuses of its corporations. It only has a responsibility to protect the rights of its inhabitants and to account for failing to do so. Hence, the duty to protect does not superimpose 'unlimited' liability on the state so that the latter automatically bears responsibility for the negligent conduct of the former. Rather, a state is more likely to be held accountable for the outcome of its failure to prevent environmental and social harm by private actors than for the actual conduct that occasioned the violation (see Figure 3-2 below for further insight).

Hypothetical case

Assume that a certain Mr A lives with his family at their permanent place of abode in a remote location in Tembisa, South Africa - a sparsely populated community sitting on a rich commercial deposit of high-grade gold ore. Mr A's property, first built some 200 years ago when his ancestors settled there, boasts fertile land, proximity to water and thick vegetation.

Company X, which has recently been granted exploration and mining licences and allied permits, arrives Tembisa and sets up a gold mine less than 1 kilometre from Mr A's abode. Company X has fulfilled all environmental and social impact assessment requirements to the government. However, due to frequent explosions at the mine, Mr A's house is witnessing massive cracks on the wall with a few failed portions. Much of the land in Mr A's backyard proximate to the river has been lost to landslides arising from the tumultuous vibrations from Company X's operations. The erosion from the landslides have eaten deeply into Mr A's property. Also, effluents from Company X's acid mine drainage dam have unexpectedly leaked into the river in Mr A's backyard and subsistence farm, polluting their source of drinking water and destroying virtually all sources of food and fish and a substantial portion of the forest.

Aggrieved, Mr A files a claim against the Government and Company X, not for tort but, violation of his rights to life, dignity, food, health, private and family life, and the environment. What are the responsibilities of South Africa and Company X? Is South Africa solely responsible for the harmful operations of Company X or does

Company X have an obligation to manage the potential adverse impacts of its operations?

Case analysis

- ***State***

South Africa has the primary obligation to ensure through laws and regulatory enforcement that Company X's mining operations do not cause harms to others (SERAC case; IHRDA case; Velásquez-Rodríguez v Honduras). It is obliged to protect Mr A based on its international human rights commitments under ratified treaties and 'soft' law (African Charter articles 21 & 24). This includes ensuring that environmental and social impact assessment requirements are not merely an effort to fulfil all righteousness but are done to identify, prevent or mitigate and remedy risks (UNGPs paragraphs 1-8).

In this case, although compliance with environmental and social impact assessments have been undertaken and dispensed with, the escalating impacts of Company X's operations on Mr A's life, dignity, health, environment, and private and family life render ineffective the oversight measures earlier taken by the state with respect to Company X operations. South Africa is accountable for failing to sufficiently supervise Company X's operations in a way that prevents or minimises harm to Mr A.

- ***Company X***

The liability of South Africa for the failure to take preventive or protective action against the deleterious conduct of Company X does not absorb Company X of its failure to exercise due diligence with respect to Tembisa residents. This is because had Company X undertaken a transparent, inclusive and thorough environmental, social and human rights impact assessment, it would have had ample opportunity to identify, prevent, mitigate or remediate the harms now suffered by Mr A and family (UNGPs paras 17-20). The responsibility to undertake human right due diligence (or human rights impact assessment) is correlative to the rights of Mr A and exists over and above the tick-box exercise of undertaking an environmental and social impact assessment. Based on international human rights and environmental law, Company X is responsible for the actual violations of the rights of Mr A, even though South Africa failed to properly regulate Company X.

Also, whilst Company X is not accountable before any international adjudicatory mechanism for its harmful operations, it is not redeemed of any obligations applicable to it under international or domestic law with respect to Mr A. Those obligations may be effectively pursued domestically by Mr A against Company X to the farthest extent possible.

Figure 3-2: Hypothetical case analysis.

3.5 Conclusion

In the end, it is clear that unless the business and human rights discourse is framed within the broader context of sound legal and theoretical justifications, and incorporates the pluri-versality of perspectives, its conceptualisation of corporate human rights accountability may continue to be problematic not just for developing countries but also for victims. As this chapter has shown, the African regional human rights system fundamentally recognises the horizontal relationship between corporations and individuals and the 'obligations' that exit between them. This suggests that unless the discourse is sufficiently localised to take into consideration the correlations between rights and duties, and power and responsibility, the exclusion of southern perspectives from the debate is bound to continue to perpetuate the oppressive foundation upon which the international legal order is built.

The African approach to accountability of corporations for human rights violations provides a critical basis for challenging the dominate narratives in the business and human rights discourse which are totally non-reflective of the historical, cultural, and legal realities of Africa. By laying down cogent rules of laws and theories of legal conceptions on the obligation of business to respect human rights, and by conceptually clarifying the technical import of 'corporate accountability', a strong justification is adduced for questioning the current theoretical framework upon which the UNGPs has been developed and articulated. This chapter therefore lays a veritable foundation not only for delineating the contours of corporate accountability in Africa, but – as I will now do in the following chapters - for interrogating the challenges to holding extractive corporations accountable in host and home states.

PART II

Limits of domestic regulation

4.1 Introduction

Corporate human rights obligations are only as good as the extent to which they are enforced. Unless adequately scrutinised and successfully invoked, there can be very little assurance that they will be respected. As such, government has the primary responsibility to regulate the conduct of corporations and protect the human rights of those likely to be adversely impacted by business activities.[1] In the extractive industries where there are considerably high environmental, human rights and social risks, the uncertainty of corporate behaviour makes an abusive course more probable, particularly where there is neither a profitable alternative to taking calculated risks nor an incentive to prioritise fundamental human concerns. As many extractive ventures show, poor risk-management practices can certainly lead to violations when businesses are inadequately monitored.[2]

To minimise the opportunities for abuses and maximise safeguards, business discretion must be controlled. Laws and regulations operate to guide proper conduct

1 CM Rogerson 'Mining enterprise, regulatory frameworks and local economic development in South Africa' (2011) 5 *African Journal of Business Management* 13373 13374.

2 D Fiaschi, E Giuliani, C Macchi, M Murano & O Perrone 'To abuse or not to abuse. This is the question. On whether social corporate responsibility influences human rights abuses of large multinational corporations (1990-2006)' (2011) 17-18 *LEM Working Paper Series, No. 2011/13, Scuola Superiore Sant'Anna, Laboratory of Economics and Management (LEM), Pisa* <https://www.econstor.eu/bitstream/10419/89538/1/663316243.pdf> (18 October 2019); DM Franks, R Davis, AJ Bebbington, SH Ali, D Kemp & M Scurrah 'Conflict translates environmental and social risk into business costs' (2014) 111 *Proceedings of the National Academy of Sciences* 7576 7580.

and put company tendencies in check.[3] Ideally, a state has the primary responsibility to ensure that corporations registered in its territory, irrespective of industrial operation, comply with domestic (and international) laws and standards.[4] With sovereign control over its territory, it is in a prime position to stipulate the ground rules that govern industry participation. In the context of foreign investments in the extractive industries, host governments have the primary responsibility to ensure that corporations operating in the extractive sector of the economy comply with domestic laws and standards in mineral-extraction processes.

The regulatory responsibility of a host government is underscored by two important factors. First is the expectation that all actors in its territory should, as a matter of course, operate under the rule of law. The state has a duty to ensure that corporate actors operating under its suzerainty are obliged to conform to local rules, are law-abiding and utilise good – if not best - practices in their operations. This is especially relevant with respect to public health, the environment, workers' welfare, and the safety of individuals and communities proximate to extractive activities. Second is that, as party to international treaties on corruption, the environment, human rights and labour, the state is obliged to adopt concrete measures domestically to safeguard its populace from the adverse impacts of extractive processes. Once a host state has ratified a treaty, it is ordinarily obliged to take appropriate domestic steps to protect the human rights and social wellbeing of its citizenry.

In effect, the wheels of state institutions are fundamentally important to the efficient running of the international legal regime.[5] Without states, international law and order would be unachievable. The legal, political and economic structures of today's international society is built on the historic and on-going power interactions between and among states.[6] Over the last century, however, those structures have

[3] T Murombo 'Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation' (2013) 9 *Law, Environment & Development Journal* 31 49; M Mazalto 'Governance, human rights and mining in the Democratic Republic of Congo' in B Campbell (ed) *Mining in Africa: Regulation and development* (2009) 187 197.

[4] P Muchlinski 'Social and human rights implications of TNC activities in the extractive industries' (2009) 18 *Transnational Corporations* 125 132; African Union 'African Mining Vision' (2009) 6-7 <https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_english.pdf> (accessed 5 October 2019).

[5] C Lafont 'Accountability and global governance: Challenging the state-centric conception of human rights' (2010) 3 *Ethics & Global Politics* 193 198; BS Brown 'The protection of human rights in disintegrating states: A new challenge' (1992) 68 *Chicago-Kent Law Review* 203 204.

[6] P Cullet 'Differential treatment in international law: Towards a new paradigm of inter-state relations' (1999) 10 *European Journal of International Law* 549 556.

been disrupted by non-state actors on an incremental scale, in ways that have dramatically altered global perceptions of sovereignty and power. As the global community becomes more integrated and as state and non-state interactions more multinational and transnationalised, the basic assumptions of states as the only major centres of power have ceased to exist as we know it.[7]

Scholars of the international political economy somewhat agree that due to the rapid changes spurred by global capitalism, 'the state is trapped by a transnational society created not by sovereigns, but by nonstate actors.'[8] As these changes continue to disrupt the structures of global politics and economies, the dramatic shifts that have seen the emergence of new power brokers can no longer be ignored. Especially, in terms of how international law scholars perceive state obligations or responsibility for human rights violations committed by powerful non-state actors.

Amidst the unfolding shifts are many consequential issues that raise many unresolved questions. For instance, how should less developed or struggling developing states square up to transnational corporate actors which have become as powerful, if not more powerful than even developed states? How should states beleaguered by conflict, poverty and malnutrition, disease, debt, corruption and weak political and social governance engage or regulate way more powerful TNCs? How can such states balance the obligation to regulate TNCs and protect human rights against the legitimate existential desire for investment-led development? How can economically 'captured' states reform laws if reforms would elicit pushbacks from corporations with tremendous power, and whose actions can have serious consequences on the national economy? How should business and human rights scholars interact with these important queries about natural resource governance and the human rights accountability of corporations engaged in the extractive industries in Africa?

By evoking these thought-provoking questions, this chapter seeks to establish that, based on the on-going shifts in the global political economy and the challenges of development facing weak African states, *exclusive* dependence on the regulatory

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7 SD Krasner 'State power and the structure of international trade' in JA Frieden & DA Lake (eds) *International political economy: Perspectives on global power and wealth* (2000) 19. See earlier treatise - SD Krasner 'State power and the structure of international trade' (1976) 28 *World Politics* 317-347.

8 Krasner (n 7 above) 19.

institutions and capacity of host states alone to regulate TNCs and pursue human rights accountability domestically is problematic and therefore ineffective.[9] In justification of this position, two main arguments are advanced.[10] *First*, I argue that the power differential between TNCs and host states make host state regulation alone an incomprehensive governance proposition. *Second*, I argue that the weakness of host states in Africa renders total reliance on domestic systems of regulation and accountability inadequate for addressing corporate abuses in the extractive industries.

In evaluating the capacity of host states to effectively regulate extractive TNCs and ensure accountability (and access to justice) for victims of human rights violations, I adopt the following structure. First, I will contextualise the governance, structural and institutional weaknesses of host states in Africa relative to the economic power of extractive TNCs. Second, I will consider in some detail the dilemma of host states when confronted with the challenge of advancing human rights at the same time as they pursue economic development through foreign investments in the extractive sector. Third, I will then show how the prioritisation of foreign investments has led to the capture of the regulatory host state - the overriding factor militating against effective corporate regulation and human rights accountability. Last, I will show, using brief case studies, first, of the Nigerian state and Royal Dutch Shell's operations in the Niger Delta region and, then, of other countries, how the deficits of host state governance and regulations have impacted the effectiveness and adequacy of domestic systems of accountability and justice. Thereafter, I will conclude.

4.2 Weak host states and natural resource governance

Africa boasts a tremendous share of global natural resource wealth. It is home to the largest arable land, the second largest tropical rainforest, and the second longest and largest rivers (the Congo and Nile rivers).[11] The continent rests on 30% of global mineral reserves, 8% of the global oil stock and 7% of global natural gas. It is

[9] E Canel, U Idemudia & LL North 'Rethinking extractive industry: Regulation, dispossession, and emerging claims' (2010) 30 *Canadian Journal of Development Studies* 5 16-17.

[10] Brown (n 5 above) 203.

[11] African Natural Resources Centre 'Catalyzing growth and development through effective natural resources management' (2016) 3 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/anrc/AfDB_ANRC_BROCHURE_en.pdf> (accessed 14 June 2019).

surrounded by an aquaculture and fisheries sector valued at an estimated USD24 billion. The African Natural Resources Centre estimates that minerals account for about 28% of gross domestic product (GDP) and 70% of total African exports.[12] Going by these figures, natural resources have a potential to significantly contribute to the overall growth and development of African states.[13] The extractive industries have a potential to rake in an annual government revenue of USD30 billion over the next decade. As of 2011, Angola's oil and gas reserves were projected to last another 20 years, and Nigeria's reserves another 40 years. These are in addition to new finds of oil, gas and mineral reserves in Ghana, Liberia, Mozambique, Sierra Leone, Tanzania and Uganda, which are estimated to 'contribute between 9% and 31% of additional government revenues over the first 10 years'.[14]

Yet, for natural resources to drive economic prosperity in Africa, domestic governance must be strong, transparent, accountable and beneficial to the generality of the populace. Laws and institutions must be in place that regulate abusive corporate conduct, establish good international industry practices and foster sustainable natural resource governance. These are intended to ensure respect for human rights, the environment and the social wellbeing of communities. Effective natural resource governance also requires that regulators and supervisory institutions are open, transparent and accountable; that information on resource concession-holders and the terms of resource exploitation are freely available to the public; that individuals and communities for whose benefits extractive investments are supposedly undertaken are duly consulted and their free, prior and informed consent (FPIC) obtained before undertaking extractive projects; and that, should grievances arise, access to judicial and non-judicial remedies are guaranteed.

4.2.1 The duty of weak states to regulate

This above ideal condition of natural resource governance highlights the centrality of the state's role in industry and corporate regulation. It envisages strong local laws and the efficiency of domestic oversight bodies, enforcement mechanisms, and judicial institutions. As established in the preceding chapters, this re-echoes the

[12] As above

[13] As above. *Cf* X Sala-i-Martin & A Subramanian 'Addressing the natural resource curse: An illustration from Nigeria' (2013) 22 *Journal of African Economies* 570-615; A Mähler 'Nigeria: A prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta' (2010) 8-10 <http://repec.giga-hamburg.de/pdf/giga_10_wp120_maehler.pdf> (accessed 14 June 2019); M Watts 'Resource curse? Governmentality, oil and power in the Niger Delta, Nigeria' (2004) 9 *Geopolitics* 50-80.

[14] African Natural Resources Centre (n 11 above) 3.

obligation of a state to guarantee the rights of all individuals 'within its territory and subject to its jurisdiction'.[15] This obligation to *protect* individuals 'against acts committed by private persons or entities that would impair the enjoyment of Covenant rights', in essence, demands direct state regulation and intervention.[16] It includes the responsibility to provide '[e]ffective access to judicial and administrative proceedings, including redress and remedy'.[17]

Under international law, a host state is attributable with international responsibility if its failure to regulate companies engaged in natural resource exploitation in its territory results in human rights abuses.[18] This responsibility is based on the notion that the state has sovereign independence and territorial jurisdiction over companies operating in its territory. The UN Charter on the Economic Rights and Duties of States 1974 and several UN General Assembly resolutions affirm the economic independence and permanent sovereignty of states over their natural resources.[19] Based on the *presumption* of economic sovereignty and independence, states are considered to have control over all activities taking

15 ICCPR art 2(1). Also see ICESCR art 2(2).

16 UN Human Rights Committee 'General Comment No 31: The nature of the general legal obligation imposed on states parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 8; UN Committee on Economic, Social and Cultural Rights 'General comment No. 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' UN Doc E/C.12/GC/24 (10 August 2017) paras 14-22; UNGPs principles 1-10.

17 The Rio Declaration on Environment and Development 1992 Principle 10; ICCPR art 2(3); UN Committee on Economic, Social and Cultural Rights 'General comment No. 24' para 19.

18 International Law Commission 'Responsibility of States for International Wrongful Acts' (2001) 2 *Yearbook of the International Law Commission* arts 1-6.

19 UN General Assembly resolution 3281(XXIX) 'Charter of Economic Rights and Duties of States' A/RES/3281(XXIX) (12 December 1974) <https://undocs.org/en/A/RES/3281(XXIX)> (accessed 16 April 2019); UN General Assembly resolution 3201 (S-VI) 'Declaration on the establishment of a New International Economic Order' A/RES/3201(S-VI) (1 May 1974) <https://undocs.org/en/A/RES/3201(S-VI)> (accessed 16 April 2019); UN General Assembly resolution 3202(S-VI) 'Programme of Action on the establishment of a New International Economic Order' A/RES/3202(S-VI) (1 May 1974) <https://undocs.org/en/A/RES/3202(S-VI)> (accessed 16 April 2019); UN General Assembly resolution 1803(XVII) 'Permanent sovereignty over natural resources' A/RES/1803(XVII) (14 December 1962) <https://undocs.org/en/A/RES/1803(XVII)> (accessed 16 April 2019); UNGA Resolution 1515(XV) 'Concerted action for economic development of economically less developed countries' A/RES/1515(XV) (15 December 1960) para 5 (on 'the sovereign right of every state to dispose of its wealth and its natural resources'); Also see UN General Assembly resolution 3299(XXIX) 'Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the granting of Independence to colonial countries and Peoples in Southern Rhodesia, Namibia and Territories under Portuguese domination and in all other Territories under colonial domination and efforts to eliminate colonialism, *apartheid* and racial discrimination in southern Africa' A/RES/3299(XXIX) (13 December 1974) <https://undocs.org/en/A/RES/3299(XXIX)> (accessed 16 April 2019); UN General Assembly resolution 3336(XXIX) 'Permanent sovereignty over natural resources in the occupied Arab territories' A/RES/3336/XXIX (17 December 1974) <https://undocs.org/en/A/RES/3336(XXIX)> (accessed 16 April 2019); UN General Assembly Resolution 1514(XV) 'Declaration on the granting of Independence to colonial countries and peoples' A/RES/1514(XV) (14 December 1960) <https://undocs.org/en/A/RES/1514(XV)> (accessed 16 April 2019).

place in their territories. As a genre of the international legal regime, international human rights law is predicated on the same presumption that states are able and, by ratifying human rights treaties, willing to protect human rights. For this reason, state parties to treaties are constantly obliged to adopt domestic measures to give effect to their international human rights obligations.

This means that, under the international human rights regime, states are obliged to firmly regulate business enterprises, enforce laws that require extractive corporations to respect human rights and define their expectation of business with respect to human rights – irrespective of their structural or institutional capacities. The United Nations Guiding Principles on Business and Human Rights 2011 (UNGPs) specifically emphasises the mandatory role of states to 'protect against human right abuse within their territory and/or jurisdiction' by corporations.[20] States are also required under the UNGPs to take appropriate measures aimed at preventing, investigating, punishing and remedying human rights abuses through effective legislation, regulations, policies and adjudication. However, notice that these responsibilities are articulated in a way that hardly gives any consideration to the power differential among states and between states and TNCs, the weak influence of underdeveloped states over international treaties and the incapacities of weak states to fulfil their obligations under such treaties.

Yet, the developmental, governance and institutional deficits in the developing world make that assumption a faulty one. In weak governance zones, the responsibility to regulate extractive TNCs and protect human rights is readily unmatched by the requisite institutional capacity or inclination of states to do so. In 'areas of limited statehood', Börzel argues, state capacities for effectively setting and enforcing collectively binding rules are extremely inadequate.[21] In Africa, especially, systemic developmental challenges and institutional pathologies in governance make the travails of states complex and perplexing.[22] Fundamental governance failures go way beyond what are generally perceived as entrenched

[20] UNGPs Principle 1.

[21] TA Börzel, J Hönke & CR Thauer 'Does it really take the state? Limited statehood, multinational corporations, and corporate responsibility in South Africa' (2012) 14 *Business and Politics* 1 6; A Prakash & JJ Griffin 'Corporate responsibility, multinational corporations, and nation states: An introduction' (2012) 14 *Business and Politics* 1 5.

[22] P Tikuisis & D Carment 'Categorization of states beyond strong and weak' (2017) 6 *International Journal of Security and Development* 1-2; D Haglund 'Regulating FDI in weak African states: A case study of Chinese copper mining in Zambia' (2008) 46 *The Journal of Modern African Studies* 547-575.

corruption and lack of effective institutional checks. States are constantly challenged in their development and ability to exert regulatory authority over the governed and over matters within their sovereign purview in a fundamental way.[23] They lack strong laws and institutions to rein in powerful TNCs or to guarantee effective remedies to victims. This, I argue, cannot be ignored in relation to the host state's duty to regulate and ensure adequate protection of human rights in its territory.

A state is characterised as weak where it is unable to effectively and autonomously exercise dominion over its people and territory within the global community. Kassab defines weak states as 'vulnerable states that have difficulty consolidating sovereignty' in a manner that 'directly affects their autonomy and ability to act in the international system.'[24] When a state is too weak to exert regulatory authority over business due to failing institutions or an unwillingness to do so, it can be hollow for international human rights law to totally depend on its systems of regulation, enforcement, accountability and justice against abusive powerful corporations.

Weak states are vulnerable to internal and external pressures because they are susceptible to political, economic, social and environmental shocks over which they have little or no control.[25] Domestically, they are fragile because the contest among the political elite for the control of state resources entrenches less democratic accountability and weakens institutions, which in turn leads to weak natural resource governance. They are also vulnerable externally because with minimal or no power they are unable to influence international settlements and negotiate treaties or their scope of responsibilities under such treaties.

The inability of African states to use their natural resources as a catalyst for development is often attributed to the resource curse.[26] As the economic

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[23] SE Rice & S Patrick 'Index of state weakness in the developing world' (2008) 13-14 <https://www.brookings.edu/wp-content/uploads/2016/06/02_weak_states_index.pdf> (accessed 8 June 2019).

[24] HS Kassab *Weak states in international relations theory: The cases of Armenia, St Kitts and Nevis, Lebanon, and Cambodia* (2015) 88.

[25] C Easter 'Small states development: A Commonwealth Vulnerability Index' (1999) 351 *Round Table* 403.

[26] R King 'An institutional analysis of the resource curse in Africa: Lessons for Ghana' (2009) 2 *Consilience* 1-22; M Humphreys, JD Sachs & JE Stiglitz 'Introduction: What is the problem with natural resource wealth?' in M Humphreys, JD Sachs & JE Stiglitz (eds) *Escaping the resource curse* (2007) 1 2; H Mehlum, K Moene & R Torvik 'Institutions and the resource curse' (2006) 116 *The*

performance of many resource-rich African countries show, resource wealth does not always equal economic success. Quite the opposite, a distinct attribute of extractives-dependent economies is that 'over half of the economies it has driven are not catching up' with its developmental promises.[27] Those that were projected to make significant developmental leaps upon finding huge mineral deposits have often fallen for the resource trap. Hendrix and Noland attribute this phenomenon to the heightened competition for state control due either to the presence of "contestable" resources or ensuring 'the continuation of less than best practice with respect to governance'.[28] Such countries fail to utilise their resource endowment opportunities to drive broad-based growth, economic diversification and development because of their 'lack of or inappropriate institutions' to make the critical linkages between natural resources and development.[29]

Countries like Angola, Equatorial Guinea, Nigeria, Sudan and Zambia show that over-dependence on resource rents can lead to rent-seeking behaviour, corruption, weak tax regimes and neglect of other viable and important sectors of the economy.[30] For these countries, resource discovery and high resource rent have, in many cases, been linked to institutional weakening.[31] The lack of fiscal discipline led to sudden increases in government spending, household consumption (due to wage increases) and, invariably, corruption. Rampant corruption blocks the entrenchment of accountability and the ultimate decline of states institutions. As Cameron and Stanley argue, weaknesses in governance mechanisms can limit the state's ability to be accountability to its citizens.[32] Without strong and accountable institutions, several countries have misused their resource wealth opportunities or descended into violent conflicts soon after resource discovery.

Economic Journal 1-20; E Duruigbo 'The World Bank, multinational oil corporations, and the resource curse in Africa' (2005) 26 *University of Pennsylvania Journal of International Economic Law* 1 5-20; N Shaxson 'New approaches to volatility: Dealing with the "resource curse" in sub-Saharan Africa' (2005) 81 *International Affairs* 311-324; ML Ross 'The political economy of the resource curse' (1999) 51 *World politics* 297 300; TL Karl *The paradox of plenty: Oil booms and Petro-states* (1997) 24.

27 PD Cameron & MC Stanley *Oil, Gas, and Mining: A sourcebook for understanding the extractive industries* (2017) 3

28 C Hendrix & M Noland *Confronting the resource curse: The economics and geo-politics of natural resource governance* (2014) 4. Also see M Côte & B Korf 'Making concessions: Extractive enclaves, entangled capitalism and regulative pluralism at the gold mining frontier in Burkina Faso' (2018) 101 *World Development* 466 475.

29 African Mining Vision (2009) 14.

30 Mehlum et al (n 26 above) 1.

31 V Belinga, MK Melou & JP Nganou 'Does oil revenue crowd out other tax revenues? Policy lessons for Uganda' (2017) *World Bank Policy Research Working Paper 8048* 1-2.

32 Cameron & Stanley (n 27 above) 7.

Host states that are beleaguered by weak natural resource governance institutions are often unable to effectively regulate companies or ensure widespread protection of vulnerable communities. The 2017 Resource Governance Index (RGI), for instance, affirms the visible disparity between the operations of companies in developed countries and those in underdeveloped ones. The RGI reports that while companies in states with strong resource governance operated with relatively less impact on host communities and the local environment, they were 'often lax in their effort' to protect host communities and the environment in weak governance settings.[33]

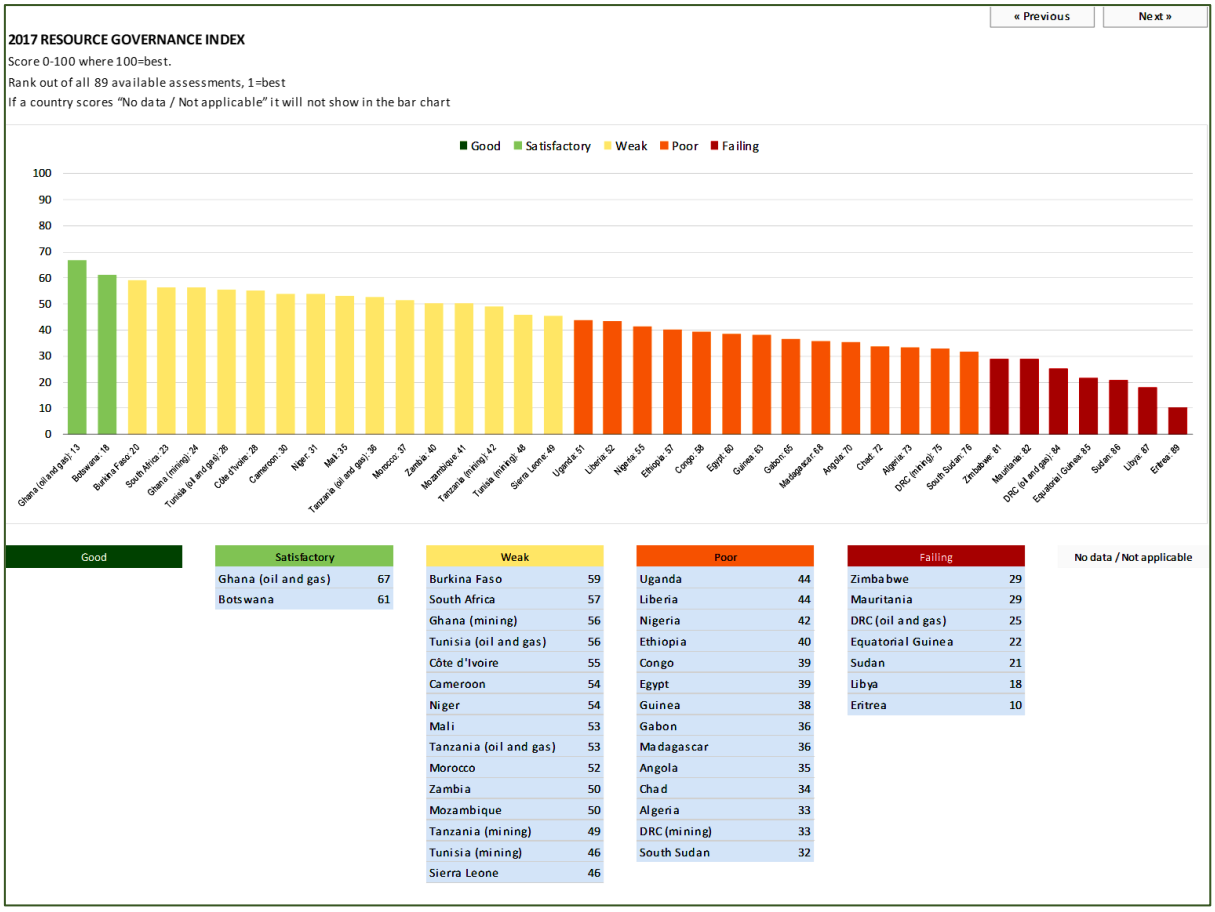

Figure 4-1: 2017 RGI assessment of 28 resource-dependent African countries.

Source: Natural Resource Governance Institute 2017 Resource Governance Index.

The RGI acknowledged that, although several countries have made recorded progress in terms of legal reforms, adopting new laws was insufficient to ensure effective governance. It finds that 'countries with the weakest resource governance are least likely to implement the rules they set', suggesting that other factors

[33] Natural Resource Governance Institute '2017 Resource Governance Index' (2018) 16 <https://resourcegovernance.org/sites/default/files/documents/2017-resource-governance-index.pdf> (accessed 10 June 2019).

precipitated the challenge of corporate regulation and human rights accountability.[34] The RGI shows that 26 of 28 resource-reliant African countries exhibited weak, poor or failing natural resource governance quality, except for Botswana.[35] By virtue of this assessment, no resource-reliant African country got a 'good' score. See Figure 4-1 above for the disaggregated chart containing the index assessment of the 28 African countries.

4.2.2 Underdevelopment and the lack of effective social control

Given the abysmal performance of resource-rich African states, I argue that the failure of African states to regulate corporations and ensure good resource governance cannot be dissociated from the wider challenges of development and social control. Here, I highlight four broad challenges that make the international legal order's exclusive dependence on the duty of host states to regulate TNCs and ensure effective human rights accountability a deliberate illusion.

First, the hazards of weak natural resource governance and the lack of effective accountability-enforcing domestic institutions are exacerbated by the challenges of underdevelopment. Underdevelopment hampers African states' ability to deal with the developmental issues they face and makes building autonomy from developed states or powerful corporations difficult.[36] The World Bank confirms that '[i]mportant near and longer term vulnerabilities remain in many of the [African] region's economies'.[37] Often in lack of the power, revenue, infrastructure and organised public service delivery system to address the pressures and threats with which they are confronted, many African states cannot but depend on external powers and organisations for support and aid, including investments from TNCs. Having a need to survive, the interests and foreign policies of such states tend to be predominantly influenced by the quest for economic development. This warrants that in the pursuit of development, there is an inclination by weak states to dampen strong industry rules in favour of natural resource investment and private commercial interests.

To understand how the challenge of underdevelopment impacts the (in)capacity of African countries to properly regulate TNCs in the extractive

[34] Natural Resource Governance Institute (n 33 above) 14.
[35] Natural Resource Governance Institute (n 33 above) 10. Also see Rice & Patrick (n 23 above) 13.
[36] Kassab (n 24 above) 67, 74.
[37] World Bank *Assessing Africa's Policies and Institutions: 2017 CPIA Results for Africa* (2018) 5.

industries, the varied assessment reports and developmental indices on Africa cannot simply be ignored to the vagaries of ideological or doctrinal arguments on host state regulation. For one, the 2018 Global Hunger Index (GHI) results for Sub-Saharan Africa informs that the rates of child mortality, child stunting, child wasting, and undernourishment in Africa is unacceptably high, and that 'the 2015–2017 undernourishment rate, at 22 percent, has increased marginally since 2009–2011 … and is the highest regional rate of all regions in the report.'[38]

More so, of the 119 countries that were ranked in the GHI, 35 of the 45 countries with serious levels of hunger and the five worst-performing countries suffering from an 'extremely alarming' level of poverty are from Africa.[39] Similarly, Sub-Saharan Africa retained its position at the bottom of the 2018 Human Development Index (HDI) with a 34.9 per cent HDI value between 1990 and 2017, collecting the worst-performing ten countries in the global ranking. These are resource-rich Niger (0.354), Central African (0.367), South Sudan (0.388), Chad (0.404), Burundi (0.417), Sierra Leone (0.419), Burkina Faso (0.423), Mali (0.427), Liberia (0.435), and Mozambique (0.437), respectively.[40]

Second, while the challenges of underdevelopment yet persist, African states have hardly been spared from the tumult arising from the fast pace of globalisation. The rapid expansion of the free market economy to the enclaves of national economies has allowed relatively weak states little room to measure up to its complexities. As they become deeply subsumed into the global economy, the vulnerability of African states and the weak condition of their capacities have become more visible to corporate exploitation. In an economic sense, countries with a low regulatory environment and weak enforcement systems are a catchpoint for reduced business expense. As such, foreign investors in the extractive industries looking to minimise operational costs and maximise profits particularly seek out such destinations for the exploitability of the elite and the vulnerability of state institutions.[41]

[38] Global Hunger Index '2018 Global Hunger Index results: Global, regional, and national trends' (2018) <https://www.globalhungerindex.org/results/> (accessed 18 May 2019).

[39] As above.

[40] United Nations Development Programme 'Human Development Indices and Indicators: 2018 Statistical Update' (2018) 2 <http://hdr.undp.org/sites/default/files/2018_summary_human_development_statistical_update_en.pdf> (accessed 18 May 2019).

[41] EO Ekhator 'Public regulation of the oil and gas industry in Nigeria: An evaluation' (2016) 21 *Annual Survey of International & Comparative Law* 43 48.

As agents of globalisation, the character and activities of TNCs present a special problem for weak states in three ways. One, TNCs operate across national frontiers, while maintaining a central global command and control office in places often beyond the reach of one state.[42] By fronting local subsidiaries in host states in Africa, TNCs are able to circumvent or limit liability for the economic, social and human rights violations they commit in a host state's territory. Two, TNCs exploit loopholes in the tax policies of weak states to avoid taxes that can support critical infrastructure and sustain the development trajectory of African states.[43] Illicit financial (out)flows cost Africa an estimated USD1.2 to USD1.4 trillion between 1980 and 2009, with TNCs in the extractive sector accounting for 65% of total outflows.[44] In 2018, that number was disaggregated to roughly USD50 billion of IFFs annually.[45] And three, TNCs can act as powerful gatekeepers, hoarding or blocking access to cutting-edge technology and know-how in the exploitation of the natural resources of developing countries through patents and exclusive production agreements with technology companies. And the ability to move across boundaries suggests that TNCs wield strong bargaining position against states that heavily depend on foreign direct investments (FDIs). For instance, if workers in a particular state demand higher wages or improved health and safety policies, the TNC can basically shift production to another state where labour standards are less demanding.[46] The threat posed by this fluid ability to relocate from one jurisdiction to another make states which cannot afford to lose the economic opportunities TNCs create locally susceptible to corporate influence.

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[42] D Fieldhouse '"A new imperial system"? The role of the multinational corporations reconsidered' in JA Frieden & DA Lake (eds) *International political economy: Perspectives on global power and wealth* (2000) 167 168.

[43] M De Haldevang & J Rohrlich 'A US multinational avoided South African taxes worth twice Johannesburg's social housing budget' 25 July 2019 <https://qz.com/africa/1674113/airplane-leasing-firm-aircastle-avoided-14-8-million-in-south-african-taxes/> (accessed 2 August 2019); Christian Aid, Oxfam & Action Aid 'Getting to good: Towards responsible corporate tax behaviour' (November 2015) 9 <https://www-cdn.oxfam.org/s3fs-public/file_attachments/dp-getting-to-good-corporate-tax-171115-en.pdf> (accessed 23 October 2016).

[44] Economic Commission for Africa 'Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa' (2015) 97 <https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf> (accessed 26 March 2019).

[45] OECD *Illicit Financial Flows: The Economy of Illicit Trade in West Africa* (2018) 13; C Guyot 'Illicit financial flows cost Africa $50 billion a year, states new report' 22 February 2018 <https://www.euractiv.com/section/africa/news/illicit-financial-flows-cost-africa-50-billion-a-year-states-new-report/> (accessed 24 July 2019).

[46] SM Tarzi 'Third world governments and multinational corporations: Dynamics of host's bargaining power' in JA Frieden & DA Lake (eds) *International political economy: Perspectives on global power and wealth* (2000) 159.

As host states are almost always unconscious to the theatrics and threats of corporate manipulation, they prove vulnerable to corporate power. Corporations are aware that domestic political and economic pressures on governments can fuel a general eagerness to pursue economic growth. Based on this vulnerability, many Africa states have been lured with FDIs as baits and entrapped in lop-sided bilateral investment treaties. They have been drawn into stiff competition among themselves for the most investor-friendly destination on the continent.[47] This has given rise to what can best be described as a 'race to the bottom' as African states jostle to temper strong regulatory standards and labour laws in the hopes of increased FDIs.[48]

The resulting effect is a compromise of human rights, local environmental and social conditions and the non-sustainable – or, in most cases, degrading – use of natural resources. As Özden states:

> Transnational corporations (TNCs) *continue* to reinforce their hold on the natural resources of the planet, dictating their agendas to the weakest countries and exploiting their peoples. Directly or indirectly, they bear an enormous responsibility for the deterioration of the environment and for the systematic increase of human rights violations. Able to be both everywhere and nowhere, they escape from practically all democratic and judicial control.[49]

This shows that with the challenges of development and globalisation escalating incommensurately to the conditions of African states, the characteristics of sovereign independence and territorial integrity seem, by themselves, to be insufficient in responding to the tumultuous offensive of global capitalism and the rising power of transnational corporate actors on the world stage.

Third, all African countries, save for Botswana, Mauritius and Seychelles, fall within the category of fragile or transitioning states. As of 2019, no less than 21 of the world's 30 most fragile countries were African.[50] Of the 55 African states ranked by the Fund for Peace, about 50 show significant stages of state distress, failure or fragility. For most of these countries, there is a general lack of capacity to effect adequate regulatory supervision. In particular, Africa's economic powerhouses –

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47 Z Elkins, AT Guzman & BA Simmons 'Competing for capital: The diffusion of bilateral investment treaties, 1960–2000' (2006) 60 *International organization* 811 812; Y Luo 'A coopetition perspective of MNC–host government relations' (2004) 10 *Journal of International Management* 431 435; A Guzman 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1998) 38 *Virginia Journal of International Law* 639 641.

48 Börzel et al (n 21 above) 2.

49 M Özden *Transnational corporations and human rights: What is at stake in the United Nations debate over the Norms on the responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights* (2005) 3 [emphasis mine].

50 Fund for Peace 'Fragile state index annual report 2019' (2019) 11 <https://fragilestatesindex.org/wp-content/uploads/2019/03/9511904-fragilestatesindex.pdf> (accessed 9 May 2019).

Nigeria and South Africa – have both fared quite poorly in the Fragile State Index (FSI). With increasing corruption, conflicts and criminality in its goldmining and oil producing areas, Nigeria retained its spot in the 'alert' category, ranking at the same level as Iraq and Burundi in the 2019 FSI. Similarly, South Africa has over the past decade become one of the fast-deteriorating countries that was not in a state of conflict. It has been on 'a ten-year worsening trend that was matched only by the likes of war-torn Libya and Syria for the magnitude of its negative rate-of-change.'[51] It is currently embroiled in several political inquiries involving high-level official corruption by big multinationals, public institutions and public office holders, and placed in the 'elevated warning' category.

The weak regulatory environment and poor accountability mechanisms in many African countries exacerbates the high risk of state fragility, violence and conflict which adversely impact growth and development. According to the World Bank, fragile states in Africa exhibit much weaker performance on policy and institutional quality than those of other regions.[52] Countries with weak institutions are a breeding ground for corruption and rent-seeking behaviour, which runs down innovation, poor production capacity and worse growth outcomes.[53]

Fourth, in addition to the challenges of underdevelopment, globalisation and fragility, there is merit in considering the structural problems of social control that followed the arbitrary creation of states in Africa. The narrative that African states are only failing because of corruption is a narrative that does not exonerate foreign complicity. Cameron and Stanley argue that understanding a country or region's political and institutional context is relevant to linking the causality between the extractive industries and weak institutional governance.[54] In drawing the linkages between resource exploitation and institutional weakening in Africa, I argue that the structural challenges bedevilling the post-colonial states in Africa are not accidental. They go to the very foundations of state construction in Africa when long-established pre-colonial societies and systems of social control were destroyed by European powers in favour of a state structure that facilitates colonial companies' exploitation

[51] Fund for Peace (n 50 above) 11; A Sguazzin 'South Africa's decline is worst among nations not at war, model shows' *Bloomberg* 17 April 2019 <https://www.bloomberg.com/news/articles/2019-04-17/south-africa-s-decline-worst-of-nations-not-at-war-model-shows> (accessed 23 October 2019).

[52] World Bank (n 37 above) 11.

[53] World Bank (n 37 above) 7.

[54] Cameron & Stanley (n 27 above) 26.

of the continent. There is no doubt that the structure of African states today is a vivid reflection of the colonial experiment that saw the balkanisation of long-standing ancient kingdoms and, in their stead, created new 'states' that maintained European exploitation of Africa's resources.[55]

As Midgal argues, the European colonialists' demolition of old structures and strategies of social control and survival without a replacement strategy left many African societies in a state of perpetual fragility and conflict.[56] From the DRC to Somalia and from Nigeria to Angola, the weak and fragmented structures of social organisation in today's states arose from the forced merger of mostly unrelated traditional African societies. The lack of nationhood among states has been the bane of many states and state institutions. Recognising this is fundamental to addressing the crisis of fragility, statehood and institutional weakness in Africa. As the World Bank alludes, the weak institutions characteristic of fragile settings, such as law enforcement and judicial institutions, impede the ability to respond effectively to instances of violence and deter future cases.[57]

In reality, many developing states still lack economic independence, several decades after political independence. Despite having the requisite agency and formal political 'independence' to regulate the extractive industries, African states are still not economically independent.[58] Many African countries today are tied to the apron strings of former colonial powers through historical exploitation, debt and the economy of dependence. By means of 'indirect exercises of power and influence by strong states and transnational corporations over weaker states', African states have remained subdued economically.[59] They are often unable to undertake important law reforms that can be beneficial to the people due to lopsided international investment

[55] U Idemudia 'Corporate social responsibility and the rentier Nigerian state: Rethinking the role of government and the possibility of corporate social development in the Niger Delta' (2010) 30 *Canadian Journal of Development Studies* 131 134; E Canel, U Idemudia & LL North 'Rethinking extractive industry: Regulation, dispossession, and emerging claims' (2010) 30 *Canadian Journal of Development Studies* 5 21.

[56] JS Midgal *Strong societies and weak states: State-society relations and state capabilities in the Third World* (1988) 97-98; EE Osaghae 'Fragile states' (2007) 17 *Development in Practice* 691 695.

[57] World Bank (n 37 above) 25.

[58] MB Ramose 'Philosophy and Africa's struggle for economic independence' (2006) 25 *Politeia* 3 8; PJ McGowan & K Gottwald 'Small state foreign policies: A comparative study of participation, conflict, and political and economic dependence in black Africa' (1975) 19 *International Studies Quarterly* 469 485.

[59] T McCarthy *Race, empire, and the idea of human development* (2009) 4.

agreements (IIAs) and foreign government pressure that are skewed in favour of developed countries.[60]

Chafer confirms that the West's reluctant granting of political independence to Africa meant that 'the priority was to ensure that decolonisation did not mark an end, but rather a restructuring, of the imperial relationship in Sub-Saharan Africa.'[61] McGowan similarly states that 'France balkanised black Africa with the intention of maintaining the dependency status of her former colonies.'[62] Today, not only do Francophone African states still have to pay colonial taxes to France, France retains 50% of the foreign reserves of those states (previously 100% from independence to 1973 and 65% from 1973 to 2005), regulates the currencies of over 14 states, maintains a strong military presence in its former colonies and retains 'a right of first refusal' with respect to the mineral resources in those countries.[63] In January 2019, the Deputy Prime Minister of Italy equated France's unending colonialism of the continent to 'impoverishing Africa', and precipitating the exodus of African migrants to Europe.[64]

4.2.3 Insufficiency of state consent in invoking the duty to regulate

The general expectation that weak host states must abide by treaties to which they have voluntarily subscribed is underscored by *consent*. Host states are considered to have consented to act in compliance with their obligations under treaties which they have ratified. However, that consent is often consent given in circumstances over which underdeveloped states had little or no influence. Weak states have less control over their own fate in the international arena and incur substantial sovereignty costs when they impulsively ratify treaties or are cajoled by powerful ones to do so. Since

[60] R McCorquodale & P Simons 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 *Modern Law Review* 598 600.

[61] T Chafer 'Franco-African relations: Still exceptional?' in MS Shanguhyia & T Falola (eds) *The Palgrave handbook of African colonial and postcolonial history* (2018) 801 806.

[62] PJ McGowan 'Economic dependence and economic performance in black Africa' (1976) 14 *The Journal of Modern African Studies* 25 32.

[63] G Spagnol 'Is France still exploiting Africa?' 10 February 2019 <http://www.ieri.be/fr/publications/wp/2019/f-vrier/france-still-exploiting-africa> (accessed 10 February 2019); NS Sylla 'The CFA Franc: French monetary imperialism in Africa' 12July 2017 <https://blogs.lse.ac.uk/africaatlse/2017/07/12/the-cfa-franc-french-monetary-imperialism-in-africa/> (accessed 10 February 2019); MR Koutonin '14 African countries forced by France to pay Colonial Tax for the benefits of slavery and colonization' 14 January 2015 <https://ibw21.org/editors-choice/14-african-countries-forced-by-france-to-pay-colonial-tax-for-the-benefits-of-slavery-and-colonization/> (accessed 10 February 2019).

[64] H Ridgwell 'Italy accuses France of 'impoverishing Africa' *VOANews* 23 January 2019 <https://www.voanews.com/europe/italy-accuses-france-impoverishing-africa> (accessed 8 February 2019).

the time of colonisation, many African states have had very little choice on whether to ratify a treaty they are well aware they lack the capacity and resources to fulfil. Yet, they do so because their economic survival depends on their human rights scorecard, which are often preconditions imposed by rich ones for foreign aid and loans.

In the global arena, international relations and treaties are influenced primarily by state power. As Abbott and Snidal remark, 'international law is wholly beholden to international power.'[65] The extraordinary power and authority that strong states wield over weak ones are 'reflected in several rules of international law and many treaties concluded by the colonial Powers with their dependencies or the small and weak independent States.'[66] Because the sustained and manifest exercise of power is costly to maintain, not only are weaker states often disadvantaged during treaty negotiations, international outcomes are far more in the control of powerful states.

As such, governments of weak countries may find it domestically costly to implement international rules over which they had little say.[67] Under international treaties, for example, the obligation to regulate corporations and ensure efficient justice delivery require infrastructure and consistent budgetary allocation that can prove to be *domestically costly* where the costs of doing so is disproportionate to the resources available to a state. Despite that they had no influence on the obligations attributed to them under treaties, weak and poor African states are expected to implement those obligations on the same terms as powerful and rich states. For this reason, Abi-Saab states that 'treaties have been used to sanctify subjugation and exploitation of the smaller and weaker States. They have, moreover, been used to impose protection and exploit economic privileges.'[68] Thus, in much of the body of international law regarding state responsibility today, the applicable rules that were established not only absented the interests, but were made to the

[65] KW Abbott & D Snidal 'Hard and soft law in international governance' (2000) 54 *International Organisations* 421 448.

[66] RP Anand 'Attitude of the Asian-African states towards certain problems of international law' (1966) 15 *The International and Comparative Law Quarterly* 55 61.

[67] Abbott & Snidal (n 65 above) 449.

[68] GM Abi-Saab 'The newly independent states and the rules of international law' (1962) 8 *Howard Law Journal* 168.

detriment, of weak states.[69] They are rules premised almost exclusively on the disproportionate relations between powerful states and weaker ones.[70]

Consequently, consent by itself is insufficient either to counter the supervening factor of state (in)capacity or to realise the domestic exercise of a host state's duty to regulate TNCs and protect human rights. As Posner states '[a]n act of consent is not a sufficient condition for creating an obligation', rather *additional formalities* 'provided externally by domestic or international law' are required.[71] In other words, critical to the implementation of the obligation to regulate corporations and protect human rights are formalities legally undertakable by government and which depend on a state's governance capacities and institutions. If the challenges with which underdeveloped states are faced with fundamentally affects the exercise of their obligations - and they do in real life - then strong domestic regulation and human rights accountability will be unachievable. Even as a weak state's obligation regarding corporate governance and regulation may remain binding at law, it is more likely to be honoured in breach due to persisting state incapacities and institutional failures. Therefore, I submit that the state's duty to protect as emphasised by the UNGPs inordinately over-characterises the position of weak states. For it falls short of addressing how that duty can be addressed by states entangled in the snares of fundamental economic, governance and structural difficulties.

Legal positivists who only see international law as it is regardless of the various nifty factors that affect its functionality domestically tend to adopt a simplistic approach to state responsibility. They tend to argue that so long as underdeveloped states have consented to international human rights obligations, they are bound at all cost by the duty to regulate commercial actors and protect communities from the harmful activities of companies. Irrespective of their circumstance. This approach apparently disregards state (in)capacity as a marker for the implementation of the state obligation to regulate corporations and protect human rights. Such a denialist viewpoint is unpersuasive and runs contrary to the reality that regulating and holding

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[69] Also see P Nervo 'State responsibility (A/CN.4/106)' (1957) 1 *Yearbook of the International Law Commission* 154 155.

[70] G Simpson *Great powers and outlaw states: Equal sovereigns in the international legal order* (2004) 57, 63-68.

[71] EA Posner 'Do states have a moral obligation to obey international law?' (2002) 55 *Stanford Law Review* 1901 1909-1910. Also see N Krisch 'The decay of consent: International law in an age of global public goods' (2014) 108 *American Journal of International Law* 1-40. *Cf* MJ Lister 'The legitimating role of consent in international law' (2011) 11 *Chicago Journal of International Law* 663-691.

transnational corporate actors accountable domestically are highly dependent on the power (or capacity) and will of states.

It would be ostentatious to assume that the fundamental challenges confronting the post-colonial state will suddenly disappear. That soon, African states would swiftly become strong enough to assert their sovereignties and be able to pursue courses that best serve the generality of their populace. And that they will eventually be able to control TNCs that have an unchallenged stranglehold of the natural resources in their territory and ensure adequate remedies to victims. As much as weak African states may be deemed to have consented to human rights treaties, the challenges of underdevelopment, conflict, poverty, disease and persisting governance failures are important factors that weigh heavily against their ability to challenge powerful TNCs. These cannot simply be ignored in a pragmatic assessment of state capacities in relation to state obligations under international human rights law.

4.2.4 Regulation of powerful TNCs by weak states - a paradox?

If intrinsically weak states lack the fundamental capacity to effectively control their societies, how can they be expected to measure up to the demands of international law to regulate powerful TNCs and at the same time protect the human rights of individuals and communities? In the pursuit of practicable solutions to the challenges of development in Africa, there can be no wishful thinking that weak states will be able to do so. Already, the state duty to protect as articulated in the UNGPs has over-estimated and over-characterised the capacity of underdeveloped states. The ability to 'prevent, investigate, punish and redress' violations perpetrated by transnational business enterprises rests purely on the capacity and efficiency of state institutions.[72]

By totally ignoring the developmental challenges, weak institutions and poor systems of social control that weak states possess, the UNGPs and existing international human rights standards fail to address the questions that make those duties unrealisable in less developed countries. In relation to TNCs, the UNGPs and scholars who harp heavily on the duty of states fail to address the disproportionate power and capacities between transnational business conglomerates and African states in several ways.

[72] UNGPs Principle 1.

The disparity in economic power between extractive TNCs and African states renders illusory international law's *total reliance* on host state regulation and control. In the last several decades, TNCs have become more economically powerful and more influential than many developing host states combined.[73] Weeramantry maintains that '[i]ndeed, the economic power of several individual multinationals is greater than that of more than three-quarters of the nation States of the world.'[74] Global Justice Now estimates that corporations make up 69 of the top 100 economic entities and that the top 10 corporations in the world have an aggregate revenue equal to those of 180 countries combined.[75]

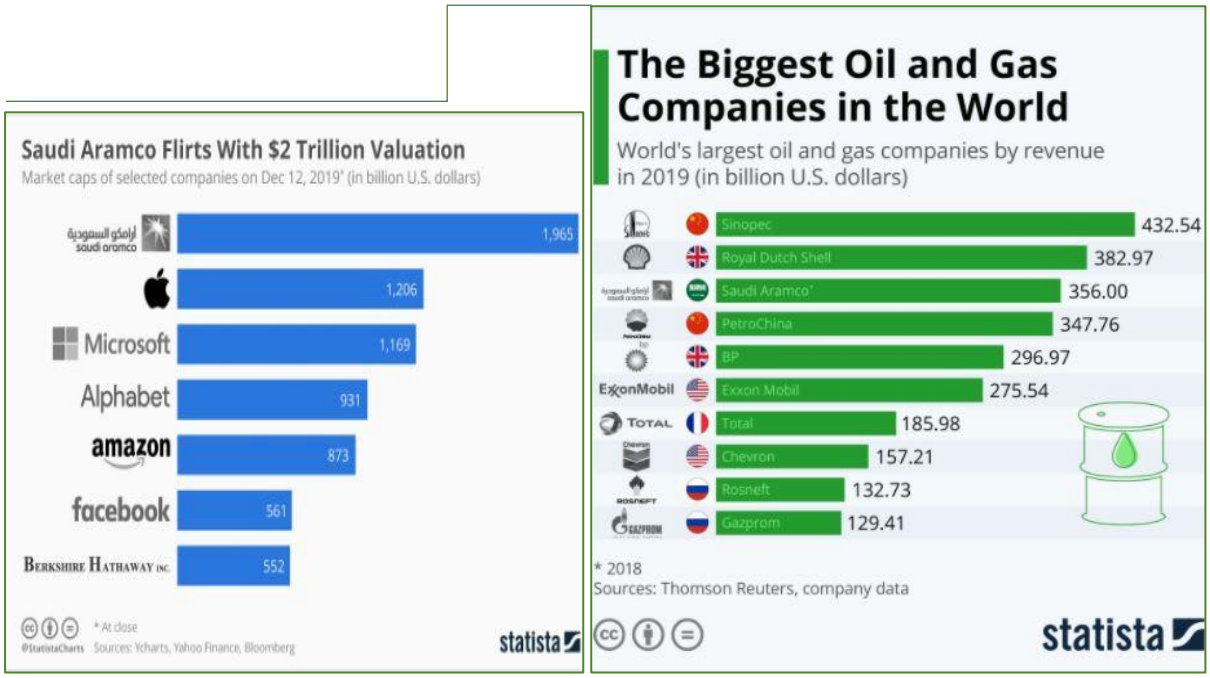

Figure 4-2: The financial power of oil and gas companies.

Source: Statista.

For instance, Saudi oil multinational, Saudi Aramco, emerged in 2019 as the largest oil and gas company in the world with a total assets value of USD 388.6 billion

[73] RM Thomas 'Host state treatment of transnational corporations: Formulation of a standard for the United Nations Code of Conduct on Transnational Corporations' (1983) 7 *Fordham International Law Journal* 467 471.

[74] CG Weeramantry 'Human rights and the global marketplace' (1999) 25 *Brooklyn Journal of International Law* 27 41.

[75] Global Justice Now '69 of the richest 100 entities on the planet are corporations, not governments, figures show' 17 October 2018 <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show> (accessed 12 February 2019); Global Justice Now '10 biggest corporations make more money than most countries in the world combined' 12 September 2016 <https://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined> (accessed 12 February 2019).

and market capitalisation of USD2 trillion (see Figure 4-2 above).[76] By this figure, it is economically more powerful than Nigeria and South Africa – the top two economies in Africa. And then, there is the Royal Dutch Shell which currently is the fifth largest oil and gas corporation in the world. If it were a country, it would easily be the world's 18th largest economy in the world.[77] It is economically bigger than Mexico and over 170 countries more. Exxon Mobil comes next at the 21st and BP at 27th position, surpassing the economies of India and Belgium, respectively. And then, there is China's China National Petroleum, and Sinopec that would be the world's 15th and 16th largest economies if they were states, surpassing the advanced economies of South Korea and other developed states. How do African states stack up to these extractive TNCs in terms of regulations and accountability in the industry?

This dynamic of power between TNCs and host African states is critical to comprehending the limits of state regulation and victims' quest for accountability by extractive companies responsible for human rights violations. This is because 'the question of regulation, or the lack of it, its effectiveness, and the disposition and attitude of regulators to the enforcement of compliance is driven primarily by power.'[78] Zenkiewicz states that the enormous influence TNCs now wield exceedingly shifts the balance of power entirely from states in their favour.[79]

In 2018, the cumulative value of the top five oil companies in the world totalling USD1.99 trillion dwarfed the gross domestic product (GDP) of USD1.6 trillion of the top five African economies combined.[80] That figure is also greater than the US$900 billion GDP of the rest 50 African states combined.[81] In pursuit of economic globalisation, corporations have gained tremendous influence at the expense of

[76] K Buchholz 'The biggest oil and gas companies in the world' 10 January 2020 <https://www.statista.com/chart/17930/the-biggest-oil-and-gas-companies-in-the-world/> (accessed 11 January 2020); K Buchholz 'Saudi Aramco flirts with $2 trillion valuation' 13 December 2019 <https://www.statista.com/chart/20300/market-caps-of-selected-companies-on-dec-12-2019/> (accessed 26 December 2020).

[77] J Myers 'How do the world's biggest companies compare to the biggest economies?' *World Economic Forum* <https://www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/> (accessed 8 February 2019).

[78] E Oshionebo *Regulating transnational corporations in domestic and international regimes: An African case study* (2009) 211.

[79] M Zenkiewicz 'Human rights violations by multinational corporations and UN initiatives (2016) 12 *Review of International Law & Politics* 119 125.

[80] Worldatlas.com 'Biggest oil companies in the world 2017' <https://www.worldatlas.com/articles/biggest-oil-companies-in-the-world.html> (accessed 17 February 2018); C Lewis 'Top 5 African economies' *Business Chief* 4 January 2017 <http://africa.businesschief.com/finance/2673/Top-5-African-economies> (accessed 17 February 2018).

[81] As above.

states and thereby become new power brokers on the global scene.[82] Babic et al argue that the global scale of the corporation's new-found power not only permanently transforms the relations between states and corporations but 'implies that the role of states in global capitalism has ceased to be relevant to understanding global power relations.'[83]

4.2.5 Linkages between scale of corporate abuses and state weakness

For victims of corporate abuses in Africa, the absence of strong laws and systems of environmental, social and governance (ESG) accountability in host states has had a two-fold impact. First, the chain of human rights and environmental violations by companies engaged in the extractive industries is directly correlative of the weak exercise of regulatory power by states. There is a symmetrical link between the frequency and scale of past and on-ongoing violations and the inadequate exercise of state authority. Secondly, the weak regulatory environment in many states has invariably curtailed the right of access to justice and adequate remedies in Africa. As adequate remedies are predicated on adequate laws so is effective enforcement dependent on effective institutions. The dereliction of states in both areas of governance make accountability for violations illusory and local remedies unavailable, insufficient and inadequate.[84]

Despite the critical governance deficit created by the incapacities of states in Africa, it does not nonetheless permit bad industry practices by companies as being witnessed in the extractive industries. The regulatory inertia of African states to good corporate governance is not akin to institutional consent. Nor can it be, contemplatively, taken for granted as licensing poor environmental, social and human rights risks management practices by companies.[85] Yet, the systemic challenges of host states, ironically, provide an essential point of business appeal for TNCs' investment in Africa. TNCs are drawn by the very vulnerabilities that make strong corporate regulation and accountability impossible in weak states.[86] This entails the opportunity to negotiate deals in a clandestine, confidential and often

[82] N Jägers 'The legal status of the multinational corporation under international law' in MK Addo (ed) *Human rights standards and the responsibility of transnational corporations* (1999) 259 260.

[83] M Babic, J Fichter & EM Heemskerk 'State versus corporations: Rethinking the power of business in international politics' (2017) *The International Spectator* 20 21.

[84] Ekhator (n 41 above) 68, 77.

[85] S Baughen *Human rights and corporate wrongs: Closing the governance gaps* (2015) 7.

[86] Ekhator (n 41 above) 48; D Shapiro, B Hobdari & CH Oh 'Natural resources, multinational enterprises and sustainable development' (2018) 53 *Journal of World Business* 1 9; Muchlinski (n 4 above) 126.

surreptitious manner, export raw materials without transparent reporting in order to evade custom duties, taxes and royalties, pay bribes to senior government officials and rent-seeking elite who are often unaccountable to the people, and circumvent important environmental, health and safety requirements.

4.3 Balancing natural resource investments and human rights

Human rights are not antithetical to resource-led development. Quite the opposite, both are mutually reinforcing and are much needed to deliver tangible public goods to the citizenry. The duty to regulate is not superseded by the equally relevant obligation to pursue socio-economic growth and development. A developing state has as much duty to ensure adequate corporate regulation and protection of human rights as it has toward advancing the welfare of its citizens. It has a duty to provide basic infrastructure such as electricity, water, roads, healthcare, education, employment opportunities, and ensure law and order. These require a tremendous amount of resources that are not always immediately within the means of host governments. Hard-pressed to deliver on electoral and political promises and retain the confidence of the governed, governments are constantly under immense pressure – from within and outside the state - to pursue foreign capital and loans to finance development programmes.

In further justifying the central thesis of this chapter that *total* dependence on host states for corporate regulation and remedies is impracticable, I argue in this section that the constant crisis between, one, the obligation to protect human rights through adequate corporate regulation and, two, the obligation to address the challenges of poverty and underdevelopment present African states with a fundamental dilemma. The dilemma of balancing two equally important and mutually reinforcing obligations. Here, states have the challenge of raising the human rights bar for business without discouraging private-led investments as a driver of economic growth and development. Giving that most resource-dependent states lack the requisite technological know-how to speed-roll development, are often poor and characterised by weak institutions, how do they negotiate IIAs with no competitive advantage or strong bargaining position? How do they promote FDIs, create jobs and advance economic prosperity without making trade-offs and hurtful concessions to investors that may have adverse consequences for labour rights and communities?

4.3.1 Host states' duty towards foreign investors

To usher in foreign investments into their countries, states must guarantee to investors the security of their investment. States do this by executing bilateral or multilateral investment treaties (BITs or MITs).[87] Collectively, these are otherwise known in general as international investment agreements (IIAs). As BITs between investors and states become common place, the tenure and effect of the obligations acquired under such treaties can be far-reaching for host countries. According to Elkins et al, BITs are agreements stipulating the terms and conditions for private investment by one country's nationals and companies in the economy of another.[88] Under such treaties, host states frequently agree to *umbrella* clauses – an express commitment that a state will live up to its promises to investors.[89] Umbrella clauses impose 'a requirement on each Contracting State to observe all investment obligations entered into with investors from the other Contracting State.'[90] By virtue of such agreements, African countries assume binding obligations that attract consequences under international trade and investment law. States accept those obligations and undertake to execute them in good faith.[91]

Generally, host states agree to different categories of obligations to protect foreign investors under IIAs. The purpose of such commitment is to address investors' concerns about issues of FDI admission into and capital repatriation from the country, non-discriminatory treatment, non-expropriation without compensation and resolution of disputes.[92]

Obligations of host states to investors			
Category		Character of protection	
		Substantive	Procedural
1.	FDI admission and capital repatriation	✓	-
2.	Non-discrimination	✓	-
3.	Non-expropriation without compensation	✓	-
4.	Dispute resolution	-	✓

Table 4-1: Host state obligations to investors.

87 BITs, in the case of two parties, and MITs, where there are more than two parties.

88 Z Elkins et al (n 47 above) 812; M Sornarajah 'State responsibility and bilateral investment treaties' (1986) 20 *Journal of World Trade* 79–98.

89 JW Yackee 'Pacta sunt servanda and state promises to foreign investors before bilateral investment treaties: Myth and reality' (2008) 32 *Fordham International Law Journal* 1550 1554.

90 J Wong 'Umbrella clauses in bilateral investment treaties: Of breaches of contract, treaty violations, and the divide between developing and developed countries in foreign investment disputes' (2006)14 *George Mason Law Review* 137 138.

91 Yackee (n 89 above) 1568; Vienna Convention on the Law of Treaties 1969 art 26.

92 Elkins et al (n 47 above) 812.

First of all, FDI admission - currently - are mostly governed by IIAs. Unlike traditional market-supporting institutions for monetary and trade relations, there are yet no established mechanisms for the admission of FDI in many countries. Since foreign investors risk losing their direct investments if no assurances are pre-determined, states need to address investor concerns about admission and repatriation of direct investments by establishing guarantees and reposing market confidence. In the context of Africa, the weak regulatory environment in many countries raises red flags to potential investors regarding the significant risks of uncertainty, instability or conflict. To develop confidence in the economy, host states commit to FDI admission and repatriation guarantees in IIAs as an ease-of-doing-business measure.

Second, a host state undertakes to eliminate discriminatory treatment of investors by committing to treat foreign investors on equal and fair terms as it does its citizens. This obligation entails the duty not to discriminate. In the General Agreement on Tariffs and Trade 1994 (GATT), for instance, World Trade Organisation (WTO) member states undertake to deal with investors based on the *most-favoured nation* and the *national treatment* principles.[93] These principles require that WTO member states, in granting a tariff or regulatory advantage, do not discriminate between or treat less favourably similar products originating from different countries.[94] In the context of extractive investments in Africa, African WTO members are obliged under IIAs to apply the most-favoured nation and the national treatment obligations to foreign investors regarding any benefit or concessions that accrue to their nationals or most-favoured nations with respect to investments, imports and exports of minerals or the conditions of mineral extraction.

Third, a host state undertakes to not expropriate or nationalise the business or assets of a foreign investor in the extractive industries without compensation. This obligation is a countermeasure to the spate of expropriations of the private assets of colonial companies in the 1970s and 1980s. In justification of nationalisation, developing countries had argued that it was within their sovereign right to do so, and

[93] GATT arts I and III; M Houde 'Most-favoured-nation treatment in international investment law' in B Flodgren (ed) *Corporate and employment perspectives in a global business environment* (2006) 69-96; S Fietta 'Most favoured nation treatment and dispute resolution under bilateral investment treaties: A turning point?' (2005) 8 *International Arbitration Law Review* 131 134; L Ehring 'De facto discrimination in world trade law: National and most-favoured-nation treatment—or equal treatment?' (2002) 36 *Journal of World Trade* 921-977.

[94] T Waelde 'International law of foreign investment: Towards regulation by multilateral treaties' (1999) 1999 *Business Law International* 50-79.

that to interpret *umbrella* clauses in BITs to include the obligation of 'prompt, adequate, and effective compensation' would have been to perpetuate the economic dominance of developed countries over weak ones and limit the latter's sovereign right to control their own resources. To secure the rights of foreign investors to adequate compensation in the event of expropriation, BITs require states to guarantee compensatory measures or be liable for failure to do so.

Last is the obligation of host states to be subject to a 'neutral' dispute resolution mechanism jointly agreed to with the investor, in the event of a dispute. In most BITs, host states in Africa agree to settle their disputes using international investment arbitration services or by resorting to the judicial systems of developed countries. Based on such commitments, a British Virgin Islands company - Process and Development Limited (P&ID) - obtained a final arbitral award of USD6.6 billion in 2015 against Nigeria.[95] The award followed allegations of breach of a 20-year gas supply and processing agreement between P&ID and the Federal Government of Nigeria. The investor sued on the ground that Nigeria had renounced the contract by failing to supply it with wet gas for processing three years after the agreement was signed.

4.3.2 Duty towards individuals, communities and the environment

At the same time as the obligations to investors exist, host states remain bound by their human rights duties towards rightsholders under domestic and international law. In the extractive industries context, they have duties towards individuals and communities likely to be adversely impacted by extractive investment projects. Under the African Charter and other international human rights instruments, people have, in addition to their various individual civil and political as well as economic, social and cultural rights, a collective right to existence.[96] They have the right to freely dispose of their natural resource wealth.[97] They have 'the right to economic,

[95] *Process & Industrial Developments (P&ID) Ltd v The Ministry of Petroleum Resources of the Federal Republic of Nigeria* (31 January 2017) <https://jusmundi.com/en/document/pdf/Decision/IDS-PID-31012017-01/en/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017> (accessed 17 February 2019). *Cf Process & Industrial Developments (P&ID) Ltd v The Ministry of Petroleum Resources of the Federal Republic of Nigeria* (31 January 2017) <https://jusmundi.com/en/document/pdf/Opinion/IDS-PID-31012017-02/en/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-dissenting-opinion-of-bajo-ojo-san-tuesday-31st-january-2017> (accessed 17 February 2019).

[96] African Charter art 20.

[97] African Charter art 21.

social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'[98] They have 'the right to national and international peace and security.'[99] They also have 'the right to a general satisfactory environment favourable to their development.'[100]

The entire gamut of individual and collective rights in the regional and international human rights corpus creates correlative duties for African states under international law.[101] In *SERAC v Nigeria* (*SERAC* case),[102] the African Commission held that the obligations accepted by state parties under the African Charter and other international human rights treaties 'generate at least four levels of duties for a state that undertakes to adhere to a rights regime'. These levels include the duties to promote, protect, respect, and fulfil human rights. These obligations pertain to all catalogues of human rights and involve positive and negative duties.[103]

First, the state has a duty to protect the rights of those likely to be adversely impacted by extractive investments - workers, communities and the environment. This obligation includes the duty to regulate the kind of investor that are allowed to exploit its natural resources and provide effective remedies in the event that there are allegations of breaches.[104] In the *SERAC* case, the Commission held that the duty to protect entails taking protective measures through legislation and the provision of effective remedies to ensure that right-holders are protected against economic, political and social interferences. According to the Commission

> Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.[105]

In the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter on Human and Peoples' Rights relating to the Extractive Industries 2018 (SRGPs), the African Commission offers practical guidance on the scope of the state's *protect* obligations with regard to the rights of peoples under articles 21 and

98 African Charter art 22.
99 African Charter art 23.
100 African Charter art 24.
101 The Charter of Economic Rights and Duties of States 1974 art 30.
102 (2001) AHRLR 60 (ACHPR 2001) para 44.
103 As above.
104 UNGPs principles 1, 3-5.
105 *SERAC* case (n 102 above) para 46. *Cf* G Eweje 'Labour relations and ethical dilemmas of extractive MNEs in Nigeria, South Africa and Zambia: 1950–2000' (2009) 86 *Journal of Business Ethics* 207-222; G Eweje 'Hazardous employment and regulatory regimes in the South African mining industry: arguments for corporate ethics at workplace' (2005) 56 *Journal of Business Ethics* 163-183.

24 of the Charter. It clarifies that the obligation to protect includes entrenching internationally recognised standards on environmental protection, transparency and fiscal responsibility with respect to natural resource development, and on guarantees against labour and human rights abuses throughout the operational cycle of extractive projects.[106]

States have a duty to apply relevant human rights, environmental and labour standards to protect individuals and communities either associated with large-scale or artisanal and small-scale mining or drilling activities. Through legislation, regulations, policies and other administrative measures, host states have a responsibility to 'adopt the required institutional measures for monitoring and enforcing the fiscal, environmental, labour, health and human rights observance standards by third parties' including corporate investors in extractive business and joint ventures with SOEs.[107] The obligation to protect also includes the establishment of standards on the procedure and 'criteria for the granting of concession or licences to extractive companies for the exploration and extraction of natural resources.'[108] Thus, licences to extractive companies should be negotiated and granted based on internationally accepted standards on transparency, probity, human rights and the environment.[109]

The SRGPs further enunciate that a crucial element of the duty to protect is the host state's duty to provide 'effective, well-resourced and technically equipped judicial and non-judicial mechanisms' for addressing disputes.[110] These mechanisms should be empowered to resolve grievances bordering on non-compliance with international human rights, labour and environmental standards, including disputes between companies and communities.

Second, host states have a duty to respect human and peoples' rights.[111] In the *SERAC* case, the Commission held that the obligation to respect entails that a state must refrain from encroaching on the enjoyment of all human rights. It must 'respect right-holders, their freedoms, autonomy, resources, and liberty of their actions.'[112] In the context of land and resource exploitation, a state must respect

[106] SRGPs para 45.
[107] SRGPs para 46, UNGPs principles 3-5.
[108] SRGPs para48
[109] As above.
[110] SRGPs para 49.
[111] UNGPs Principle 6.
[112] *SERAC* case (n 102 above) para 45.

the right of peoples to the free use of resources owned or at the disposal of an individual or a collective of individuals. In the case of a group, states are obliged to respect the right of a people to the use of the group's resources, especially if those resources are connected to their sustenance and survival.

In the SRGPs, the Commission asserts that the *respect* obligation also requires that states avoid unnecessary interference with the enjoyment by people of the right to a general satisfactory environment. It includes that potentially affected communities should be adequately consulted and allowed to participate in decision-making processes affecting them, their land or resources. The Commission emphasises that the state 'should have due regard to the cultural and natural heritage and sacred sites of peoples and communities.'[113]

Third, a host state has an obligation to promote the individual and collective rights of its population, including during trade and investment negotiations. States are obliged to take into consideration the fundamental rights and interests of its people, and the potential adverse impacts that the implementation processes of investment deals may have on the lives and wellbeing of communities. Under the African Charter, state parties undertake to 'promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter' and to ensure that the 'corresponding obligations and duties are understood.'[114] The SRGPs also emphasizes that this duty entails enabling the general public and affected communities to have timely and unhindered access to information on the extractive industries and the environment. It also requires regulatory authorities to disseminate information and undertake public education as well as awareness creation about extractive activities. In this respect, regulatory bodies must ensure the due consultation and effective participation of the general public and local populations, including vulnerable groups, on issues pertaining to extractive projects.

Last, a host state has a duty to fulfil its international law obligations towards the socio-economic wellbeing of individuals and communities.[115] Having voluntarily undertaken the obligation to protect, promote and respect the human rights of all

[113] SRGPs para 44; *Centre for Minority Rights Development (Kenya) & Anor v Kenya* (2009) AHRLR 75 (ACHPR 2009) paras 173, 204-206.
[114] African Charter art 25; *SERAC* case (n 102 above) para 46.
[115] UNGPs Principles 5-10.

persons in its territory, a state must take positive steps towards their actual realisation.[116] It has a responsibility to use the proceeds of resource exploitation for the economic, social and cultural development of the people. This entails not only adopting laws and establishing institutions, but also investing in the necessary public and social amenities and infrastructure to improve the lives and living standard of the people. Host states have to make the necessary investment to conserve and improve the environment.[117] They must ensure that the laws and policies governing the operation of domestic and foreign companies guarantee business respect of human rights in their operation. They must also ensure transparency and accountability between business and the state, on the one hand, and between business and right-holders, on the other.

More so, the obligation to fulfil requires that host states vigorously pursue development initiatives through foreign cooperation and investments. States have a duty to pursue resource driven FDIs and development partnerships as measure for propelling national growth and development. These require that states enter into BITs and IIAs that create complex legal relationships and obligations. So, where does this leave them?

4.3.3 Are African states left with a Hobson's choice?

Considering that resource-rich African countries depend heavily on FDIs in the extractive industries to drive economic growth,[118] sustain development and meet the socio-economic expectations of their citizens, the obligation to vigorously regulate business tend to be at loggerheads with their economic development objectives. This is because FDIs are highly competitive and more likely to flow to areas with fewer regulations, lesser labour costs and a much better ease-of-doing-business reputation.[119] Since African states often lack a competitive advantage regarding the needed technologies and know-how to harness their resources, strong regulations in

[116] *SERAC* case (n 102 above) para 47.
[117] SRGPs paras 52-55.
[118] African Development Bank 'African economic outlook 2018' (2018) 102 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/African_Economic_Outlook_2018_-_EN.pdf> (accessed 19 September 2019).
[119] O Morrissey & M Udomkerdmongkol 'Governance, private investment and foreign direct investment in developing countries' (2012) 40 *World Development* 437 440; E Asiedu 'On the determinants of foreign direct investment to developing countries: Is Africa different?' (2002) 30 *World Development* 107 110-112.

the extractive sector of one African country may operate to dissuade FDIs in favour of another that has relatively lesser corporate regulation and accountability.[120]

The enormous developmental challenges in Africa leave host states with a Hobson's choice. They are torn between subscribing to FDIs based on lob-sided investment obligations contained in BITs and their human rights obligations that favour strong corporate regulation and mechanisms of accountability. Confronted with the challenges of poverty, unemployment, lack of basic infrastructure such as schools, hospital, water, food, roads, African governments tend to prioritise the existential issue of development over human rights.[121] The complexity of having to make hard choices renders it impracticable to assume that developing host countries will be able to find a delicate balance between striking fair investment deals that take the rights of individuals and communities into consideration, and simultaneously complying with their international obligation to vigorously regulate businesses' impacts on human rights.[122] Entrenched corruption and persisting institutional weakness make that possibility quite unlikely.

In a 2003 report, the UN Commission for Human Rights recognised the challenge posed by defining investors' rights in the wake of investment liberalisation and suggested the need to balance investors' rights with appropriate checks and balances. The report noted that

> Investors' rights are instrumental rights…defined in order to meet some wider goal such as sustainable human development, economic growth, stability, indeed the promotion and protection of human rights. The conditional nature of investors' rights suggests that they should be balanced with corresponding checks, balances and obligations—towards individuals, the State or the environment.[123]

4.4 Obligations of extractive corporations to host countries

Regardless of the quandary of conflicting state commitments, corporate investors engaged in the business of resource exploitation in Africa owe obligations to host states in which they invest. Such obligations arise from the exercise of sovereign

[120] O Gajigo, E Mutambatsere & G Mdiaye 'Gold mining in Africa: Maximizing economic returns for countries' (2012) 147 *Working Paper Series* -Tunis, Tunisia: African Development Bank 16 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.594.7577&rep=rep1&type=pdf> (accessed 11 May 2019); R Kraemer & R van Tulder 'Internationalization of TNCs from the extractive industries: A literature review' (2009) 18 *Transnational Corporations* 137 145.

[121] E Giuliani & C Macchi 'Multinational corporations' economic and human rights impacts on developing countries: A review and research agenda' (2014) 38 *Cambridge Journal of Economics* 479 480.

[122] Muchlinski (n 4 above) 132.

[123] UN Commission for Human Rights 'Human rights, trade and investment: Report of the UN High Commissioner for Human Rights' E/CN.4/Sub.2/2003/9 (2 July 2003) para 37.

rights and duties by states and international human rights law.[124] Below, I identify other cogent obligations of extractive corporations to a host state.

4.4.1 Compliance with laws and regulations

Every corporate business has a duty to abide by the legislation, regulations and policies of the host state. As a corporate citizen, it is bound by the (bill of rights in the) constitution, local laws pertaining to corporate governance, health, labour, environmental conservation and management, gender, and the extractive industries. In many African countries, corporations have a duty to respect the bill of rights enshrined in the Constitution.[125] They are also obliged to comply with directives issued by regulatory and supervisory institutions, which incur administrative, civil and criminal consequences. In many jurisdictions, companies which fail to adhere to local laws and regulations can be subjected to administrative sanctions or civil and criminal proceedings.

The UNGPs affirms the responsibility of corporations to comply with 'all applicable laws', honour internationally recognised human rights principles when faced with contradictory obligations, and treat the risk of causing or supporting violations as a legal compliance issue.[126] This implies corporate compliance with civil, criminal, environmental and human rights law in host countries.

4.4.2 Respect for host communities' rights and the environment

To earn their social licence to operate, corporations have an obligation to respect the rights of local communities proximate to extractive activities. This obligation includes having effective and representative stakeholder engagement with all segments of a host community to ensure broad community support. The African Commission clarifies that this obligation entails that businesses 'adequately inform and substantively consult with the affected people on any of their activities or on decisions that may materially affect the people'.[127] It also warrants that their free, prior and informed consent should be obtained for investment projects, regardless of whether or not such local communities are identified as indigenous

[124] E de Brabendere 'Human rights and international investment law' (2018) 2-7 *Grotius Centre Working Paper Series* No 2018/075-HRL — 26 March 2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149387&download=yes> (accessed 12 May 2019).

[125] Constitution of Republic of Kenya 2010 secs 2(1) & 260; Constitution of the Federal Republic of Nigeria 1999 secs 6(6) & 46(1); Constitution of the Republic of South Africa 1996 sec 8(2); Constitution on the Republic of Zimbabwe 2013 sec 2(2).

[126] UNGPs Principle 23(a)(b)(c).

[127] SRGPs, para 64.

communities.[128] This is relevant in the context of mass relocations or cultural infringements arising from extractive investments. In particularly difficult environments, including fragile, conflict and violent settings, corporate businesses retain the responsibility to respect internationally recognised norms 'to the greatest extent possible.[129]

Furthermore, the recognition of the right to a general satisfactory environment as a collective right imposes a corresponding obligation to respect. Under the African Charter, corporations have an obligation not just to do no harm to the environment but also to respect the environmental rights and wellbeing of communities.[130] They retain vicarious liability for sub-contractors or agents engaged to act on their behalf, including outsourced security and recruitment companies.[131] This obligation of corporations towards communities and the environment has a clear legislative basis under article 27 of the African Charter.[132]

To operationalise the obligation to respect, corporate entities engaged in the extractive industries are encouraged under the UNGPs and the SRGPs to conduct *human rights due diligence*.[133] Human rights due diligence is the process companies are expected to carry out to help them identify, avoid, reduce and answer for how they deal with adverse environmental, social and human rights impacts with which they are involved. This may vary in complexity with a company's size, context and nature of operations. It should be an ongoing rather than a once-off exercise considering that human rights risks change as a company's operations evolve.[134]

[128] E Greenspan 'Free, prior, and informed consent in Africa: An emerging standard for extractive industry projects' (2014) 5-6 <https://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF> (accessed 19 May 2019). Although the right to FPIC is regarded as a right of *indigenous* peoples under international human rights law, the term 'indigenous' is still contested term in Africa because of the widespread belief that most African communities are indigenous to their land. The African Commission sets a few parameters for who can be referred to as 'indigenous peoples'. This includes self-identification, use or special attachment to traditional land, and being in a condition of domination or marginalisation by a national or hegemonic majority. See African Commission on Human and Peoples' Rights 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (2005) <https://www.iwgia.org/images/publications//African_Commission_book.pdf> (accessed 15 June 2019).

[129] UNGPs Principle 23 Commentary.

[130] *SERAC* case (n 102 above) para 55.

[131] Voluntary Principles on Security and Human Rights.

[132] SRGP para 56; See Chapter 3, section 3.2 above.

[133] UNGPs Principle 17; SRGPs para 58.

[134] As above.

4.4.3 Transparency and disclosure

Extractive corporations have a legal responsibility to conduct business in a transparent and accountable manner. In countries where there are disclosure and transparency laws and regulations, they have a duty to disclose information to the general public, especially those most likely to be adversely affected by their industrial activities. Where they have conducted environmental, social and human rights impact assessments – in line with their due diligence obligations, - they must fully disclose the extent of identifiable risks and potential adverse impacts of the project. They must also make information on their activities readily available to communities upon request. Under the SRGPs, the African Commission affirms that companies have 'all applicable fiscal responsibilities and transparency obligations' including to disclose the identities of their promoters, shareholders, creditors and local partners.[135]

In several resource-dependent countries in Africa, international transparency and disclosure standards for the oil, gas or mining sector such as the Extractive Industries Transparency Initiative (EITI) are lacking. Only Nigeria, Liberia and Tanzania have adopted dedicated legislation for transparency and disclosure of extractive contracts and payments.[136] Some countries such as Burkina Faso, Côte d'Ivoire, Mali, and Niger have issued presidential or ministerial decrees for the implementation of EITI standards in their respective countries.[137] Senegal has express provision in its Mining Code requiring respect for human rights and transparency in mineral extraction processes.[138] Where legislation does exist, I argue that they impose binding obligations on business entities engaged in the extractive sector for disclosure and transparency.

However, it has to be acknowledged that, for those African countries that have done so, the enactment of dedicated legislation for transparency and disclosure is not always synonymous with the actual practice of transparency and disclosure. Concessionary contracts in many resource-rich countries remain shrouded in secrecy; often, under the banner of *confidentiality*. Most Nigerians do not have access to oil

[135] SRGPs para 63.
[136] Liberia Extractive Industries Transparency Initiative (LEITI) Act 11 of 2009; Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007; Tanzania Extractive Industries Transparency & Accountability Act 23 of 2015.
[137] EITI 'Tanzania enacts EITI legislation' <https://eiti.org/news/tanzania-enacts-eiti-legislation> (accessed 18 November 2019).
[138] Code Minier Loi No 2016-32 arts 94 & 95.

mining leases or gas drilling contracts nor know the terms on which joint-venture contracts are negotiated with multinational corporations like Shell, Chevron and ENI. In Tanzania, Liberia and Senegal, there are so far no known open-access contract repositories despite the presence of relatively new legislation. Until such laws are tested in the courts, only time can tell the extent to which transparency and disclosure can be legally demanded or exercised.

4.4.4 Respect for state sovereignty and non-interference

Despite their power and wealth, TNCs have a duty to respect the authorities in their host countries. Under the Charter of Economic Rights and Duties of States, TNCs have an obligation to not intervene in the internal affairs of a host state.[139] They have a duty not to interfere or encroach in domestic politics or elections by taking sides, clandestinely financing political parties or subverting the electoral process. TNCs also have a responsibility to not bribe political office holders in order to have their way at the expense of the people, circumvent environmental, health and safety laws or avoid their human rights due diligence obligations. Even where they collaborate with the state through production sharing contracts or joint ventures, they have an obligation to not undermine the sovereign authority of weak states.

4.4.5 Sustainable business practice

Lastly, corporations engaged in extractive business have an obligation to conduct their business in a sustainable way. In the laws on mining, oil and gas, they often have a legal obligation to conduct their industrial processes in compliance with environmental legislation and in line with 'good mining practice' or 'established best practices'.[140] They cannot exploit resources through means that are excessively destructive to the environment or harmful to workers and communities. Under the African Charter, people have a right to lawfully recover their property and an adequate compensation in the case of 'spoliation'.[141] In the recent past, research found that there were 'risks inherent in adopting a simple cost-benefit approach to the management' of adverse environmental, social and human rights impacts.[142] Therefore, in the pursuit of the Sustainable Development Goals 2030 (SDGs), the UN

[139] The Charter of Economic Rights and Duties of States 1974 art 2(2)(b).
[140] Ghanaian Minerals and Mining Act 703 of 2006 secs 67(4)(c) & 93; Nigerian Minerals and Mining Act 2007 sec 118(b).
[141] African Charter art 21(2).
[142] Shift/Harvard Kennedy School 'Costs of company-community conflict in the extractive sector' (2014) <https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf> (accessed 18 November 2019).

calls on businesses to embrace multi-stakeholder partnerships that propel the sustainable development agenda.[143] This is because the responsibility of businesses to conduct their activities in a sustainable manner 'cannot be offset by investments in social development initiatives.'[144]

4.5 Corporate 'capture' of the regulatory host state in Africa

The problem of regulatory inadequacy would have been resolvable if institutional weakness were all that operated against effective corporate regulation and human rights accountability in host states. Yet, it is hardly just that. With the structural and institutional vulnerabilities of many African countries, corporate entities have 'captured' the state and further weakened its ability to regulate abuses in the private commercial sphere. By 'capture', I mean 'the efforts of firms to shape the formation of the basic rules of the game (i.e. laws, rules, decrees and regulations) through illicit and non-transparent private payments to public officials'.[145] In many resource-dependent African states, the interactions between companies and the state are often marked by a rentier relationship, where companies seek to confer some illicit benefit on politicians in return for operating short of legal requirements.[146]

I argue that the capture of host states in Africa dampens trust in domestic systems of oversight and accountability. Captor companies aim to procure advantages from the state, including contract rights and personalised protection in areas where the state consistently under-provide the public goods necessary for entry and competition.[147] According to Hellen et al, state capture can be likened to

[143] SGDs Goal 17.17.

[144] N Agarwal, U Gneiting & R Mhlanga 'Raising the bar: Rethinking the role of business in the Sustainable Development Goals' (February 2017) 5 <https://www-cdn.oxfam.org/s3fs-public/dp-raising-the-bar-business-sdgs-130217-en_0.pdf> (accessed 18 November 2019); J Ruggie & Shift 'The Sustainable Development Goals and the Guiding Principles' (2016) <http://www.shiftproject.org/resources/viewpoints/sustainable-development-goals-guiding-principles/> (accessed 18 November 2019); Shift 'Business, human rights and the Sustainable Development Goals – Forging a coherent vision and strategy' (2016) <http://s3.amazonaws.com/aws-bsdc/BSDC-Biz-HumanRights-SDGs.pdf> (accessed 18 November 2019).

[145] JS Hellman, G Jones & D Kaufman 'Seize the state, seize the day: State capture and influence in transition economies' (2003) *31 Journal of Comparative Economics* 751 756. Also see J Onuoha 'The state and economic reforms in Nigeria: An explanatory note on the capture theory of politics' (2008) 5 *African Renaissance* 35 39-40.

[146] Hellman et al (n 145 above) 756 ['collusion between firms and politicians providing preferential treatment creates rents that are then shared'].

[147] Hellman et al (n 145 above) 753-754.

a 'form of grand corruption' that frustrates the political economy of reform.[148] When state institutions are perennially weak and the avenues of accountability are stymied by the 'romantic' collaboration between private actors and repressive or corrupt regimes, not only are the conditions of independent regulations lost, social justice become illusory.[149] In this section, I identify five ways by which weak resource-rich states have been captured.

4.5.1 Stabilisation or freezing clauses in BITs and IIAs

Many African states are unable to undertake important law reform efforts due to obligations under stabilisation or freezing clauses. Stabilisation clauses are clauses contained in IIAs that impose limitations or compensatory obligations on host states for changes to domestic law throughout the life cycle of an investment. Such clauses operate to restrain host states from altering the laws and regulations in force at the time of signing an IIA or require host states to pay compensation for investors' compliance with legal changes. For host states, the implication is a waiver of the right to reform old laws or enforce new rules that address abusive conduct of foreign investors or TNCs operating in the extractive industries in their territories.[150]

Cotula states that the legal essence of stabilisation clauses is to pacify investors' desire for stability in the regulatory framework on which the viability of their investments rely. Yet

> they [stabilisation clauses] may also constrain the ability of the host state to comply with evolving international environmental law and to raise the environmental standards that are applicable to investment projects within its jurisdiction, particularly where environmental regulation would increase project costs.[151]

In a study conducted in 2009, Shemberg found that stabilization clauses were designed to insulate investors from implementing new environmental, social and human rights laws or provide investors with compensation for compliance with such laws in host countries. The study found that *full freezing clauses* were seen in

[148] J Hellman & D Kaufmann 'Confronting the challenge of state capture in transition economies' (2001) 38 *Finance & Development* 31.

[149] C Coumans 'Alternative accountability mechanisms and mining: The problems of effective impunity, human rights, and agency' (2010) 30 *Canadian Journal of Development Studies* 27 28-29.

[150] OA Oniyinde & TE Ayo 'The protection of energy investments under umbrella clauses in bilateral investment treaties: a myth or a reality?' (2017) 61 *Journal of Law, Policy and Globalization* 161 162.

[151] L Cotula 'Stabilization clauses and the evolution of environmental standards in foreign investment contracts' (2007) 17 *Yearbook of International Environmental Law* 111 112.

contracts in Sub-Sahara Africa 83 percent of which were in the extractive sector.[152] To show the exploitative imbalance arising from the disparate use of freezing clauses between OECD and non-OECD countries, '[n]o contract from the OECD countries contain[ed] either full or limited freezing clauses'; whereas contracts with stabilisation clauses were 'prevalent in the contracts in this study in all non-OECD countries.'[153]

Furthermore, in the cases where there were limited economic equilibrium clauses – clauses that provide for investors to incur some degree of financial cost along with limited host state compensation for compliance with legal changes – they 'differ[ed] greatly' between OECD and non-OECD countries. Unlike in non-OECD countries, such limited economic equilibrium clauses 'almost always' apply stabilisation cover only to laws that discriminate against investors and sometimes presented risk-sharing conditions or compensation regarding only specific legal changes.[154]

The above incongruent application of stabilisation clauses show that they perpetuate economic exploitation by developed countries or MNCs and are intended to hinder weak states from undertaking long-term legal changes that ensure strong corporate regulation and human rights accountability.

4.5.2 Joint venture contracts and production sharing agreements

Government's involvement in both resource administration and exploitation can limit effective corporate regulation and facilitate grand corruption in the extractive sector. In countries where resource exploitation is jointly carried out by government and companies, the responsibility of government as regulator and business can become blurred, leaving no controls on the adverse impacts on workers, communities and the environment.[155] With many African countries usually lacking transparent and accountable institutions, rent-seeking politicians and senior officials of SOEs prove to be target of corporate bribes, while accountability for abuses can prove incredibly difficult for victims. In Nigeria, for instance, where the government acts 'as both a

[152] A Shemberg 'Stabilization clauses and human rights' (2009) 17 <https://business-humanrights.org/sites/default/files/reports-and-materials/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf> (accessed 2 January 2018).

[153] As above.

[154] As above.

[155] C Kaeb 'Emerging issues of human rights responsibility in the extractive and manufacturing industries: Patterns and liability risks' (2008) 6 *Northwestern Journal of International Human* Rights 327 330.

regulator and player in the oil and gas industry', the conclusion of joint projects with companies like Shell often imply that government as co-violator will be unable to provide proactive regulatory oversight.[156]

Obioma asserts that wide-ranging government involvement in the oil sector 'may spawn innumerable opportunities for corruption'.[157] One of the ways through which corruption manifests in the sector is by the active collaboration between government and private investors – be they local or foreign – through joint venture contracts (JVCs) or production sharing agreements (PSAs). JVCs are a modern way of resource concession where host governments through their national oil or mining company participate in the exploitation of a particular resource.[158] Chevron, Eni, ExxonMobil, Shell and Total operate through JVCs and PSAs with Nigeria's state-owned company, Nigerian National Petroleum Corporation and its subsidiaries. Oyefusi argues that such joint arrangements have not only increased the incidents of conflict and corruption in countries like Nigeria but 'ha[ve] made oil companies in the country almost entirely involved in government administration.'[159] Mabuza et al similarly argues that weak governance can afford mining companies the avenue to 'take advantage of any apparent disorder, either in local government or political upheaval within communities.'[160]

There are considerable weaknesses in Nigeria's term contract system that permits false reporting of the volumes of crude oil lifted from Nigeria as against the volume official approved. Due to the discretionary and politicised nature of term contract awards, companies gain or lose their crude oil allocations 'depending on their relationship with the officials in charge and the influence of their local contacts or "sponsors."'.[161] The Natural Resource Governance Institute found that

[156] Ekhator (n 41 above) 64-65.

[157] BK Obioma 'Corruption reduction in the petroleum sector in Nigeria: Challenges and prospects' (2012) 3 *Mediterranean Journal of Social Sciences* 98 101.

[158] S Saidu & HA Sadiq 'Production sharing or joint venturing: What is the optimum petroleum contractual arrangement for the exploitation of Nigeria oil and gas? (2014) 2 *Journal of Business and Management Sciences* 35 42.

[159] A Oyefusi 'Oil-dependence and civil conflict in Nigeria' (2007) 20 CSAE WPS/2007-09, Centre for the Study of African Economies, University of Oxford <http://www.csae.ox.ac.uk/materials/papers/2007-09text.pdf> (accessed 18 November 2019).

[160] L Mabuza, N Msezane & M Kwata 'Mining and corporate social responsibility partnerships in South Africa' (2010) 15 *Africa Institute of South Africa Policy Brief* 1 4.

[161] A Gillies, M Guéniat & L Kummer 'Big spenders Swiss trading companies, AFRICAN oil and the risks of opacity' (2014) 15 <https://resourcegovernance.org/sites/default/files/documents/bigspenders_20141014.pdf> (accessed 18 November 2019).

> In 2012, Vitol and Trafigura each received term contracts worth 30,000 barrels per day. Each of the companies also operates its own oil marketing joint venture with NNPC…and these entities each received additional 30,000 barrel per day allocations that year. However, rather than 60,000, market data suggests that Vitol bought closer to 145,000 barrels per day in 2012, and Trafigura 97,000—far exceeding their allotted shares, and a discrepancy that illustrates the laxity of the system.[162]

This complex alliance between extractive business and government sustains institutional corruption, deepens state weakness and affects the decision-making outcomes of governments. For example, in the 2010 Wikileaks cables, Shell claimed to have penetrated key ministries of the Nigerian government and 'consequently had access to everything that was being done in those ministries.'[163] The company infiltrated Nigeria so much so that it exchanged intelligence with US diplomats.[164] Given such situations of corporate capture of the regulatory state, it is hard to expect that states that are already structurally weak can assert their role in regulating abusive business activities and ensuring corporate human rights accountability.

4.5.3 Bribery and corruption

Entrenched bribery and corruption by rent-seeking political elites can operate to sabotage the regulatory effort of resource-dependent states in Africa. Vulnerabilities in such countries are either systemic or arise from the licencing process, the monitoring or implementation practice or connecting factors.[165] According to Transparency International, Sub-Saharan Africa remains the region with the lowest score on the Corruption Perception Index 2018, having failed to translate its anti-graft commitments into tangible progress. With longstanding political and socio-economic challenges, many of the states in the region 'struggle with ineffective institutions and weak democratic values, which threaten anticorruption efforts.'[166]

For countries with ineffective institutional oversight and accountability, bribery and corruption can negatively affect the policy direction of governments with respect to the administration of the oil, gas and mining sectors. Obioma argues that

[162] As above.
[163] D Smith 'WikiLeaks cables: Shell's grip on Nigerian state revealed' *The Guardian* 8 December 2010 <https://www.theguardian.com/business/2010/dec/08/wikileaks-cables-shell-nigeria-spying> (accessed 18 November 2019);
[164] A Sundby 'WikiLeaks: Shell oil infiltrated Nigerian gov't' *CBSNews* 8 December 2010 <https://www.cbsnews.com/news/wikileaks-shell-oil-infiltrated-nigerian-govt/> (accessed 18 November 2019).
[165] Transparency International and Transparency International Australia *Mining awards corruption risk assessment tool* (2017) 9.
[166] Transparency International 'Corruption Perception Index 2018' (2019) 11 <https://www.transparency.org/files/content/pages/2018_CPI_Executive_Summary.pdf> (accessed 18 November 2019).

corruption in resource-dependent economies are of four categories: administrative corruption, commercial corruption, grand corruption and, especially, policy corruption.[167] In his analysis, Obioma highlights that, in the case of policy corruption in the Nigerian petroleum industry, companies have influenced 'the design of sector policies, as well as the enactment of sector laws and taxes in a manner intended to provide political or personal gains at the public expense.'[168] In 2018, for example, Italian prosecutors filed criminal charges against the Chief Executive Officer of ENI and top Shell officials for the more than USD1 billion that was made in payments to secure oil prospecting licence (OPL) 245 from senior officials in the Nigerian government.[169]

Similarly, in South Africa, the numerous domestic corruption scandals rocking the mining industry and the uppermost ranks in government tell on the links between mining companies and senior government officials. Leonard states that the hobnobbing between private business and South African government officials have seen 'mining companies influencing government decision-making over mining development.'[170] Such instances of corruption dampen the ability of state institutions to function objectively in the administration and regulation of the extractive sector.

4.5.4 Corporate lobbying

A more formalised form of business capture of the regulatory state is corporate lobbying. Extractive corporations have been 'active lobbyists in regulatory debates' regarding environmental management, taxation and fiscal policies, global climate change and sustainable development.[171] They are determined to deploy the enormous wealth and resources at their disposal during negotiations with government in order to influence legislation and policy. For instance, in 2019, amidst the growing global campaigns against fossil fuels, Global Witness reported that 'oil and gas majors were planning to spend USD5 trillion (4.5 trillion Euros) on new

[167] Obioma (n 157 above) 102.
[168] As above; PA Donwa, CO Mgbame & OL Ogbeide 'Corruption in the Nigerian oil and gas industry and implication for economic growth' (2015) 14 *International Journal of African and Asian Studies* 29 34-35.
[169] K Gilblom, J Browning & C Albanese 'Shell, Eni officials named in $1 billion Nigeria lawsuit' *Bloomberg* 7 May 2019 <https://www.bloomberg.com/news/articles/2019-05-07/shell-eni-executives-named-in-1-billion-nigeria-bribery-suit> (accessed 16 October 2019).
[170] L Leonard 'Mining corporations, democratic meddling, and environmental justice in South Africa' (2018) 7 *Social Sciences* 259 266.
[171] C Cortese, HJ Irvine & M Kaidonis 'Standard setting for the extractive industries: A critical examination' (2007) 1 *The Australasian Accounting Business and Finance Journal* 1 3.

exploration by 2030'.[172] In furtherance of this plan, investigations by Friends of the Earth Europe, Corporate Europe Observatory, Food and Water Europe and Greenpeace have shown that since 2010 Shell, ExxonMobil, BP, Total and Chevron as well their respective trade representatives had held over 327 meetings and spent over EUR250 million on EU lobbying against drastic climate action.[173]

In countries with weak institutions, lobbying can enable powerful economic actors to influence regulations and undermine the public interest.[174] Given the lack of access to information in Africa, one can only imagine the volume of cash and resources dedicated to 'lobbying' senior government officials and lawmakers in African states.[175] In the course of this research, this researcher could find no evidence to show where lobbying is regulated in Africa. This leaves political office holders in African states exposed to the enticements and allure of corporate power in exchange of exploration and mining licences, weak implementation or laxed enforcement of industry rules in the extractive sector.

4.5.5 Illicit financial flows (IFFs)

Another area where host states in Africa prove vulnerable to corporate capture is illicit financial (out)flows (IFFs). Due to the weak fiscal governance in the extractive sector of many countries, governments are often unable to effectively monitor and plug all avenues of IFFs and revenue leakages. A 2018 OECD report on IFFs in Africa states that IFFs cost Africa over USD50 billion every year.[176] A similar report by the High-Level Panel on Illicit Financial Flows from Africa established by the UN Economic Commission for Africa in 2015 estimates that between USD1.2 and 1.4 trillion were illegally repatriated from the continent between 1980 and 2009. The Panel found

[172] Global Witness 'Big oil is set to spend $5 trillion on fossil fuels we can't afford to burn' 23 April 2019 <https://www.globalwitness.org/en/blog/big-oil-set-to-spend-5-trillion/> (accessed 16 October 2019).

[173] Friends of the Earth Europe 'Big oil spent over 250 million euros lobbying the EU' 24 October 2019 <https://www.foeeurope.org/big-oil-spent-over-250-million-lobbying-EU-241019> (accessed 24 October 2019).

[174] F Bourgouin 'The politics of large-scale mining in Africa: Domestic policy, donors, and global economic processes' (2011) 111 *Journal of the Southern African Institute of Mining and Metallurgy* 525-528.

[175] NF Campos & F Giovannoni 'Lobbying, corruption and political influence' (2007) 131 *Public Choice* 1-21; Transparency International 'In whose interest? Political integrity and corruption in Africa' 11 July 2019 <https://www.transparency.org/news/feature/political_corruption_and_political_integrity_in_africa> (accessed 11 November 2019). *Cf* A Cuervo-Cazurra 'The effectiveness of laws against bribery abroad' (2008) 39 *Journal of International Business Studies* 634-651.

[176] OECD *Illicit Financial Flows: The Economy of Illicit Trade in West Africa* (2018) 13; Claire Guyot 'Illicit financial flows cost Africa $50 billion a year, states new report' 22 February 2018 <https://www.euractiv.com/section/africa/news/illicit-financial-flows-cost-africa-50-billion-a-year-states-new-report/> (accessed 24 July 2019).

that about 65% of all IFFs that occurred in Africa were done by business, while the remaining 30% and 5% occurred through crime and corruption, respectively.[177]

The above reports found that the highest incidents of IFFs occurred in the extractive sector and were concentrated in a few countries. For instance, more than 56.2% of IFFs from Africa come from oil, iron and steel, copper, precious metals and mineral. The Panel states

> Nearly three-fourths of the total IFFs in oil from Africa during 2000–2010 are from Nigeria (34.5 per cent), Algeria (20.1 per cent) and Sudan (12.0 per cent; ECA 2012). In precious metals and minerals, iron and steel, and ores, the greatest shares in total IFFs from Africa are from the Southern African Customs Union (SACU), with 97.6 per cent, 59.7 per cent and 51.8 per cent, respectively. Zambia accounts for 65 per cent of the continent's IFFs in copper.[178]

The Panel found that extractive corporations and financial institutions involved in the sector connive with corrupt government officials to dubiously ship off taxable revenues out of Africa to prominent countries like the United States, Germany, France, Canada, China, Japan, India and South Korea. Particularly, extractive TNCs employ various tax avoidance tactics such as ghost company registration in secrecy jurisdictions, company registration in tax havens, transfer pricing, trade mis-invoicing and mispricing, posting fictitious losses and money laundering, all in a bid to circumvent tax payments. The reports also show how IFFs undermine state structures, depicting that resource-rich states with non-existent or inadequate institutional architecture were most vulnerable.[179] The above inexhaustive list of factors that precipitate and sustain the corporate capture of host governments dash hopes of strong corporate regulation in host states.

4.6 Impacts of state weakness on corporate accountability: Nigeria and elsewhere

The consequences of the structural institutional and governance lapses in African countries are two-fold. On the one hand, there is a resulting lack of accountability

[177] M Tafirenyika 'Illicit financial flows from Africa: Track it, stop it, get it' *African Renewal* December 2013 <https://www.un.org/africarenewal/magazine/december-2013/illicit-financial-flows-africa-track-it-stop-it-get-it> (accessed 20 July 2019); I Countess 'Illicit financial flows thwart human rights and development in Africa' 5 February 2015 <http://www.cadtm.org/Illicit-financial-flows-thwart-human-rights-and-development-in-Africa> (accessed 24 July 2019).

[178] UN Economic Commission for Africa 'Illicit Financial Flows: Report of the High Level Panel on Illicit Financial Flows from Africa' (2015) 97 <https://www.uneca.org/sites/default/files/PublicationFiles/iff_main_report_26feb_en.pdf> (accessed 26 July 2019).

[179] UN Economic Commission for Africa (n 178 above) 20; R Jenkins 'Globalization, corporate social responsibility and poverty (2005) 81 *International Affairs* 525 531.

of corporations involved in human rights abuses, while on the other, there is the unavailability, inadequacy or ineffectiveness of local remedies for victims. In this section, I undertake an analysis of several case studies concerning environmental, social and human rights abuses in Nigeria and elsewhere in Africa that exemplify the inadequacy of human rights protection and lack of accountability in host states.

4.6.1 Analysis I: Weak regulation and remedies in Nigeria

Nigeria's Niger Delta region comprises nine states with over 800 oil producing communities located in the southern part of the federation.[180] The states – Ondo, Edo, Delta, Bayelsa, Rivers, Akwa Ibom, Cross River, Abia and Imo - cut across the South-West, South-South and South-East political zones. The region is probably prominent for not just its large deposits of oil and gas resources but also for being one of the most polluted and impoverished places on earth. Since 1957 when oil was first discovered in commercial quantities in the region to date, there has been an orgy of oil spills; in all, over 12 000 documented spillages accounting for over 1.5 million tonnes of crude.[181] Yet, both laws and institutions continue to prove inadequate to rein in on corporate abuses and protect victims.

(a) Old laws for complex new industry challenges

Beyond its weak judicial protection of human rights, Nigeria maintains an antiquated cache of laws and regulations relevant to the extractive industries that run short of its human rights obligations. First of all, companies engaged in the business of mineral extraction are incorporated, administered and regulated in accordance with Nigeria's companies' legislation. Until 2018 (when a review was undertaken to promote greater ease of doing business in Nigeria), this was done under the Companies and Allied Matters Decree (Act) 1 of 1990.[182] The Decree consolidated the Companies Act 51 of 1968, Registration of Business Names Act 17 of 1961 and Land (Perpetual Succession) Act 21 of 1926.[183] However, companies had no environmental, social or human rights obligations, and the passage of the Companies and Allied

[180] Ministry of Petroleum Resources 'National Petroleum Policy: Nigerian Government policy and actions' (2017) 41 <http://www.petroleumindustrybill.com/wp-content/uploads/2017/07/National-Petroleum-Policy-Approved-by-FEC-in-July-2017.pdf> (accessed 18 October 2019).

[181] As above, 43; E Chinedu & CK Chukwuemeka 'Oil spillage and heavy metals toxicity risk in the Niger Delta, Nigeria' (2018) 8 *Journal of Health and Pollution* 1 2; B Ordinioha & S Brisibe 'The human health implications of crude oil spills in the Niger delta, Nigeria: An interpretation of published studies' (2013) 54 *Nigerian Medical Journal* 10-16.

[182] By virtue of section 315(1)(a) of the 1999 Constitution, all Decrees adopted during the military regimes are deemed to be Acts of the National Assembly to the extent that they dwell on matters on which the National Assembly is empowered to make laws.

[183] The Companies Act 51 of 1968 is itself traceable to the Companies Ordinance 1912.

Matters Act 2018 after nearly three decades later, nevertheless, failed to tag companies with such a responsibility. Considering that this reform has been undertaken at a time when the global discourse on business and human rights has gained traction, it does not get any stranger that such a contemporary legislation could fail so abysmally to incorporate provisions of either the African Charter or the UNGPs in its provisions.

Despite the much-needed reforms, Nigeria's principal regulatory framework for the oil, gas, mining, health, labour and the environmental sectors remain primarily dominated by colonial laws and regulations. The current legislation on oil, gas and mining trace their origins to the Southern Nigeria Mining Regulation (Oil) Ordinance of 1907.[184] This Ordinance was based on the Colonial Model Oil Mining Regulations and was subsequently replaced by the Mineral Oils Ordinance of 1914.[185] After amendments to the Ordinance in 1925 and 1950, the colonial Mineral Oils Act 120 of 1958 was enacted, soon after Shell discovered oil in commercial quantities in 1956.[186]

In the wake of Nigeria's political independence from Britain, Act 120 of 1958 was subsequently replaced with the Petroleum Act 150 of 1958 and the Petroleum Fuel Control Act 151 of 1958.[187] Soon after Nigeria sunk into military rule, the 1958 Act was replaced with the Petroleum Control Decree (Act) 28 of 1967 and the Petroleum Regulations 1967 conferring supervisory authority over the petroleum industry on the military government.[188] Decree 28 was subsequently revised and returned a year later as the Petroleum Act 69 of 1969. It is this piece of legislation that provides the authority for regulating pollution in the oil industry.[189] Now an

[184] P Steyn 'Oil exploration in colonial Nigeria' (2006) 8 XIV International Economic History Congress, Helsinki 2006 Session 11 <http://www.helsinki.fi/iehc2006/papers1/Steyn.pdf> (accessed 19 November 2019).

[185] BS McBeth *British oil policy, 1919-1939* (1985) 2.

[186] The Mineral Oils (Safety) Regulations 1962 (Laws of Nigeria Cap 45 of 1963) was enacted as a subsidiary legislation under the Mineral Oils Act. The Regulations was not revised until 1997 vide the Mineral Oils (Safety) Regulations 1997. Till date, 22 years later, no further revisions have been undertaken on this critical piece of legislation. Also see Deep Water Block Allocations to Companies (Back-in-Rights) Regulations; Oil Prospecting Licences (Conversion to Oil Mining Leases, etc.) Regulations

[187] Laws of Nigeria Caps 150-151 of 1958; Laws of Nigerian Cap 45 of 1963.

[188] Laws of Nigeria Cap 71 of 1967; Petroleum (Amendment) Regulation 1989. For further reading on Nigeria's military rule, see TO Okoloise 'The military bureaucracy and political change in Nigeria' unpublished Doctoral dissertation, Texas Southern University, 1977.

[189] Section 9.

archaic law, the Act confers wide discretion on the President and Minister of Petroleum and has remained in force for the past 50 years.

In 2000, the government introduced the Petroleum Industry Bill (PIB) to revise the Petroleum Act and overhaul and transform the upstream and downstream petroleum sectors. The 362-section Bill seeks to establish a comprehensive framework for the petroleum industry. It makes a decent effort to address pertinent issues such as protected objects, consultation, environmental pollution, remediation of environmental damage, decommissioning of oil wells, corporate compliance with health regulations, duty for environmental restoration and corporate social responsibility.[190] A drawback in the Bill is its complete silence on the corporate responsibility to respect human rights. Considering the currency of the legislation in the wake of the UNGPs, it is expected that such new legislation should recognise the nexus between business and human rights in its provisions.

However, administration after administration, the PIB is yet to see the light of day 21 years after its introduction. Strong lobbying against the passage of the Bill by corporations and contentious issues dealing with resource revenues and the rights of host communities have persistently prevented its passage. To circumvent the consensus hurdle and ensure the badly needed reforms in the industry, the Bill was broken up into four new Bills: Petrol Industry Governance Bill, Fiscal Regime Bill, Upstream and Midstream Administration Bill, and Petroleum Host Communities Bill.[191] The first of these Bills, the Petroleum Industry Governance Bill, was passed by the National Assembly in 2018, but the President withheld his assent because the Bill reduces the power of the President and petroleum minister to supervise and award oil licences and contracts.[192] The Attorney-General of the Federation has justified this refusal of assent on the ground that the Bill 'provided more priority to the individual more than the public interest.'[193]

[190] Petroleum Industry Bill (2012 version) secs 198-201, 203-205, 290 & 293-294.

[191] J Payne & C Eboh 'Nigeria passes major oil reform bill after 17 year struggle' 18 January 2018 <https://www.reuters.com/article/us-nigeria-oil-law/nigeria-passes-major-oil-reform-bill-after-17-year-struggle-idUSKBN1F72I2> (accessed 21 November 2019).

[192] P Carsten 'Update 1-Nigeria's presidency rebuffs landmark oil reform bill in current form' *Reuters* 29 August 2018 <https://www.reuters.com/article/nigeria-oil/nigerias-presidency-rebuffs-landmark-oil-reform-bill-in-current-form-sources-idUSL3N1VJ55M> (accessed 21 November 2019).

[193] SaharaReporters, New York 'Why President Buhari didn't sign Petroleum Industry Governance Bill --Attorney-general' *SaharaReporters* 27 July 2019 <http://saharareporters.com/2019/07/27/why-president-buhari-didnt-sign-petroleum-industry-governance-bill-attorney-general> (accessed 21 November 2019).

Other pieces of legislation that are essential to address the adverse environmental, social and human rights impacts of oil and gas production such as Oil Pipelines Decree (Act) 31 of 1956, Hydrocarbon Oil Refineries Decree (Act) 17 of 1965 and Oil in Navigable Waters Decree (Act) 34 of 1968, exist which are also now all outdated.[194] That is not to say that there have been no relatively new laws and policies. However, those new laws and policies fall short of making important normative leaps in terms of holding corporations accountable for human rights breaches or advancing the human rights protection of individuals and communities. For example, Nigeria adopted the National Petroleum Policy and the National Gas Policy 2017.[195] Yet, nowhere in either document – as recent as they are - are human rights expressly articulated nor are communities the centre of policy protection.

Nigeria introduced the Deep Offshore and Inland Basin Production Sharing Contracts Decree (Act) 15 of 1993 to regulate deep offshore oil production and imposed a 12% royalty fee for PSAs in which the Federal Government is involved. Cosmetic revisions have been adopted since then with no significant change or effort to address the human rights and environmental challenges faced by victims.[196] The latest version of the law is the Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act of 2019 assented to by Nigeria's President on 5 November 2019.[197] The Act raised government royalties to 50% for oil and gas produced in deep offshore and inland basins and adopts a price-based royalty regime for condensate,

[194] Oil Pipelines Act 31 of 1956 secs 11(5) & 17(4), (amended by 24 of 1965) Cap O7 LFN 2004. Also see Environmental Impact Assessment Act 86 of 1992 secs 2(1)(4), 13 & 60; The Land Use Act 3 of 1978; Harmful Waste (Special Criminal Provisions) Act 42 of 1988 Cap H1 LFN 2004 secs 6, 7 & 12; Hydrocarbon Oil Refineries Act 17 of 1965 secs 1 & 9; Oil in Navigable Waters Act 34 of 1968 Cap O6 LFN 2004 secs 1(1), 3, 6 & 7; Associated Gas re-injection Act 99 of 1979 secs 3(1) & 4; Sea Fisheries Act 71 of 1992 Cap S4 LFN 2004 secs 10 & 14(2); Exclusive Economic Zone Act 28 of 1978 Cap E11 LFN 2004; Factories Act 16 of 1987 Cap F1 LFN 2004 sec 13; Petroleum Production and Distribution (Anti-Sabotage) Act 35 of 1975 Cap P12 LFN 2004; Territorial Waters Act 87 of 1963 (amended by 38 of 1971, 98 of 1977 and 1 of 1998); River Basins Development Authority Act 35 of 1987; Water Resources Act 101 of 1993 W2 LFN 2004; Federal National Park Act 46 of 1999; Nigerian Mining Corporation Act 39 of 1972; Criminal Justice (Miscellaneous Provisions) Act 30 of 1975; The Nigerian Oil Gas Industry Content Development Act 2 of 2010.

[195] Ministry of Petroleum Resources (n 180 above); Ministry of Petroleum Resources 'National Gas Policy: Nigerian Government policy and actions' (2017) 43 <http://www.petroleumindustrybill.com/wp-content/uploads/2017/06/National-Gas-Policy-Approved-By-FEC-in-June-2017.pdf> (accessed 19 November 2019)

[196] The Decree 15 was replaced with the Deep Offshore and Inland Basin Production Sharing Contracts Decree (Act) 9 of 1999 (amended by Deep Offshore and Inland Basin Production Sharing Contracts (Amendment) Decree 26 of 1999).

[197] O Oke, M Omidiran & D Oshodi 'Nigeria: The Deep Offshore and Inland Basin Production Sharing Contract (Amendment) Act 2019: Matters arising' 12 November 2019 <http://www.mondaq.com/Nigeria/x/862970/Oil+Gas+Electricity/The+Deep+Offshore+and+Inland+Basin+Production+Sharing+Contract+Amendment+Act+2019+Matters+Arising> (accessed 21 November 2019).

crude oil and gas to plug rental leakages. However, it fails to address the effects of stabilisation clauses on existing BITs, JVCs and PSAs between Nigeria and oil multinationals. It has been suggested that Nigeria would need to renegotiate with contractor parties in existing PSAs and JVCs in order to align the terms of the PSAs with the fiscal stipulations of the new Act.[198]

More so, subsisting environmental pollution in the oil and gas sector suggests that Nigeria's laws and environmental governance framework are ineffective in practice. Despite having a robust environmental framework and several environmental enforcement agencies, oil spills and gas flares have continued unabated.[199] In 2017 alone, oil companies flared about one billion standard cubic feet per day of associated gas; that is, about 19% of associated gas from the total crude oil produced.[200] With this figure, Nigeria produces an estimated 350 to 400 million tonnes of CO2 emissions per year which is roughly 2% of global CO2

[198] Banwo & Ighodalo 'Stabilization clauses in production sharing contracts – How relevant in the light of amendments to the Deep Offshore and Inland Basin (Production Sharing Contract) Act?' (2019) 3 <https://banwo-ighodalo.com/assets/grey-matter/3bf57a40d7c25f22e0be9b860c7de8d1.pdf> (accessed 8 November 2019).

[199] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (or NESREA Act); National Oil Spill, Detection and Response Agency (NOSDRA) Act 2006. The NESREA Act is supplemented by 33 important regulations the following of which are relevant to the extractive industries: National Environmental (Wetlands, River Banks and Lake Shores) Regulations SI 26 of 2009; National Environmental (Watershed, Mountainous, Hilly and Catchments Areas) Regulations SI 27 of 2009; National Environmental (Sanitation and Wastes Control) Regulations SI 28 of 2009; National Environmental (Permitting and Licensing System) Regulations SI 29 of 2009; National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations SI 31 of 2009; National Environmental (Ozone Layer Protection) Regulations SI 32 of 2009; National Environmental (Noise Standards and Control) Regulations SI 35 of 2009; National Environmental (Soil Erosion and Flood Control) Regulations SI 12 of 2011; National Environmental (Desertification Control and Drought Mitigation) Regulations SI 13 of 2011; National Environmental (Base Metals, Iron and Steel Manufacturing/Recycling Industries) Regulations SI 14 of 2011; National Environmental (Control of Bush/Forest Fire and Open Burning) Regulations SI 15 of 2011; National Environmental (Coastal and Marine Area Protection) Regulations SI 18 of 2011; National Environmental (Construction Sector) Regulations SI 19 of 2011; National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations SI 20 of 2011; National Environmental (Non-Metallic Minerals Manufacturing Industries Sector) Regulations SI 21 of 2011; National Environmental (Surface and Groundwater Quality Control) Regulations SI 22 of 2011; National Environmental (Electrical/Electronic Sector) Regulations SI 23 of 2011; National Environmental (Quarrying and Blasting Operations) Regulations SI 33 of 2013; National Environmental (Air Quality Control) Regulations SI 64 of 2014; National Environmental (Dams and Reservoirs) Regulations SI 66 of 2014; National Environmental (Hazardous Chemicals and Pesticides) Regulations SI 65 of 2014; Crude Oil Transportation and Shipment Regulations SI 44 of 1984; National Environmental (Energy Sector) Regulations SI 63 of 2014; Petroleum Drilling and Production Regulations SI 2 of 2020 (revised in 1988, 1996, 2001 & 2006) secs 17(1)(b), 23, 25 & 27; Guidelines and Procedures for the Design, Construction, Operation and Maintenance of Oil and Gas Pipeline Systems in Nigeria 2007. Also see 1999 Constitution sec 20.

[200] Department of Petroleum Resources '2017 oil and gas industry annual report' (2018) 11 <https://www.dpr.gov.ng/wp-content/uploads/2018/10/2017-NOGIAR-WEB.pdf> (accessed 21 November 2019).

emissions.[201] With the continuation of gas flaring and oil spills, the goal of curbing the degree of harm to the environment remains a distant dream. Presently, there exists roughly 180 flare sites in Nigeria.[202]

Efforts to mandate companies to reinject associated gas into the earth have failed due to old laws such as the Associated Gas Reinjection Act 99 of 1979 and the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations SI 43 of 1984. The federal government developed the Nigeria Gas Flare Commercialisation Programme that seeks to supply more gas into the domestic market.[203] It also introduced the Flare Gas (Prevention of Waste and Pollution) Regulations 2018. However, it is yet to be seen how the commercialisation programme and the 2018 regulations will be enforced against oil companies considering Nigeria's history of poor environmental regulation and accountability.

In the case of mining, the industry was, for a long time, similarly governed by old laws that proved irrelevant to contemporary challenges. Until 2007, Nigeria's mining laws retained much of the provisions of the colonial Minerals Ordinance. The Ordinance was updated first in the 1950s as the Minerals Act 121 of 1958 Laws of Nigeria, then as the Minerals and Mining Act 34 of 1999 and, currently, the Minerals and Mining Act 20 of 2007. The current Act 20 of 2007 is supplemented by the Minerals and Mining Regulations 2011 SI 47 of 2011. These prescribe the current legal and regulatory framework for mining in Nigeria. Although relatively current, these pieces of mining legislation similarly lack a human rights language and fail to attribute human rights obligations to mining companies. Thereby, offering very faint protection to individuals and communities most proximate to the theatre of mineral extraction activities.

Considering the high risk of accidents and pollution in the oil, gas and mining industries, it is clear that the seemingly sluggish pace of legislative reforms in Nigeria barely advance the human and peoples' rights of communities. Unlike Senegal's Mining Code Law 2016-32 that expressly provides for non-discrimination and the protection of human rights and the environment, the recent partial reforms in the

[201] Department of Petroleum Resources (n 200 above) 10.
[202] Federal Government of Nigeria 'Nigerian Gas Flare Commercialisation Programme: Programme information memorandum January 2019 (Rev 1)' (2019) <https://ngfcp.dpr.gov.ng/media/1134/ngfcp-pim-rev1.pdf> (accessed 21 November 2019).
[203] As above, 19.

extractive industries in Nigeria fall short in this material respect.[204] Regardless of their currency, nothing in the recently enacted oil, gas and mining legislation prevents companies from committing abuses where paying fines and penalties would be more profitable than taking potentially costly preventive action. As Etikerentse states, even in the best of oilfield practice, oil spills and the consequential pollution are bound to occur.[205] The weak protection afforded in the sector make the current domestic regime grossly inadequate for individuals and communities adversely affected by mining companies.

(b) An elaborate human rights framework slackened by weak adjudication

Amidst its cache of non-human rights inclusive laws, Nigeria has an elaborate environmental, labour and human rights framework to protect individuals and communities from corporate abuses in the extractive industries. Human and peoples' rights are enshrined in both its constitutional and legislative corpus. In Chapter Four of the Constitution of the Federal Republic of Nigeria 1999 (1999 Nigerian Constitution), Nigeria enshrined a Bill of Rights that guarantees the fundamental rights of all individuals in Nigeria. The Bill of Rights is complemented by a fairly robust environmental framework for regulating the adverse impact of mining on health, safety and the environment (land, water and air).[206]

Nigeria has ratified several international human rights standards that impose a compelling duty on the state to protect human rights and regulate the activities of non-state actors in its territory. As party to several UN, ILO and OAU/AU human rights instruments, it is bound by its treaty obligations to protect human and peoples' rights in its territory.[207] Notably, Nigeria domesticated the African Charter on 17 March 1983 in the form of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 2 of 1983 (African Charter Act).[208] It is the first and only country on the continent to wholly domesticate the Charter word-for-word.[209] This incurs profound consequences for the scope of human rights protection domestically. For instance, whilst economic, social and cultural rights as well as peoples' rights are not justiciable in the 1999 Constitution, they are expressly guaranteed by the

[204] Code Minier Loi No 2016-32 arts 84, 94 & 95.
[205] G Etikerentse *Nigerian Petroleum Law* (1985) 73.
[206] n 200 above.
[207] Vienna Convention on the Law of Treaties 1969 art 26.
[208] Cap A9 Laws of the Federation of Nigeria 2004; Cap 10 Laws of the Federation 1990.
[209] VO Ayeni 'Impact of the African Charter and the Maputo Protocol in Nigeria' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 183 186-187; F Viljoen *International human rights law in Africa* 2nd ed (2012) 527.

African Charter Act.[210] This implies that all categories of rights – civil and political, socio-economic and group rights – are justiciable in Nigeria.[211] As such, violations of any category of rights arising from the operations of oil and gas companies are arguably justiciable in Nigeria.

In principle, allegations of human rights and environmental abuses in Nigeria's oil and gas industries can be determined by an elaborate court structure and hierarchical system of judicial appeals.[212] Under the 1999 Constitution, allegations of human rights abuses by companies may be instituted before the Federal High Court or a state High Court (including the High Court of the Federal Capital Territory, Abuja).[213] Matters concerning a federal body or institution or that fall within the Exclusive Legislative List of the Constitution may be proceeded before any division of the Federal High Court.[214] And any matter not listed as falling within the jurisdictional competence of the Federal High Court may be litigated before a State High Court.[215] The National Industrial Court, a court of concurrent jurisdiction with the Federal High Court, has judicial powers to adjudicate on all disputes pertaining to employment, wages, collective bargaining and trade or industrial unions even in relation to oil-related cases.[216] Appeals from these courts of first instance as a matter of course proceed to the Court of Appeal and, thereafter, the Supreme Court.

However, the provision of a comprehensive framework and system of courts notwithstanding, legal, procedural and practical barriers make domestic litigation of oil-related cases an extraordinary and often costly task. First, *legal barriers* exist in the form of statutory limitations of time within which victims of corporate wrongs may bring civil proceedings before courts.[217] Although the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules) states that human rights claims

[210] African Charter Act arts 15-17. *Cf* 1999 Nigerian Constitution secs 6(6)(c), 13-20.
[211] EO Ekhator 'The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria' (2015) 41 *Commonwealth Law Bulletin* 253 260-261; MC Okoloise 'Protection of human rights in Nigeria and relevance of international human rights law' unpublished LLB dissertation, Ambrose Alli University, 2010, 99-104; AN Nwanzuoke 'The impact of the African Charter on the enforcement of human rights in Nigeria' (2005) 3 *Nigerian Bar Association* 65-78.
[212] 1999 Nigerian Constitution secs 230-259, 270-274, 286-294.
[213] 1999 Nigerian Constitution sec 46.
[214] 1999 Nigerian Constitution sec 251.
[215] 1999 Nigerian Constitution sec 272.
[216] 1999 Nigerian Constitution sec 254C.
[217] *John Eboigbe v The Nigerian National Petroleum Corporation* (1994) 6 SCNJ 71.

are not barred by statutes of limitation,[218] it is yet to be tested whether the FREP Rules, as a secondary body of rules, can override statute.

Second, *procedural barriers* such as jurisdictional hurdles, judicial rules on classification of claims, representative (or class) actions and service of court processes on corporate entities, delay tactics, and acute congestion of courts can lead to losses on technical grounds in court.[219] This can operate to prevent or discourage legal action against corporations in Nigeria and obfuscate victims from effectively litigating claims before courts. Lastly, *practical difficulties* such as cost of litigation, inaccessibility of evidence or information, distance, intimidation or killing of witnesses, political interference and the power differential between TNCs and claimants weigh in on the quest of justice.

Additional to these barriers is a judicial inertia to promptly identifying the human rights elements of cases categorised from the outset as purely tort. Short of prioritizing social justice over the economic interests of oil majors, there is often lacking a human rights approach in judicial reasoning to assess the reasonableness or justifiability of corporate actions, state security agencies or statute. To exemplify the state of judicial inertness in Nigeria, Frynas states that despite the frequency of oil spills litigation between the 1980s and 1990s, there has been 'a general paucity of studies on judicial law-making' in Nigeria.[220] This he attributes to the weak quality of judgments which are often merely descriptive of substantive law and the failure by academics to investigate and clarify the surge in oil-connected cases in Nigeria.

After considering 28 oil-related cases in his scholarly article, Frynas found that 'the economic interests of the oil industry appeared to be more important to the judge than the course of justice.'[221] Not only did courts fail to treat oil spill cases as a human rights issue or assess the claims of pollution and deprivation of livelihood against the standards of domestic and international human rights law, there was a prioritisation of the economic needs of the state and companies over and above that of affected individuals and communities. For instance, in the case of *Chinda v Shell-BP*,[222] the Judge found that the claimants' demand that the gas flares operated by

[218] FREP Rules Order III.
[219] T Osipitan 'Problems and causes of delay in the litigation process in Nigeria' in CO Okonkwo (ed) *Contemporary issues in Nigerian law: Essays in Honour of Justice Bola Ajibola* (1992) 490 491.
[220] JG Frynas 'Legal change in Africa: Evidence from oil-related litigation in Nigeria' (1999) 43 *Journal of African Law* 121 121-122.
[221] Frynas (n 220 above) 122-123.
[222] 12 (1974) 2 RSLR 1.

Shell within five miles of their village must be discontinued was 'an absurdly and needlessly wide demand'.[223] To exemplify the degree of corporate confident in such state of judicial inertia, a senior Shell staff is on record to have boasted that '[t]he law is on our side because in the case of a dispute, we don't have to stop operations.'[224]

That is not to say that the human rights provisions in the Constitution and the African Charter Act have not been advanced by the courts. They have, but mostly only when allegations of human rights violations have been expressly pleaded by the plaintiffs. The cases of *Gbemre v Shell Petroleum Development Company of Nigeria*,[225] *Odafe v Attorney General of the Federation*,[226] *Ubani v Director, State Security Service*,[227] *Abacha v Fawehinmi*,[228] to name a few, are instructive. A reason for this is that, regardless of the constitutional and statutory guarantees of human rights in Nigeria, judges slavishly rely on common law principles of pleadings. Under such rules, a court cannot adjudicate on human rights claims that have not been expressly pleaded before it.[229]

More so, unlike the constitutions of countries like South Africa, Kenya and Zimbabwe which expressly require the actions of government organs and private enterprises to comply with the Bill of Rights, there is no such obligation categorically binding Nigerian courts. This suggests that even if Nigerian courts could competently highlight the human rights elements of civil claims as an issue of law regardless of whether it has been expressly pleaded by the parties, they may not be constitutionally bound to do. This leeway for judicial discretion muzzles the judiciary's commitment to prioritising human rights protection as against weighing the harms committed by oil companies against the obfuscating requirement of proof of negligence. It is for this reason that many academic scholars and jurists believe that tort law principles offer no effective remedy to victims of oil spills.

Thanks to Nigeria's common law tradition, majority of the oil-related cases show that Nigerian courts are, more often than not, likely to treat human rights

[223] As above, 14. See also in *Siesmograph Services (Nigeria) Ltd v Ogbeni* (1976) 4 SC 85 (*Ogbeni* case).
[224] Personal interview with JA Odeleye, SPDC's Legal Manager and Company Secretary (Lagos, February 1998) cited in Frynas (n 220 above) 123.
[225] (2005) AHRLR 151 (NgHC 2005) para 5.
[226] (2004) AHRLR 205 (NgHC 2004) paras 37-39.
[227] (1999) 11 NWLR (625) 129.
[228] (2000) 6 NWLR (660) 228.
[229] *Imana v Robinson* [1979] 3-4 SC 1 9.

violations as purely tort issues. As Okonmah confirms, not only are victims of oil pollution exposed to weak statutory protection, they are often 'left to the vagaries of the common law regime based largely on the torts of trespass to land, nuisance, negligence and the rule in *Rylands v Fletcher*.'[230] Illustrating how limited an approach this is, Okonmah argues that for Nigerian judges, *negligence* is the single most important element of causation, duty, breach and damages in oil-pollution cases in the Delta.[231]

The problem with treating human rights matters as tort is the evidentiary shift from the person to the harm. Under the civil law of tort, the onus is on the plaintiff to prove not merely the fact that a violation or injury had be caused by the defendant. Proof must also be adduced to show either that the defendant was reckless in the exercise of the duty of care or failed to exercise 'good oil field practice' (as required by the Petroleum Act 69 of 1969) or violated the obligations and conditions imposed by Nigeria's mining laws.[232] These are requirements which require special knowledge and which the plaintiff may not often have. In the absence of any statutory requirement prescribing strict liability for environmental harm and human rights violations, the judiciary – as the last hope of the common man and woman – is often expected to rise to the occasion of ensuring adequate justice. Unfortunately, where the law falters, Nigerian judges seem to fail in this regard, neglecting to take on an activist approach that is tilted in favour of protecting the rights and dignity of communities.

Several cases demonstrate this current state of judicial stasis in Nigeria,[233] but for the purpose of this analysis, I will rely on one striking case. In *Siesmograph Service v Mark* (*Mark* case),[234] which pertained to violations committed by an oil services company, the plaintiff's fishing nets on which he depended for his livelihood and wellbeing had been destroyed by the defendant's seismic boats. The defendant was an oilfield services company operating in Nigeria. At the trial, there was no question that the defendant was responsible for the damage. Yet, the plaintiff's claims were rejected by the court on the ground that there was a failure to establish

[230] P Okonmah 'Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta' (1997) 41 *Journal of African Law* 43.
[231] Okonmah (n 230 above) 49.
[232] Minerals and Mining Regulations 2011 SI 47 of 2011 secs 20-22.
[233] *Ogbeni* case (n 223 above); *Seismograph Service v Akporuovo* (1974) All NLR 95; *Amos v Shell-BP* 4 ECSLR 486.
[234] (1993) 7 NWLR 203.

that the company's destructive actions were negligent. In dismissing the claims for lack of proof of negligence, the Court held that 'the allegation that the vessel "tore" through and carried the floaters, etc away is not by itself suggestive of excessive speed or any amount of negligence.'[235]

Here, it was not difficult for the court to appreciate – in the very least – that there had been a violation of the plaintiff's rights to livelihood, food and property by the oilfield services company. Yet, because the court neglected to consider the human rights components of the claim – even where not expressly pleaded – it glossed over the immediate and long-term adverse socio-economic and human rights ramifications of the defendant's actions on the plaintiff's livelihood and dignity. As a consequence, the court failed to fairly consider the impact of the defendant's actions on the plaintiff's human rights to determine whether they were, in fact, justified. By religiously applying tort rules to clear cases of human rights violations, the court lost sight of the broader picture that *the person* more than *the injury* is the true centrepiece of the domestic human rights edifice.

(c) Protracted litigation and recurring corporate violations

In addition to the weak adjudication of oil-spill cases, Nigerian superior courts of record are currently overwhelmed by a backlog of environmental and social justice cases going over several decades.[236] This can be problematic to the cause of justice considering that victims directly impacted by environmental tragedies in the Niger Delta are met by strangulating delay in court. Human Rights Watch confirms that '[d]elays plague the course of litigation against oil companies' in Nigeria.[237] Since the 1970s, hundreds of oil spill-related cases have lingered in Nigerian courts for generations, with many remaining in court beyond the victims' lifetime.

The case of *Agbara v Shell Petroleum Development Company* (*Ejama-Ebubu* case)[238] filed in 2001 on account of 'continuing nuisance' is perhaps the best-known

[235] *Mark* case (n 234 above) 212. See also O Amao *Corporate social responsibility, human rights and the law: Multinational corporations in developing countries* (2011) 129-131.

[236] EC Okonkwo 'Assessing the role of the courts in enhancing access to environmental justice in oil pollution matters in Nigeria' (2020) 28 *African Journal of International and Comparative Law* 195 203; F Dada & E Alemika 'Meeting the need for a technologically driven justice delivery system: The elixir of rights and judicial expediency' (2020) 11 *Beijing Law Review* 805 806; TOS Owolabi & EC Okonkwo 'Compensation for environmental pollution and justice procurement in the Niger Delta area of Nigeria: The mass media role' (2014) 16 *Journal of Sustainable Development in Africa* 35 41-42.

[237] Human Rights Watch *The price of oil: Corporate responsibility and human rights violations in Nigeria's oil producing communities* (1999) 157

[238] Unreported Suit No. FHC/ASB/CS/231/2001 14 June 2010 (*Ejama-Ebubu* case).

example of a community's quest for social justice for over 40 years. The claim was based on a massive spill of over 2 000 000 barrels of crude oil involving Shell's operations in the Ejama Ebubu community at the height of the Nigerian Civil War in 1970. The spill saturated 255 hectares of arable land and contaminated the only stream supporting the community. For decades, there was a war of words between the community and Shell as to the real cause of the spill. While the community attributed the rupturing of pipelines and the resulting spills to Shell's negligence, Shell attributed the spill to sabotage by the retreating Biafran rebels. The claims included a demand of special damages of N5.4 billion for the destruction of renewable crops, loss of income, injurious affliction, health hazards and desecration of ancestral shrines, and general damages to the tune of N10 billion. This also included interest of 25% from the date of the cause of action to the date of judgment and 10% from the date of the judgment debt to the time of payment.

At the trial, it was established in evidence that although Shell continued crude oil extraction after the Civil War, it did nothing to stop the continuing oil leakages into nearby community streams and farmlands for over 15 years. The claimants relied on documentary evidence to prove that the land had become 'unfit for human activity' and called in aid expert opinion to show that 'it would take 30 years from 21st November, 2001' for the polluted area to recover from the contamination.[239] There were also written correspondences from Shell to the community showing acknowledgment of the pollution. Yet, after employing several delay tactics to frustrate the case, Shell failed to respond to the claims despite having participated at the trial.

After ten years of trial and 40 years since the original spill, the Court concluded the case through a final judgment delivered on 14 June 2010. It found merit in the claim and accordingly awarded special and punitive general damages in the plaintiffs' favour to the tune of N15.4 billion. The court also ordered Shell to decontaminate the land to as good a position as it was before the spill occurred. However, the plaintiffs' joy was short-lived as Shell lodged an appeal at the Nigerian Court of Appeal and subsequently at the Supreme Court of Nigeria.[240] On 11 January 2019, the Supreme Court dismissed Shell's appeal bringing 19 years of formal litigation to an end. Following this victory, the Ejama Ebubu community proceeded

[239] *Ejama-Ebubu* case (n 238 above) 7.
[240] *SPDC & Ors v Agbara & Ors* (2015) LPELR-25987(SC).

to the UK to register the judgment and did so successfully by order of Master Eastman on 25 February 2019.[241] However, that order was short-lived as Shell successfully blocked the registration on 5 December 2019.[242] The matter is currently on appeal leaving the Ejama-Ebubu community even more uncertain of justice 50 years after the devastation of their community.

The Ejama Ebubu case is just one instance. According to Amnesty International, '[h]undreds of oil spills from Shell's pipelines occur every year' (see Amnesty International's picture below)[243] In 2008 and 2009, Shell similarly had two massive oil spill incidents that arose from the recurring rupturing of its over 55-year oil pipelines in Bodo community in Ogoniland.[244] About 600 000 barrels of crude oil are estimated to have simmered into adjoining land and creeks and into the Delta rivers.[245] Initially, Shell blamed the incident on sabotage but subsequently in 2015 agreed to pay US$83.3 million in compensation, taking responsibility for the two spills.[246] In 2010, Shell admitted spilling nearly 14 000 tonnes of crude oil in the Niger Delta, two times more than what it spilt in 2008 and four times what it split in

[241] D Iriekpen 'UK court asks Shell to pay Ogoni community N183bn' *ThisDay Live* 19 May 2019 <https://www.thisdaylive.com/index.php/2019/05/19/uk-court-asks-shell-to-pay-ogoni-community-n183bn/> (accessed 2 November 2019); Proshare 'Shell docked as Nigerian oil community wins court judgment in the UK' 13 May 2019 <https://www.proshareng.com/news/Stock%20&%20Analyst%20Updates/Shell-Docked-As-Nigerian-Oil-Community-Wins-Court-Judgment-in-The-UK/45316> (accessed 6 December 2019).

[242] *Agbara v The SPDC & Others* [2019] EWHC 3340 (QB); E Spence 'Shell wins ruling blocking enforcement of Nigerian spill case' *Bloomberg News* 5 December 2019 <https://www.bnnbloomberg.ca/shell-wins-ruling-blocking-enforcement-of-nigerian-spill-case-1.1358012> (accessed 6 December 2019).

[243] Amnesty International 'Nigeria: Long-awaited victory as Shell pays compensation for oil spills' 7 January 2015 <https://www.amnesty.org.au/nigeria-shell-oil-spill-victory/> (accessed 12 September 2019).

[244] J Vidal 'Shell oil spills in the Niger delta: "Nowhere and no one has escaped"' *The Guardian* 3 August 2011 <https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo> (accessed 24 March 2018). Also see D Korsah-Brown 'Environment, human rights and mining conflicts in Ghana' in L Zarsky (ed) *Human rights and the environment: Conflicts and norms in a globalizing world* (2002) 79 83; R Thorton 'Environment and land in Bushbuckridge, South Africa' in L Zarsky (ed) *Human rights and the environment: Conflicts and norms in a globalizing world* (2002) 219-240.

[245] AD Morgan 'Long-term effects of oil spills in Bodo, Nigeria' *Aljazeera* 28 July 2017 <https://www.aljazeera.com/indepth/inpictures/2017/07/long-term-effects-oil-spills-bodo-nigeria-170717090542648.html> (accessed 24 March 2018).

[246] J Payne & S Falush 'Shell to pay out $83 million to settle Nigeria oil spill claims' *Reuters* 7 January 2015 <https://www.reuters.com/article/us-shell-nigeria-spill/shell-to-pay-out-83-million-to-settle-nigeria-oil-spill-claims-idUSKBN0KG00920150107> (accessed 26 August 2019).

2007.[247] In 2011, the United Nations Environment Programme estimated that it will take 25 to 30 years to clean up Ogoniland.[248]

Figure 4-3: Oil pollution in the Niger Delta region of Nigeria.

Photo 1: Amnesty International, Christian Lekoya Kpandei's hand soaked in oil in Bodo, 2011.[249]
Photo 2: George Osodi/Bloomberg News, showing dead fish on the shore of Bodo in 2016.[250]
Photo 3: Reuters/Ron Bousso/File, 1 August 2018, showing Port Harcourt, Rivers State, Nigeria.[251]
Photo 4: Al Jazeera, showing pollution of river a Niger Delta community relies on for fishing.[252]
Photo 5: Tolani Alli/The Guardian, showing women in search of fish, kindling or edible snails.[253]
Photo 6. Cable News Network (CNN).[254]

All photos were verified with Google Reverse Image Search and Tineye as the primary digital verification tool.

[247] Associated Press 'Shell reports record oil spillages in Nigeria' *The Guardian* 5 May 2010 <https://www.theguardian.com/environment/2010/may/05/shell-oil-spill-niger-delta> (accessed 18 November 2019).
[248] United Nations Environment Programme *Environmental assessment of Ogoniland* (2011) 226.
[249] Amnesty International (n 243 above).
[250] S Kent 'Pollution worsens around Shell oil spill in Nigeria' *The Wall Street Journal* 25 May 2018 <https://www.wsj.com/articles/pollution-worsens-around-shell-oil-spills-in-nigeria-1527246084> (accessed 18 November 2019).
[251] P Carsten, L George & E Sithole-Matarise 'UK Supreme Court to hear Nigerians' case for pursuing Shell spill claim in England' *Reuters* 24 July 2019 <https://www.reuters.com/article/uk-nigeria-shell/uk-supreme-court-to-hear-nigerians-case-for-pursuing-shell-spill-claim-in-england-idUKKCN1UJ1BZ> (accessed 18 November 2019).
[252] Al Jazeera 'New 360 film reveals Nigeria oil spill devastation' *Al Jazeera* 23 January 2018 <https://www.aljazeera.com/news/2018/01/360-film-reveals-nigeria-oil-spill-devastation-180123161406458.html> (accessed 18 November 2019).
[253] R Maclean 'Toxic mud swamps fortunes of Niger Delta women years after oil spill' *The Guardian* 19 December 2018 <https://www.theguardian.com/global-development/2018/dec/19/toxic-mud-swamps-fortunes-of-niger-delta-women-years-after-oil-spill> (accessed 18 November 2019).
[254] T Watkins 'Amnesty accuses Shell of making false claims on Niger Delta oil spill' *CNN* 7 November 2013 <https://www.cnn.com/2013/11/06/world/africa/nigeria-shell/index.html> (accessed 18 November 2019).

Also, in 2010, the rupturing of a crude oil pipeline operated by ENI's subsidiary, Nigerian Agip Oil Company/ENI (Agip), 250 metres from the Ikebiri community steeped vegetation, rivers and fish in pure crude oil, damaging the primary means of livelihood of the community. Agip blamed the burst on 'equipment failure' and closed the leak. However, it then set the contaminated area on fire without the community's consent, thereby exposing the community to a highly dangerous and environmentally hazardous mode of clean up. When the community engaged Agip with a view to receiving emergency relief materials, Agip responded in 2017 by offering the entire community the equivalent of 6 000 Euros. An offer of the equivalent of 14 000 Euros in full settlement of the community was rejected in 2017 as insufficient. According to Friends of the Earth, 'to date, the community has received no compensation for damages as a result of the spill.'[255]

These destructive incidents by multinational companies have occurred without any governmental intervention to protect the communities. The alliance between state and corporation has significantly blocked the capacity of the state to act independently in the public interest. This has ultimately affected the confidence of communities in state institutions and led to self-help and the emergence of militant groups like the Movement for the Emancipation of the Niger Delta, the Niger Delta Avengers and many others.[256] Even where domestic litigation has been successful, blatant disobedience to court orders by government and TNCs is almost a hallmark of the Nigeria state.[257] Decisions by local and international tribunals requiring government to take concrete action for the clean-up of the Delta are yet to be implemented. If anything, they are a constant tool for whipping up political sentiments to sway votes and nothing more. These failures, it is argued, make dependence on the domestic legal order for the realisation of social justice wholly inadequate.[258]

[255] Friends of the Earth 'ENI and the Nigerian Ikebiri case' 17 January 2018 <https://www.foeeurope.org/sites/default/files/extractive_industries/2018/foee-eni-ikebiri-case-briefing-update.pdf> (accessed 26 November 2019).

[256] SM Niworu 'The Niger Delta Avengers, autonomous ethnic clans and common claim over oil wells: The paradox of resource control' (2017) 11 *African Research Review* 42-56; D Moses & A Olaniyi. 'Resurgence of militancy in the Niger Delta region of Nigeria' (2017) 5 *Journal of Political Sciences & Public Affairs* 1-6.

[257] WM Tarabinah 'United States Alien Torts Claims Act (ATCA), Oil Corporations and Militarized Commerce in Nigeria's Niger Delta' unpublished PhD Thesis, University of Nigeria, 2010 5.

[258] Coumans (n 149 above) 27-28.

(d) TNCs' complicity in Nigeria's brutal repression of aggrieved communities

Due to the grim state of corporate regulation and weak institutional protection in Nigeria, oil spills and gas flaring 'continue to happen with alarming regularity' in the Niger Delta region.[259] An enduring legacy of its weak regulatory environment has been the recurring phenomenon of gas flaring and widespread environmental disasters in the oil and gas industry. As of 2 January 2020, one could visibly see the pervasive pollution of the Niger Delta from space (see diagram below). On its part, the Nigerian state has frequently sided with oil companies, rather than protect victims and the environment. It is known to have employed brutal state violence to quell civil protests, arbitrarily executed environmental activists and ignored court orders. And it has done so at the instance of or with the complicity of oil companies.

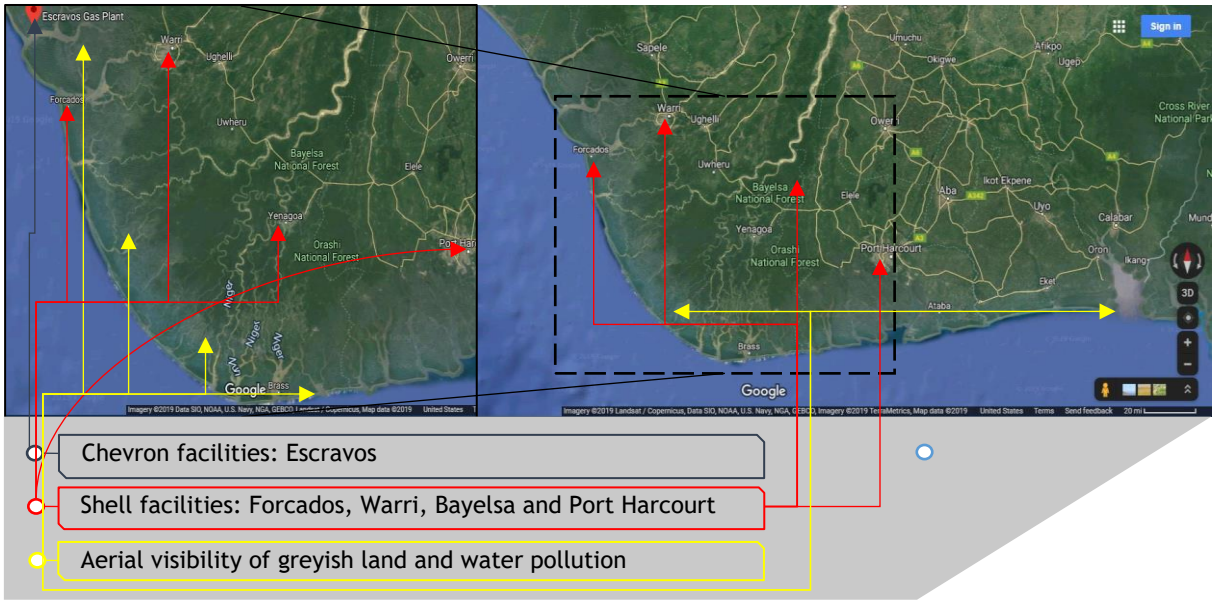

Figure 4-4: Aerial view of water and land pollution in the Niger Delta.

Source: Google Maps snipped by this author (2 January 2020).
Editing tools: Snipping tool, PowerPoint and Word.
Illustrator: *Macaulay Chairman Okoloise*

In the early 1990s, disaffection by communities in Ogoniland with Shell's environmental and social abuses resulted in recurrent protests. The protests were led by Ken Saro-Wiwa and deputy John Kpuinen, the leaders of the Movement for the Survival of Ogoni People (MOSOP) and other environmental activities. Worried that the protests were disruptive of its business interests in the region, Shell requested the intervention of the Nigerian military government to quell the protests at any cost. The army used excessive force, in the process killing hundreds, while taking

[259] United Nations Environment Programme *Environmental assessment of Ogoniland* (2011) 150, 214.

MOSOP leaders and over a dozen others into custody.[260] Ken Saro-Wiwa, John Kpuinen, Barinem Kiobel and six others were hurriedly tried on trumped up murder charges in a process that has been widely described as shambolic and subsequently sentenced to death by hanging.[261] Despite widespread international condemnation, including a request by the African Commission on Human and Peoples' Rights that the authorities stay execution until a determination of the communication before it, the federal military government proceeded to execute the famous 'Ogoni nine' on 10 November 1995.[262]

In 2017, Amnesty International reported that 'Shell was fully aware' that the Nigerian government planned to use excessive force to suppress the Ogoni protests.[263] Amnesty claimed that 'Shell had called for [Mobile Police] MOPOL's intervention at Umuechem to deal with protests' and therefore was privy to its devastating consequence.[264] Besides Shell, other TNCs like Chevron have similarly been spotlighted for instigating government to ruthlessly crush civil protests against their poor human rights and environmental abuses in the Niger Delta. Little wonder Nolan argues that the difficult political and social environment in a country like Nigeria sustain close ties and mutual reinforcements between corporations and the government in ways that implicate corporations in aiding and abetting repressive regimes.[265]

For the communities proximate to oil installations, the killing of protesters and the arbitrary execution of environmental activists were a travesty of justice by the very government that was meant to protect them. The threats of violence and the lack of safety of activists and victims in Nigeria further dampens trust and makes

[260] R Boele, H Fabig & D Wheeler 'Shell, Nigeria and the Ogoni. A study in unsustainable development: I. The story of Shell, Nigeria and the Ogoni people – Environment, economy, relationships: Conflict and prospects for resolution' (2001) 9 *Sustainable Development* 74 81.

[261] AA Idowu 'Human rights, environmental degradation and oil multinational companies in Nigeria: The Ogoniland episode' (1999) 17 *Netherlands Quarterly of Human Rights* 161 179-180.

[262] BA Jacob & F Viljoen. 'Towards a greater role and enhanced effectiveness of national Human Rights Commissions in advancing the domestic implementation of socioeconomic rights: Nigeria, South Africa and Uganda as case studies' (2015) 48 *Comparative and International Law Journal of Southern Africa* 401 408-409.

[263] Amnesty International 'A criminal Enterprise? Shell's involvement in human rights violations in Nigeria in the 1990s' (2017) 40-41 <https://www.amnesty.org/download/Documents/AFR4473932017ENGLISH.PDF> (accessed 18 August 2019).

[264] As above.

[265] J Nolan 'Business and human rights in context' in D Baumann-Pauly & J Nolan (eds) *Business and human rights: From principles to practice* (2016) 6-7; F Wettstein 'From side show to main act: Can business and human rights save corporate responsibility?' in D Baumann-Pauly & J Nolan (eds) *Business and human rights: From principles to practice* (2016) 78-79.

the utilisation of domestic institutions an unviable option. Unable to resolve their grievances either amicably with the companies or through litigation in local courts, victims have found themselves in the unpleasant position of seeking remedies in the home jurisdictions of such companies. The resulting effect has been several cases in the US, the UK, Italy and the Netherlands, some of which I will expatiate in the next chapter.[266]

4.6.2 Analysis II: Weak regulation and remedies in other African countries

The regime of weak domestic protection of human rights is not exclusive to Nigeria. In the DRC, Malawi, Uganda, South Africa and Zambia, to name a few, one can see a pattern of relatively poor state oversight and weak corporate regulation to appreciate the spate of corporate impunity. I will briefly consider these countries in turn, in order to set the factual foundation on which my claim of pervasive host state weakness is made.

In the DRC, two separate incidents but intrinsically similar pattern of corporate complicity in gross human rights violations can be seen in the activities of the Australian-Canadian company, Anvil Mining, and the German logging multinational, Danzer. In 2004, the takeover of the municipal government of Kilwa in Katanga by an armed rebellion and the probability of having its business disrupted spurred Anvil Mining to request the immediate intervention of the DRC army. This led to the massacre of almost 100 civilians, and the rape and brutalisation of several others by the army.[267] According to a UN investigative mission, Anvil Mining offered cash and logistical support including flight services, trucks and drivers to get the army to crush the rebellion at any cost. Following the indictment and only after much

[266] *Wiwa v Royal Dutch Petroleum Company* (SDNY 2002) No 96 Civ 8386; *Wiwa v Brian Anderson*; *Wiwa v Shell Petroleum Development Company of Nigeria Ltd* ; *Royal Dutch Petroleum Co v Wiwa* 532 US 941 (2001) USSC; *Kiobel v Royal Dutch Petroleum* 133 S Ct 1659 (2013) or 569 US 108 (2013); *Bowoto v Chevron Corporation* 621 F.3d 1116 (9th Cir 2010); *Bodo Community v Shell* (2017) EWHC 89 (TCC); *Okpabi v Royal Dutch Shell* [2017] EWHC 89 (TCC); *The Bodo Community v Shell Petroleum Development Company of Nigeria (The Bomu-Bonny Oil Pipeline Litigation* [2014] All ER (D) 181 or [2014] EWHC 1973 (TCC), [2014] EWHC 2170 (TCC) 4 July 2014, [2017] EWHC 89 (TCC); *Akpan v Royal Dutch Shell* (30 January 2013) LJN BY9854/HA ZA 09-1580 District Court of The Hague; *Ododo Francis v ENI and Nigerian Agip Oil Company (NAOC)* (2017) unreported – this lawsuit is still ongoing at the time of writing this chapter (for more details, see Friends of the Earth 'ENI and the Nigerian Ikebiri case' 4 May 2017 <http://www.foeeurope.org/sites/default/files/extractive_industries/2017/foee-eni-ikebiri-case-briefing-040517.pdf> accessed 18 November 2019).

[267] Human Rights Law Centre 'Australian mining company in prosecution spotlight for role in Congo massacre' 4 August 2017 <https://www.hrlc.org.au/news/2017/8/4/australian-mining-company-in-prosecution-spotlight-for-role-in-congo-massacre> (accessed 29 December 2017); M Karunananthan 'UN must challenge Canada's complicity in mining's human rights abuses' *The Guardian* 24 April 2013 <https://www.theguardian.com/global-development/poverty-matters/2013/apr/24/un-canada-mining-human-rights> (accessed 29 December 2017).

domestic and international outcry, the government initiated a symbolic military trial that saw all 12 accused persons acquitted, including the three indicted Anvil Mining officials.[268] Anvil Mining, itself was never tried, and the appeal efforts by victims to the High Military Court also failed.[269]

The other incident of corporate complicity in the DRC involved Danzer and its Congolese subsidiary, *Société Industrielle et Forestière du Congo* (SIFORCO) before the sale of the latter to the American group Blattner Elwyn. Not only was SIFORCO allegedly involved in several incidents of bribery and illegal logging in the DRC, Danzer and SIFORCO have been accused of having a 'large number of clashes' with local forest communities that led to violent police repression.[270] This was further complicated by some members of the community whisking away some industrial equipment belonging to the company in 2011 as a way of protesting SIFORCO's failure to build a medical facility and a school that it had agreed to do in writing and in a bid to strengthen their bargaining position.

At a local security meeting organised by Danzer, a decision was allegedly taken to dispatch police and military officers to the community. Following the night raid by about 60 military and police officers, the villagers were serially beaten (to the point of death of one of the villagers), many women and girls were raped, 16 villagers were arrested, and properties were burnt and destroyed. Denver was accused of paying and providing the security officers who perpetrated the violations with a driver and Danver trucks. Although some of the soldiers were convicted for the lesser offence of torture and failure to report a crime – earning just two to three years imprisonment – all of SIFORCO's officials were acquitted. According to a European Union study:

[268] *Public Prosecutor v Adémar Ilunga & Ors* RP Nº 010/2006 27 June 2007 <http://www.internationalcrimesdatabase.org/Case/766/Anvil-Mining-et-al/> (accessed 19 November 2019).

[269] Environmental Justice Atlas 'Massacre in Kilwa facilitated by Anvil Mining, operating Dikulushi open pit, Katanga province, DR Congo' 18 August 2018 <https://ejatlas.org/conflict/kilwa-mine> (accessed 8 September 2018); P Feeney 'Anvil mining and the Kilwa massacre' *Open Society Initiative for Southern Africa* 7 March 2012 <http://www.osisa.org/openspace/global/anvil-mining-and-kilwa-massacre.html> (accessed 9 September 2018).

[270] EU Policy Department for External Relations 'Access to legal remedies for victims of corporate human rights abuses in third countries' (2019) 51 <http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf> (accessed 18 November 2019); Greenpeace 'Forest crime file: Danzer Group involved in bribery, illegal logging, dealings with blacklisted arms trafficker and suspected of forgery' 2nd Ed (2004) <https://www.illegal-logging.info/sites/files/chlogging/uploads/Danzer2_English.pdf> (accessed 18 November 2019).

> The greatest hurdle that the proceedings in DRC faced 'was the chronic underfunding of the Congolese legal system. This led to constant delays; witnesses could not be examined and their protection could not be guaranteed'.[271]

In the Karonja district of Malawi, insufficient consultations with the local community about adverse mining risks, the lack of environmental impact and human rights assessments, pollution, and forced displacement have become the scourge of communities near extractive activities. In 2016, Human Rights Watch reported that families proximate to uranium and coal mining sites are at environmental, health and social risks, while others have been forcibly evicted from their ancestral homes.[272] Multinationals like Paladin Resources (operating locally as Paladin Africa Limited), Malcoal and Independent Oil Resources (operating through its subsidiary, Eland Coal Mining Company) have been put in the spotlight for the forced evictions of uranium and coal-rich communities and the discharge of mining effluents into aspects of the Lake Malawi that support local communities.[273]

In February 2014, Paladin reported a uranium oxide (U3O8) spill near its mine in Karonja.[274] Human Rights Watch states that, although the companies claim 'minimal risks' in their environmental impact assessments, experts have warned that water sources risked being contaminated by mining tails. [275] This is because the existing regulatory framework does not ensure a proper environmental and social risk assessment system that prevent pollution before mining operations are commenced. The Malawian government is unable to adequately monitor the health impacts of mining in Karonja because, inadequate reporting and weak oversight lie at the heart of the many challenges faced in Karonja. Government officials admit that companies have been left to regulate themselves due to a lack of manpower and internal coordination to effectively regulate mining companies.[276] Being substantially aid-dependent and indisposed to losing foreign investments, Malawi is unlikely to step

[271] EU Policy Department for External Relations (n 270 above) 53.
[272] Human Rights Watch '"They destroyed everything": Mining and human rights in Malawi' (2016) 46-47 <https://www.hrw.org/sites/default/files/report_pdf/malawi0916_web.pdf> (accessed 21 October 2019).
[273] K Hodal 'Mining in Malawi brings forced evictions and ruined crops, report says' *The Guardian* 27 September 2016 <https://www.theguardian.com/global-development/2016/sep/27/mining-malawi-brings-forced-evictions-ruined-crops-human-rights-watch-report-says> (accessed 21 October 2019).
[274] Nyasa Times Report 'Paladin leaks radio-active material in Karonja' 17 February 2014 <https://www.nyasatimes.com/paladin-leaks-radio-active-material-in-karonga/#comments> (accessed 21 October 2019).
[275] Human Rights Watch '"They destroyed everything": Mining and human rights in Malawi' (2016) 40, 62-63 <https://www.hrw.org/sites/default/files/report_pdf/malawi0916_web.pdf> (accessed 21 October 2019).
[276] Human Rights Watch (n 275 above) 14 & 30.

up corporate regulation in order to remain competitive in relation to other African countries.

In Karamoja, a region in North-eastern Uganda, poor labour conditions and lack of proper community consultations have, in recent years, resulted in deplorable human rights and environmental conditions of local inhabitants in the Kaabong and Moroto districts. In a 2014 report, Human Rights Watch stated that the operations of mining companies in Karamoja have precipitated '[f]ears of land grabs, loss of access to mineral deposits, water contamination and erosion, forced evictions, and failure to pay royalties to traditional land owners' in nearby communities.[277] Three companies have been fingered for the lack of transparency in their operations – East African Mining, DAO Uganda and Jan Mangal. These companies, Human Rights Watch asserts, have constantly failed to obtain the free, prior, and informed consent of local communities before starting their operations on communal lands. And corruption as well as weak laws and government administration structures make it hard to prevent or mitigate corporate abuses or offer adequate protection to endangered communities.[278] According to *Avocats san Frontières*, people are highly reluctant to use formal processes of adjudication because of the belief that the government was working together with companies.[279]

In South Africa, the complex alliance between corporate power and government with respect to human rights and business came to the fore on 16 August 2012, when 34 protesting mineworkers were massacred and nearly a hundred others seriously injured at the Marikana platinum mine, North West Province. The mine is owned by the British company, Lonmin. The massacre was the climax of disagreements between Lonmin and its mineworkers about poor labour and housing standards with respect to employee housing.[280] Opposed to negotiating with the

[277] Human Rights Watch '"How can we survive here?" The impact of mining on human rights in Karamoja, Uganda' (2014) 8-9 <https://www.hrw.org/sites/default/files/reports/uganda0214_ForUpload.pdf> (accessed 21 October 2019).

[278] Human Rights Watch (n 277 above) 75, 90-91; A Mwesigwa 'Mineral deposits in Uganda's Karamoja heighten human rights abuse – report' *The Guardian* 4 February 2014 <https://www.theguardian.com/global-development/2014/feb/04/mineral-deposits-mining-uganda-karamoja-human-rights-abuse-report> (accessed 21 October 2019).

[279] Avocat San Frontieres 'Human rights implications of extractive industry activities in Uganda: A Study of the mineral sector in Karamoja and the oil refinery in Bunyoro' (2014) 43-44 <https://asf.be/wp-content/uploads/2014/09/ASF_UG_ExtractiveSectorHRImplications.pdf> (accessed 21 October 2019).

[280] E Cairncross & S Kisting 'Platinum and gold mining in South Africa: The context of the Marikana massacre' (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health*

mineworkers, senior management of Lonmin was in favour of sacking the protesters and calling in the police to deal with the situation. Although the mineworkers and miners' union were also partly to blame, the Farlam Commission of Inquiry found, among other things, that Lonmin had started the violence by its security staff's opening fire with rubber bullets on unarmed protesters. It was also found that although it was possible for Lonmin to de-escalate tensions and meaningfully engaged the mineworkers, Lonmin chose not to do so; thereby placing its business interests over and above considerations of public safety and security.[281] The Commission also found that Lonmin had failed to abide by its housing obligations under the Social Labour Plan, which was only possible due to the weak regulation by government authorities.

In Zambia's Copperbelt Province, allegations of unethical labour and environmental practices by the state-run Zambia Consolidated Copper Mines (ZCCM) company, Western and Asian companies have attracted international attention. Each year, no less than 15 fatalities are recorded in Zambia's copper mines.[282] In the lead-mining town of Kabwe, for instance, decades of arbitrary mining practices by ZCCM made it one of the most toxic zones in the world.[283] High lead contamination levels in the area have resulted in a health crisis for adults and children alike. Air, water and soil pollution arising from massive lead poisoning and catastrophic failures in tailing dams are 'negatively affecting the health and livelihoods of people.'[284]

Policy 513 524-526; T Bell 'The Marikana massacre: Why heads must roll' (2016) 25 *New Solutions: A Journal of Environmental and Occupational Health Policy* 440 446-448. Also see G Marinovich *Murder at Small Koppie: The real story of the Marikana massacre* (2016) Penguin Random House South Africa.

[281] IG Farlam, PD Hemraj & BR Tokota 'Marikana Commission of Inquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin mine in Marikana, in the North West Province' (2015) 554-559 <https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf> (accessed 14 November 2019).

[282] Human Rights Watch '"You'll be fired if you refuse": Labor abuses in Zambia's Chinese state-owned copper mines' (2011) 2 <https://www.hrw.org/sites/default/files/reports/zambia1111ForWebUpload.pdf> (accessed 12 November 2019).

[283] D Carrington 'The world's most toxic town: The terrible legacy of Zambia's lead mines' *The Guardian* 28 May 2017 <https://www.theguardian.com/environment/2017/may/28/the-worlds-most-toxic-town-the-terrible-legacy-of-zambias-lead-mines> (accessed 28 December 2017); S Bose-O'Reilly, J Yabe, J Makumba, P Schutzmeier, B Ericson & J Caravanos 'Lead intoxicated children in Kabwe, Zambia' (2018) 165 *Environmental Research* 420-424.

[284] Human Rights Watch '"We have to be worried": The impact of lead contamination on children's rights in Kabwe, Zambia' (2019) <https://www.hrw.org/sites/default/files/report_pdf/zambia0819_web_0.pdf> (accessed 11 November 2019); C Ng'uni 'Kabwe families grappling with lead effects' *Zambia Daily Mail* 9 December 2017 <http://www.daily-mail.co.zm/kabwe-families-grappling-with-lead-effects/> (accessed 27 December 2017).

Experts warn that mass lead poisoning has almost certainly damaged the brains and nervous system of generations of children.[285] As a state-owned company, the culpability of ZCCM has significantly limited the government's ability to respond fairly and equitably to the plight of victims.

More prominently is the abusive activities of British multinational, Vedanta Resources (through its Zambian subsidiary, Konkola Copper Mines), Canadian-owned FQM and Chinese government-owned China Non-Ferrous Metals Mining Corporation's subsidiaries (China Luanshya Mine, Chambishi Copper Smelter and Sino Metal Leach Zambia). The granting of an exclusive 25-year licence to Canadian-owned First Quantum Minerals (FQM) over Kalumbila, an area over one-and-a-half times the size of Hong Kong, has placed communities at the verge of forced displacement. The process for obtaining the land for the FQM Trident Project was marred by controversy and estimated to displace some 570 families. Concerns about resettlement and compensation expressed by those affected have, till date, not been comprehensively addressed by either government or the company.[286]

Even so, Chinese companies in Zambia have been spotted for various work-related violations and for underreporting mine accidents.[287] Human Rights Watch states that several Chinese-run companies in the copper mining industry engage mineworkers in brutally long hours and sometimes without off days in a year. Worse is mineworkers' exposure to an environment with heavy concentration of dust, acid and noxious fumes without effective protective equipment. Sometimes, there is a general neglect 'to replace protective equipment damaged during work; a glove with a hole means an acid burn the next time the acid splashes up.'[288] These poor

[285] Terre des Hommes 'Alternative Report to the UN Committee on the Rights of the Child on the occasion of Zambia's combined Second, Third and Fourth State Party Report on the UNCRC: The child rights: impact of pollution caused by lead mining' (2016) 3 & 6 <http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/ZMB/INT_CRC_NGO_ZMB_22657_E.pdf> (accessed 28 December 2017); Lusakatimes.com 'Mining leaves toxic legacy in Kabwe town' 21 June 2007 <https://www.lusakatimes.com/2007/06/21/mining-leaves-toxic-legacy-in-kabwe-town/> (accessed 28 December 2017).

[286] Caritas Norway 'Who benefits? Norwegian investments in the Zambian mining industry' 28-29 <www.caritas.no/wp-content/uploads/2013/12/Who-Benefits-Norwegian-Investments-in-the-Zambian-Mining-Industri.pdf> (accessed 25 March 2018); ActionAid 'Community impacted by Kalumbila Trident Project make plea to government to resolve outstanding issues with FQM' 16 July 2014 <www.actionaid.org/zambia/news/community-impacted-kalumbila-trident-project-make-plea-government-resolve-outstanding-is> (accessed 25 March 2018).

[287] Human Rights Watch (n 284 above) 32.

[288] M Wells 'China in Zambia: Trouble down in the mines' *Huffington Post* 21 November 2011 <https://www.huffpost.com/entry/china-in-zambia-trouble-d_b_1102080> (accessed 18 November 2019).

industrial environmental, health and safety practices lead to avoidable accidents, which may have long-term consequences.

In the Copperbelt Province, Vedanta's Konkola Copper Mines contaminated the Kafue river from which residents of the Chingola community drank through its illegal discharge of effluents that – for 12 twelve years - poisoned thousands of residents.[289] Aggrieved by the irresponsible corporate conduct, some 2 001 members of the community filed an action before the Zambian High Court in the case of *Nyasulu and others v Konkola Copper Mines Plc and others* (*Kafue pollution* case).[290] The Court found KCM liable for wrongful conduct and ordered it to pay four million Kwachas to each of the 2 001 plaintiffs. The Court held that the fact that Zambia needed foreign investment did not warrant that its people be dehumanised by 'greed and crude capitalism'. However, on appeal, the Supreme Court set aside the award of damages to all 2 001 claimants, holding that the trial judge erred to have awarded damages to all 2001 based on just 12 medical reports. The Court sent back the matter to the lower court for a reassessment of damages based on only those medical reports admitted in evidence. No clean-up order was made.

Although the Zambian government is responsible for ensuring that its copper mines operate in accordance with its domestic laws and international best practices, it 'has largely failed to enforce the country's labor laws and mining regulations.'[291] Amidst endemic poverty, acute corruption among government regulatory officials and weak regulation, neither the Zambian government nor the weak judicial system can ensure adequate protection of workers and communities alike. Already, the inability of the victims in the *Kafue pollution* case to obtain effective remedies in Zambia and their lack of faith in the Zambian Government has seen the victims attempt to seek justice in the UK, the home country of Vedanta.

A common thread that seems to run through all the above-mentioned countries is the inadequacy of host state regulatory institutions and judicial systems to effectively address the demands of social justice and access to remedies. The

[289] M Mwenda 'Water pollution, Zambian villagers sue mining giant Vedanta in UK court' *LifeGate* 10 January 2017 <https://www.lifegate.com/people/lifestyle/zambia-pollution-case-vedanta> (accessed 18 November 2019); J Vidal '"I drank the water and ate the fish. We all did. The acid has damaged me permanently"' *The Guardian* 1 August 2015 <https://www.theguardian.com/global-development/2015/aug/01/zambia-vedanta-pollution-village-copper-mine> (accessed 18 November 2019).

[290] (2007/HP/1286) [2011] ZMHC 86 (31 December 2010).

[291] Human Rights Watch (n 282 above) 2.

pervasive weakness of African states to rein in MNCs and, sometimes, domestic companies make corporate violations imminent and victims' quest for justice illusive.[292]

4.7 Conclusion

As this chapter has shown, the attribution to host states under international law of the responsibility to regulate corporations and provide effective remedies to victims of corporate harm wrongly presupposes that all states have the same institutional capacity to do so. From the foregoing, it is apparently clear that not only is this not the case, many host states in Africa also leave much to be desired in terms of ensuring effective corporate regulation and adequate remedies. They are often structurally and institutionally weak or unwilling to enforce their regulatory obligation in favour of national developmental objectives.

The consistent failure to regulate the unethical activities of companies engaged in the extractive industries in order to avoid (or, in the very least, reduce) violations to the barest minimum prove that African states cannot be depended upon to adequately protect individuals and communities from the damaging activities of companies. The recurring environmental disasters and the gross human rights violations in Nigeria, the DRC, Malawi, Uganda, South Africa and Zambia demonstrate this.[293] Yet, most unfortunate is that communities and individuals are infinitely exposed to brutal corporate harms, while states stand idly. The resulting loss of faith in domestic institutions and legal remedies has seen victims in many of these countries pursue alternative recourse in the courts of the home state.[294]

[292] Ekhator (n 41 above) 68, 77.
[293] G Eweje 'Environmental costs and responsibilities resulting from oil exploitation in developing countries: The case of the Niger Delta of Nigeria' (2006) 69 *Journal of Business Ethics* 27 49.
[294] Coumans (n 149 above) 39.

5.1 Introduction

When the assault by extractive TNCs on the rights of individuals and host communities stays unchecked in host states, victims are bound to embark on a quest for justice elsewhere. In the preceding chapter, I showed how weak laws and ailing institutions weigh heavily against host countries, whittling their capacity to effectively regulate and enforce good international industry rules and practices in the extractive industries.[1] As globalisation continues to chip away traditional notions of sovereignty, its undercurrents are reverberating in weak governance zones where the struggle to contain global corporate power is more evident. On their own, many African states prove normatively and institutionally unprepared and, largely, unable to resolve the dilemma of transnational corporate regulation. And for the few, if any, that are yet able to exert substantial regulatory authority, the willingness to rein in corporate abuses tends to be obfuscated by the elevation of state and private economic interests over and above those of individuals and groups. This level of state inertia in Africa suggests that for a long time to come 'the TNC will remain

[1] EO Ekhator 'Public regulation of the oil and gas industry in Nigeria: An evaluation' (2016) 21 *Annual Survey of International & Comparative Law* 43 48; E Canel, U Idemudia & LL North 'Rethinking extractive industry: Regulation, dispossession, and emerging claims' (2010) 30 *Canadian Journal of Development Studies* 5-25; D Haglund 'Regulating FDI in weak African states: A case study of Chinese copper mining in Zambia' (2008) 46 *The Journal of Modern African Studies* 547-575; J Hönke, K Nicole, TA Börzel & A Héritier 'Fostering environmental regulation? Corporate social responsibility in countries with weak regulatory capacities: The case of South Africa' (2008) 9 *SFB-Governance Working Paper Series* 5 <https://refubium.fu-berlin.de/bitstream/handle/fub188/19154/SFB_700_Working_Paper_Nr_9.pdf?sequence=1&isAllowed=y> (accessed 26 November 2019); JP Eaton 'The Nigerian tragedy, environmental regulation of transnational corporations, and the human right to healthy environment' (1997) 15 *Boston University International Law Journal* 261 288.

unaccountable and unrestrained, and those whose rights are violated will be without an effective remedy.'[2]

A profound effect of the weak regulatory environment and inadequate remedial regime in many African states is the alienation of right-holders from the cover of domestic protection.[3] Over time, the deficits of effective resource governance and lack of accountability in African countries have led to some despondency about the capacity of local political and judicial systems. To rights-holders, the post-colonial state is insufficiently capable of supervising TNCs and squarely dealing with the increasing cases of corporate impunity. After many decades, victims have learnt the hard way that should there have to be a choice between protecting their human rights and the economic interests of the state or private persons, states are quite unlikely to choose the former. For example, in the face of the protests in Ogoniland and other Niger Delta communities in the 1990s, the Nigerian government signalled through its repressive responses that neither its political interventions nor domestic judicial institutions would be in favour of local communities disrupting the operations of oil companies.[4]

For victims of the many violations in which extractive companies have been profoundly complicit, the weak political and judicial responses suggest that transnational corporate governance cannot be left alone to the vagaries of fragile states or the weak regimes of domestic enforcement in Africa.[5] When the activities of TNCs are not effectively controlled by either the home state or the host state, it 'may result in a situation of effective impunity for human rights violations.'[6] As the world struggles to establish an effective regulatory system for TNCs, the immediate demands of accountability and social justice necessitate that other spheres of

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2 R McCorquodale & P Simons 'Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law' (2007) 70 *Modern Law Review* 598 599-600.

3 RJ Anderson 'Reimagining human rights law: Toward global regulation of transnational corporations' (2010) 88 *Denver University Law Review* 183 199-200.

4 A Groves 'Shell and society: Securing the Niger Delta' (2009) 10 *E-International Relations* 1 2-7; CI Obi 'Globalization and local resistance: The case of Shell versus the Ogoni' (1997) 2 *New Political Economy* 137-148

5 PR Waagstein 'Justifying extraterritorial regulations of home country on business and human rights' (2019) 16 *Indonesian Journal of International Law* 361 362; S Deva 'Corporate human rights violations: A case for extraterritorial regulation' in C Luetge (ed) *Handbook of the Philosophical Foundations of Business Ethics* (2012) 1077 1078.

6 O De Schutter 'Sovereignty-plus in the era of interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations' in PHF Bekker, R Dolzer & M Waibel (eds) *Making transnational law work in the global economy: Essays in honour of Detlev Vagts* (2010) 245 250.

governance beyond the immediate domain of the host state should be looked upon to take up a contributory or decisive role in tackling the problem of transnational corporate governance and TNC abuses in developing countries.[7] Typically, a state where a TNC is incorporated, listed on the stock (or commodities) exchange, or has its headquarters situated can legitimately step in to close the governance gap by enacting laws that regulate the adverse impacts of such TNC abroad. I refer to such a state in this thesis as the *home or territorial state*, and the act of regulating the conduct of TNCs beyond its physical territory as *extraterritorial regulation*.[8] Home state regulation therefore is the application of domestic rules and law enforcement authority beyond the territorial boundary of the state where an individual or entity is domiciled, registered or of which they hold citizenship.[9]

Although international human rights treaties do not expressly mandate states to regulate harm extraterritorially, the very nature of such treaties imply that they are expected to do so.[10] This is because states ordinarily have legal authority to regulate the conduct of individuals and companies registered in their territories. Based on this authority and the direct obligations assumed under international human rights treaties, states have territorial jurisdiction over the application and implementation of their obligations under such treaties. However, as O'Brien remarks, 'state jurisdiction is not the same as state responsibility.'[11] When states acquire treaty obligations to promote, protect and fulfil human rights, they acquire positive and negative obligations to protect human rights *as a universal value* and prevent violations. According to the United Nations (UN) Human Rights Committee, those obligations include exerting legislative and regulatory authority over 'acts committed by private persons or entities' that would contravene the rights and freedoms guaranteed under the International Covenant on Civil and Political Rights

7 United Nations Guiding Principles on Business and Human Rights 2011 (UNGPs) Principle 7 Commentary.

8 For a definition of *home state*, see S Deva 'Acting extraterritorially to tame multinational corporations for human rights violations: Who should "bell the cat"?' (2004) 5 *Melbourne Journal of International Law* 37 39; P Blumberg *The multinational challenge to corporation law: The search for a new corporate personality* (1993) 169.

9 RJ Turner 'Transnational supply chain regulation: Extraterritorial Regulation as corporate law's new frontier' (2016) 17 *Melbourne Journal of International Law* 188 189 (footnote 3).

10 CM O'Brien 'The home state duty to regulate the human rights impacts of TNCs abroad: A rebuttal' (2018) 3 *Business and Human Rights Law Journal* 47; UNGPs Principle 2 Commentary.

11 O'Brien (n 10 above) 61.

(ICCPR).[12] As such, it is arguable that those obligations still apply even if it is in respect of conduct by nationals that occurs abroad, outside the immediate geographical jurisdiction of a state.

However, the responsibility to regulate extraterritorially is perhaps not as contentious as the extent to which it has been or may be exercised.[13] When home states enact laws that potentially control the conduct of nationals overseas and grant judicial access to foreign victims for misconduct that happens abroad (in the host state), it can invariably result in outlying consequences, including unanticipated home state litigation. It poses a risk not only of substantive legal and jurisdictional conflicts, but also of intense clashes of national interests. Deva highlights that exercising extraterritorial jurisdictions occurs at the cost of the sovereignty of other states.[14] For these reasons, the adoption of extraterritorial laws and jurisdictional rules that allow for litigation in the home country of extractive TNCs has spurred deep scholarly inquiries into the scope and legal significance of such laws and ensuing court decisions on the sovereignty of other, especially developing, states.

The debates are quite nuanced especially in relation to the supranational regulation of the transnational corporate entity. From the nuances several questions call to mind. First is whether a home state has a responsibility to regulate the extraterritorial activities and impacts of its TNCs abroad. If it does, second is whether the extraterritorial obligation applies to activities carried on by foreign companies, including the foreign subsidiary of a TNC registered on its soil. If the obligation extends to subsidiaries of TNCs, the third question is, to what extent can a home state do so? And, lastly, what legal consequence does such regulation portend for the sovereignty of the host country? These questions have precipitated concerns across various scholarly aisles about the danger of home states regulation opening a pandora box in the relations between states and the floodgates of unhindered litigation from Africa and other developing regions against TNCs from the West.[15]

[12] UN Human Rights Committee 'General Comment No 31: The nature of the general legal obligation imposed on states parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 8; UN Committee on Economic, Social and Cultural Rights 'General comment No. 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' UN Doc E/C.12/GC/24 (10 August 2017) paras 14-22; UNGPs principles 1-10.

[13] Waagstein (n 5 above) 362.

[14] Deva (n 8 above) 47.

[15] H King 'The extraterritorial human rights obligations of states' (2009) 9 *Human Rights Law Review* 521 522.

In this chapter, I argue that despite the plausible and increasing application of legal principles and practices on extraterritoriality at the domestic and international spheres, home state regulation and litigation remain largely inadequate for offsetting the corporate accountability deficits in the extractive industries in host countries in Africa. I will justify this position on three premises.[16] First, despite the defensibility and viability of 'the home state model of extraterritorial regulation', political, business, scholarly and judicial concerns and interventions in developed countries are rapidly impeding the accountability of TNC for abusive operations carried out abroad.[17] Second, the increasing adoption of adjudicatory rules, due diligence standards and modern slavery legislation in the home jurisdictions of TNCs, although plausible, does very little for the quest of justice by victims from Africa or the developing world. Such legislation and procedural rules offer limited protection and remedies to victims for the abuses committed.[18] Last, I argue that procedural and practical barriers prevent victims, who have been denied justice in the host state, from gaining access to the courts of home countries, regardless of the merit and severity of their claims.[19]

In treating the main contention of this chapter and its underlying premises, I have outlined five sections within which the limits of extraterritorial regulation and home state litigation are to be dealt with. The next section will evaluate the practice of extraterritorial regulation of TNCs in relation to the extractive industries in African states. In the third section, I will consider the consequences of these rules for victims devastated by TNCs. This will entail identifying the regulatory and remedial significance of the extraterritorial civil and criminal laws of the US, the UK, Australia, France, the Netherlands and the EU in relation to victims' quest for accountability and justice. In the fourth section, I will assess the limited promise of home state regulation. Here, I will highlight recent aggressive protectionist actions of the US government to rollback corporate accountability. I will also assess the procedural hurdles and practical challenges that African victims face in seeking

[16] Anderson (n 3 above) 201-202.
[17] Deva (n 8 above) 40.
[18] SA Solow 'Prosecuting terrorists as criminals and the limits of extraterritorial jurisdiction' (2011) 85 *St John's Law Review* 1483 11543-1544.
[19] L Enneking 'The future of foreign direct liability? Exploring the international relevance of the *Dutch Shell Nigeria* case' (2014) 10 *Utrecht Law Review* 44 46.

justice in home states and demonstrate how these barriers clog the wheels of access to justice by African victims.[20] Lastly, I will conclude the chapter.

5.2 Extraterritorial regulation of extractive TNCs

Generally, a state cannot regulate the activities or conduct of individuals that occur in the territory of another sovereign state. International law is based on the principles of sovereign equality and non-interference.[21] As a result, the adoption by one country of a regulatory instrument that prescribes rules and controls the conduct of private persons or entities in the territory of another is considered interventionist and therefore a violation of international law. In the *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*,[22] the International Court of Justice (ICJ) held that the principle of non-interference forbids all states from intervening directly or indirect in the internal or external affairs of other states, including matters of 'a political, economic, social and cultural' nature.[23] For this reason, states are accustomed to interpreting their human rights obligations as territorially defined.[24]

However, states may enact extraterritorial legislation to protect human rights and punish violations of peremptory rules of international law (*jus cogens*) and settled rules of customary international law against international crimes such as piracy, terrorism, genocide, acts of aggression, and violations of internationally recognised human rights standards.[25] Based on this understanding, scholars and

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[20] RK Larsen 'Foreign direct liability claims in Sweden: Learning from *Arica victims KB v Boliden Mineral AB*' (2015) 83 *Nordic Journal of International Law* 404 412.

[21] Charter of the United Nations art 2; AL Parrish 'Rehabilitating territoriality in human rights' (2011) 32 *Cardozo Law Review* 1099 1109.

[22] *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* (27 June 1986) (1986) ICJ Reports 14.

[23] As above, 108 [para 205].

[24] De Schutter (n 6 above) 245. Also see WS Dodge 'The new presumption against extraterritoriality (2020) 133 *Harvard Law Review* 1582 1608-1611; WS Dodge 'Presumptions against extraterritoriality in state law' (2020) 53 *UC Davis Law Review* 1389 1394-1396.

[25] TT Phuong Tran 'Extraterritorial jurisdiction: From theory to international practices and the case of Vietnam law' (2020) 13 *Journal of Politics and Law* 151 153; O De Schutter, A Eide, A Khalfan, M Orellana, M Salomon & I Seiderman 'Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights' (2012) 34 *Human Rights Quarterly* 1084 1138-1139; Charter of the United Nations 1945 art 56; International Covenant on Economic, Social and Cultural Rights 1966 art 2(1); Universal Declaration of Human Rights 1948 arts 22 & 28; UN Declaration on the Right to Development 1986 arts 3-4; T Meron 'Extraterritoriality of human rights treaties' (1995) 89 *American Journal of International Law* 78-82; UN Committee Against Torture 'General Comment No. 2: Implementation of article 2 by States Parties' UN Doc CAT/C/GC/2 (24 January 2008) para 16; UN Human Rights Committee 'General Comment No 31: The nature of the general legal obligation imposed on states parties to the Covenant' UN Doc

activists have advanced the concept of 'extraterritorial obligations' (ETOs) for human rights. According to the ETOs Consortium, a global network of over 140 academics and civil society organisations (CSOs), ETOs are 'the human rights obligations states have beyond their national borders towards people living in other countries.'[26] In other words, they are obligations owed towards rights-holders in foreign (host) jurisdictions. To delineate the scope of states' ETOs, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (*Maastricht* Principles) was adopted in 2011 under the auspices of the ETOs Consortium. It enunciates that states have obligations to regulate the adverse impacts of private individuals and organisations and TNCs and other businesses operating beyond their territory, if such businesses or their parent companies have their centre of activity, are registered or domiciled, or have their main place of business or substantial business activities, in the states concerned.[27]

To avoid any lacuna with regard to the availability of remedies for harm, Principle 37 of the Maastricht Principles stipulates that where the resulting harm arising from an alleged violation happened in the domain of a state other than that in which the harmful conduct took place, 'any state concerned must provide remedies to the victim.'[28] Consistent with the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005*, states have a responsibility to provide victims of human rights violation with equal and effective access to justice '*irrespective of who may*

CCPR/C/21/Rev.1/Add.13 (29 March 2004) paras 2, 8 & 10; UN Committee on Economic, Social and Cultural Rights 'General Comment No 15: The right to water' UN Doc E/C.12/2002/11 (20 January 2003) para 33; UN Committee on Children's Rights 'General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child' UN Doc CRC/GC/2003/5 (27 November 2003) para 5; UN Committee on Economic, Social and Cultural Rights 'General Comment No 12: The right to adequate food (article 11)' UN Doc E/C.12/1999/5 (12 May 1999) para 15; UN Committee on Economic, Social and Cultural Rights 'General Comment No. 3: The Nature of States Parties Obligations' UN Doc E/1991/23 (14 December 1991) para 14. Also see Vienna Convention on the Law of Treaties 1969 art 53; *Case Concerning Barcelona Traction, Light, and Power Company Ltd* (*Belgium v Spain*) ICJ (second phase—merits) (5 February 1970) (1970) ICJ Reports 3 32 (paras 33-34) & 35 (paras 39-44) (*Barcelona Traction* case); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* ICJ (28 May 1951) (1951) ICJ Reports 15 23.

[26] ETO Consortium 'What are ETOs?' <https://www.etoconsortium.org/en/main-navigation/our-work/what-are-etos/> (accessed 14 May 2019).

[27] Maastricht Principles paras 24 &25(b).

[28] Maastricht Principles para 37.

ultimately be the bearer of responsibility for the violation'.[29] These provisions iterate the international human rights rule that there cannot be an absence of remedies for abuses committed in the investment relations among state and non-state entities. This suggests that for TNCs to be accountable, all states have a responsibility to ensure that mechanisms for accountability are available, effective and sufficient. And that should the (host) state where a violation occurs fail to comply with this responsibility, *any state concerned* with the operations of the transnational conglomerate *can provide remedies to the victim*.

5.2.1 General legal basis for extraterritorial regulation

Under international law, a state may be justified in utilizing the normative proposition of extraterritorial regulation for fulfilling its responsibility to promote and protect human rights from abuses by TNCs where -

(a) a TNC or investor having a controlling interest in a TNC is a national of the state concerned;
(b) a TNC, or its controlling or parent company, has its centre of operation, is incorporated or domiciled, or has its principal place of business, carries on a substantial aspect of its business activities, in the state concerned;
(c) a violation or threat of violation by a TNC occurs or originates on its territory;
(d) a reasonable nexus exists between the conduct sought to be regulated and the state concerned, including where some relevant aspects of a TNC's operations are carried out in the state's territory; and
(e) a conduct violating human rights also violates a peremptory norm of international law.[30]

The analysis in this section will, therefore, examine each of the above legal bases in order to put home country regulation and litigation in proper perspective.

(a) Nationality

The idea that home states have extraterritorial jurisdiction to protect the human rights of victims from the abusive conduct of extractive TNCs is mostly hinged on nationality. In the *Nottebohm Case (Liechtenstein v Guatemala)*,[31] the ICJ held that

[29] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 Para II(3)(c). Emphasis mine.
[30] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights 2011 para 25(a)-(e).
[31] ICJ Second phase (6 April 1955) (1955) ICJ Reports 4.

'[n]ationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals.'[32] Under the *nationality principle* of international law, states can exercise jurisdiction to regulate their nationals for criminal conduct that occurs abroad.[33] In relation to TNCs that are registered in a territorial state, this implies that the state concerned has jurisdiction on the basis of its fundamental right to regulate the criminal conduct of citizens, regardless of its physical borders.

Regulation of nationals can occur on the basis of two principles: active and passive personality.[34] The *active personality* principle is predicated on the notion that a state can exercise regulatory jurisdiction over its citizens – that is, natural and juristic persons – abroad.[35] Furthermore, even where the conduct sought to be regulated is not that of nationals, a state may nevertheless exercise extraterritorial jurisdiction if the harmful conduct of others affects its nationals (passive personality) or will have a harmful effect on its territory (effects doctrine).[36] Under the *passive personality* principle, a state may be justified in regulating the effects of a harmful conduct on its nationals abroad.[37]

Proponents of extraterritoriality argue that the obligations to regulate harmful conduct acquired under international human rights treaties by home states extend to the adverse environmental, social and human rights impacts of their nationals abroad.[38] They persuade that the universality of human rights protection will fall short of its essence, if the obligations of states to promote and protect human rights were limited to their territories. The *Case of the SS 'Lotus' (France v Turkey)* (*Lotus* case)[39] is often cited as lending credence to this position based on the decision of the ICJ that declared that states have 'a wide measure of discretion'

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32 As above, 20.

33 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ (14 February 2002) (2002) ICJ Reports 3 para 19 (Van Den Wyngaert, J dissenting). Also see T Morimoto 'Growing industrialization and our damaged planet - The extraterritorial application of developed countries' domestic environmental laws to transnational corporations abroad' (2005) 1 *Utrecht Law Review* 134 146-148.

34 McCorquodale & Simons (n 2 above) 605.

35 M Vordermayer 'The extraterritorial application of multilateral environmental agreements' (2018) 59 *Harvard International Law Journal* 59 65.

36 This is also known in international law as the 'effects doctrine'.

37 De Schutter (n 6 above) 257-258.

38 N Jägers *Corporate human rights obligations: In search of accountability* (2002) 172; I Brownlie *System of the law of nations: State responsibility* (1983) 165.

39 PCIJ (7 September 1927) (1928) PCIJ Reports 9 Series A 10 18-19.

to regulate persons, property or acts outside their territory that was not limited only to criminal acts.[40]

Although an important basis, it can be sometimes difficult to determine the nationality of a company for the purpose of exercising extraterritorial jurisdiction. It is not merely enough to look at the country where a company is registered to determine its nationality. Some difficulty with determining nationality can arise where the operations of a TNC in a developing (host) country are obfuscated in terms of ownership, control, domicile or principal place of business. For instance, an entity registered in a secrecy jurisdiction, and which subsequently owns controlling shares in a web of companies each registered in a different jurisdiction can present some regulatory challenge for a state that seeks to exercise extraterritorial jurisdiction. The separate personality of each of the companies from their (secret) shareholders can frustrate efforts to effectively regulate abusive conduct and ensure liability. This is much more so where investment treaties protect indirect ownership of a company or investment assets.[41]

(b) TNC operating in the home state's territory

Besides nationality, a state can exercise jurisdiction over harmful conduct that occurs outside its territory if a TNC registered in its territory is the parent or controlling company of a group of companies, or is headquartered, domiciled or carries on substantial aspects of its business activities in whatever form in its territory. By virtue of its sovereign control over all individuals and persons resident within its borders, it may enact laws or adopt regulations that affect the operations of the conglomerate in order to make the TNC human rights compliant. The Committee on Economic, Social and Cultural Rights (CESCR) affirms that the obligations of states under the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) are not only territorial, but also extraterritorial, especially with respect to corporations domiciled in their territories. In its General Comment 24 of 2017, the CESCR states that:

> States Parties' obligations under the Covenant do not stop at their territorial borders. States Parties are required to take the necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction

[40] *Lotus* case (n 39 above) para 46; L Henkin 'International human rights as "rights"' (1981) 23 *Nomos* 257 268; L Henkin 'Law and politics in international relations: State and human values' (1990) 44 *Journal of International Affairs* 183 201. *Cf Case Concerning the Arrest Warrant (11 April 2000* (n 33 above) paras 10, 70-71; *Barcelona Traction* case (n 25 above) 32, paras 33–34.

[41] See the 2004 Model US Bilateral Investment Treaty (BIT).

> (whether they are incorporated under their laws, or have their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.[42]

Under the Maastricht Principles, a state may impose on the parent company of a transnational group domiciled in its territory an obligation to comply with certain norms regardless of whether they operate in other countries, or to impose compliance with such norms on their subsidiaries and business partners.[43]

However, it is pertinent to acknowledge that when a state imposes obligations for certain conducts on a parent company or requires the parent company to impose compliance with the state's regulations on its foreign subsidiaries or business partners, the regulating state may be understood to exercise purely national jurisdiction over its citizen on the basis of nationality.[44] The consequence of the state's regulations is only an indirect impact of the lawful exercise of national jurisdiction.

(c) Harm planned or executed in home state

A state may also be justified in international law for adopting extraterritorial legislation that regulates the harmful conduct of a corporation or its subsidiary abroad if the conduct in question originates or an element of it was carried out in its territory.[45] This position is supported by the principle of international law that a state cannot allow its territory to be used for the purpose of executing an act that contravenes international law. In the *Corfu Channel Case (United Kingdom v Albania)*,[46] the ICJ held that given its control over its territory, a state is obliged to not knowingly allow its territory to be used for illegal acts. A failure to regulate or exercise due diligence over such acts by a corporation that violate human rights

[42] UN Committee on Economic, Social and Cultural Rights 'General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' UN Doc E/C.12/GC/24 (23 June 2017) para 26. Also see UN Committee on Economic, Social and Cultural Rights 'General Comment No 15: The right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' UN Doc E/C.12/2002/11 (20 January 2003) paras 31, 33; UN Committee on Economic, Social and Cultural Rights 'General Comment No 18: The Right to Work (Article 6 of the Covenant)' UN Doc GC 18, E/C.12/GC/18 (6 February 2006) para 30; UN Committee on Economic, Social and Cultural Rights 'General Comment No 19: The right to social security (Article 9 of the Covenant)' UN Doc E/C.12/GC/19 (4 February 2008) para 54; UN Committee on Economic, Social and Cultural Rights 'General comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)'GC 23, UN Doc E/C.12/GC/23 (7 April 2016) para 70.

[43] De Schutter et al (n 25 above) 1141.

[44] *Nottebohm* case (n 31 above) 21.

[45] De Schutter (n 6 above) 250.

[46] ICJ (9 April 1949) (1949) ICJ Reports 4 18-22.

treaties can lead to an internationally wrongful act for which the state concerned can be held accountable.[47] To avoid attribution with responsibility, states may take lawful action against TNC conduct that can have adverse impacts on human rights within or outside their territory.

(d) Nexus between home state and harm

Unlike the above three bases that directly apply to TNCs registered in the territory of the home state, there may also exist situations where the state concerned is neither the territory of registration or principal place of business, or the primary domicile of the parent company of a TNC. Aside from the instances in paragraphs (a), (b) and (c) above, states have devised ways of exerting national jurisdiction over companies that have been responsible for wrongful conduct of a civil nature or gross human rights violations in fulfilment of their *erga omnes* obligations. Often, a state seeking to exercise extraterritorial jurisdiction over the conduct of a company not registered in its territory must show that a reasonable link exists between it and the conduct or aspects of the company operations sought to be regulated. Due to the risk of violating the sovereignty of other countries, a state must show that the exercise of such jurisdiction is not in contravention of the Charter of the United Nations 1945 or other fundamental international law principles by:[48]

(a) Not interfering with the sovereign rights of other countries;
(b) Not interfering in the domestic affairs of the territorial state where the company sought to be punished is registered or domiciled; or
(c) Not contravening the principle of sovereign equality of states.

Consequently, adoption of extraterritorial legislation that seek only to prevent violations by companies which are not domiciled in or nationals of the state concerned may only be used in exceptional circumstances. For example, in relation to international crimes or international human rights violations.

(e) Violation of human rights as a peremptory norm

Today, some human rights such as the rights to life and non-discrimination and the freedom against torture – the egregious violation of which may constitute international crimes - are some of the fundamental values of the international community which all member states have a responsibility to preserve. For many

[47] NMCP Jägers 'Corporate human rights obligations: In search of accountability' (2002) 172.
[48] *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)* (27 June 1986) (1986) ICJ Reports 14.

scholars, these human rights are intrinsically related to peremptory norms and have been 'perceived as inherent to *jus cogens*.'[49] A state's obligation to prevent the violation of peremptory rules of customary international law or to adopt legislative and other measures to give effect to a human rights treaty includes regulating conduct that can have a harmful impact on human rights within or outside its borders. This includes the obligation to regulate corporate-sponsored slavery, torture, genocide, and crimes against humanity in order to preserve the sanctity of peremptory norms of general international law.[50] All these are issues on which states as members of the international community have a common interest, and which have an absolute and non-derogable character.

As the Universal Declaration of Human Rights 1948 has gained universal traction and most states have ratified the International Covenants as well as allied thematic treaties addressing international crimes, some international human rights (which are inextricably linked to the subject matter of international crimes) have gained universal recognition similar to peremptory norms and elicit *erga omnes* obligations for their protection. As such, states may exercise 'excusing' jurisdiction to punish international crimes and abuses that are tantamount to gross or massive human rights violations outside their national boundaries on the ground that such violations amount to a violation of peremptory norms of international law.[51]

In reality, however, rather than constrain TNCs, the manner in which TNCs are able to get away with abuses committed overseas may not be unconnected with the degree of lobsided concessions and protection they enjoy under international investment agreements negotiated by their home governments. This is in sharp contrast to the expectation under international human rights law that states will endeavour to regulate their nationals in respect of abuses they cause whether domestically or abroad. In the *Barcelona Traction* case, the ICJ held that although a state is bound to give protection to a company under domestic and international law, the protection offered a company was 'neither absolute nor unqualified.'[52] This is

[49] A Bianchi 'Human rights and the magic of *jus cogens*' (2008) 19 *The European Journal of International Law* 491 492; EMK Uhlmann 'State community interests, jus cogens and protection of the global environment: Developing criteria for peremptory norms' (1998) 11 *Georgetown International Environmental Law Review* 101 128-130.

[50] S Pillay 'And justice for all - Globalization, multinational corporations, and the need for legally enforceable human rights protections' (2004) 81 *University of Detroit Mercy Law Review* 489 502.

[51] JE Vinuales 'State of necessity and peremptory norms in international investment law' (2008) 14 *Law and Business Review of the Americas* 79 80, 91-92, 96.

[52] *Barcelona Traction* case (n 25 above) 32, para 33.

because although states have an obligation to protect the corporate structure, they had an overriding obligation towards the international community. This means that while TNCs may be entitled to protection under international investment treaties by the governments of the home state where they are domiciled, states have an overriding legal responsibility to regulate conduct that impinge absolute international values, including non-derogable international human rights norms. The Human Rights Committee affirms that the non-derogable provisions enumerated in article 4(2) of the ICCPR 'is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant'.[53] The CESCR also affirms that 'States Parties cannot derogate from the obligations under the Covenant [ICESCR] in trade and investment treaties they may conclude.'[54] Based on this universal recognition by the international community, states are understood to have obligations under human rights treaties and customary international law that are excluded from derogation. And such obligations follow from the fact that 'the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction.'[55]

The above bases for the exercise of extraterritorial jurisdiction, therefore, affirms the authority of the governments of home countries to regulate the wrongful conduct of their TNCs abroad. However, in predominantly capitalist countries, TNCs have argued against extraterritorial intervention in the free market, opting instead to self-regulate. For TNCs, self-regulation was not so much borne out of humanitarian interest but the need to avoid higher regulations, preserve a good public image of the corporate structure and the fear that failure to adopt voluntary codes of conduct could hinder profitability and long-term access to international finance.[56] These concerns propelled TNCs' interest in self-regulation. Proponents of self-regulation also contended that a combined effect of public pressure and self-regulation would put TNCs on a 'race to the top' for human right compliance.[57] However, self-

[53] UN Human Rights Committee 'General Comment No 29: Article 4: Derogations during a State of Emergency' UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 11.

[54] UN Committee on Economic, Social and Cultural Rights General Comment 24 (n 25 above) para 13.

[55] As above, para 27.

[56] T Conzelmann 'Business self-regulation: How to design monitoring and compliance institutions' (2005) 5-6 <https://www.researchgate.net/profile/Thomas_Conzelmann/publication/267919329_Business_Self_Regulation_How_to_Design_Monitoring_and_Compliance_Institutions/links/54db7f780cf261ce15d0337a/Business-Self-Regulation-How-to-Design-Monitoring-and-Compliance-Institutions.pdf> (accessed 26 November 2019).

[57] J Semeniuk 'The alignment of morality and profitability in corporate social responsibility' (2012) 2 *Erasmus Student Journal of Philosophy* 17 21.

regulation – by itself – has been criticised for its limited reach and lack of independent oversight or self-monitoring. [58]

As TNC abuses became more rampant in Africa, Asia and South America, its adverse socio-economic impacts generated pressure from the Western mainstream media, environmental justice and human rights organisations and activist shareholders in annual general meetings in home countries to take action. More so, evolving business and human rights norms and the increasing cases filed against TNCs in home countries by victims from developing states lent weight to the concerns in the extractive industries. The vortex of pressures has moved the hands of home country governments to rein in the unethical conduct of corporate nationals abroad.

5.2.2 State practice on extraterritorial rules

Several governments of developed countries have enacted laws that regulate a variety of conducts and enforce compliance with international standards on labour, environment, health and safety, tax, corruption and human rights.[59] In particular, laws on disclosure and transparency, modern slavery and fair labour practices, bribery and corruption, and conflict minerals are being enacted. A major consequence of such rulemaking has been the conferment of legal standing on foreign victims to pursue claims before regulatory institutions and courts of home countries. In this section, I examine a few extraterritorial laws and guidelines from the West (North America, Europe and Australia), China and South Africa that are relevant to the operations of TNCs in the extractive industries.

(a) Alien tort, disclosure, and conflict-minerals statutes of the US

The United States (US) boasts several important laws with an extraterritorial effect. The earliest and most prominent of the lot is the Alien Tort Statute (ATS) enacted by the First Congress in 1789. Enshrined in a single section of the US Code, the ATS stipulates that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty

[58] D Graham & N Woods 'Making corporate self-regulation effective in developing countries' (2015) 4 GEG Working Paper No 2005/14 <https://www.econstor.eu/bitstream/10419/196277/1/GEG-WP-014.pdf> (accessed 14 January 2020); R Jenkins 'Corporate codes of conduct self-regulation in a global economy' (2001) 2 *Technology, Business and Society* 1 25; SP Sethi 'Self-regulation through voluntary codes of conduct' in SP Sethi (eds) *Globalization and self-Regulation: The crucial role that corporate codes of conduct play in global business* (2011) 3-14.

[59] A Posthuma 'Beyond "regulatory enclaves": Challenges and opportunities to promote decent work in global production networks' (2010) 5 <http://www.ilo.int/legacy/english/protection/travail/pdf/rdwpaper43c.pdf> (accessed 14 January 2020).

of the United States.'[60] On the basis of this provision, a multitude of cases have proceeded before US courts against individuals and TNCs for abuses committed outside the US. Although enacted in the eighteenth century, the ATS was unused no more than 21 times for nearly two centuries.[61] It was only in 1980, in the notable case of *Filartiga v Pena-Irala* (*Filartiga* case),[62] that the first successful claim for civil wrong done outside the US 'in violation of the law of nations' was determined before the US Court of Appeal.[63]

The ramification of the *Filartiga* case implied that the ATS was not merely a jurisdictional statute, but could also give rise to a cause of action under US federal common law.[64] This gave impetus to subsequent cases under the ATS in the US concerning abuses by western TNCs in the extractive industries in Africa. For example, claims pertaining to US corporations' support for the Apartheid government of South Africa and its racial discrimination policies, Shell and Chevron's abuses in the Niger Delta region of Nigeria, and Talisman Energy's complicity in the genocide in Sudan have been litigated under the ATS before US courts.[65] Although the US Supreme Court has rolled back the application of ATS to claims emanating from foreign countries discussed in section 5.4.3 of this chapter, the most consequential lesson learned from ATS litigation was the magnitude of TNC abuses in developing countries. Whilst most of the victims in ATS litigation were non-US nationals, it demonstrated the level of direct involvement or complicity of TNCs in gross human rights violations in Africa and elsewhere, necessitating drastic state action.[66]

In the 1970s, concerns about illegal payments to government officials in developing countries to secure business licences, concessions or contracts evolved into a pressing public issue associated with the international flow of trade to the Global South. As the single dominant economic power at the time, US regulators sought to take an institutional approach to prevent nationals and businesses from paying bribes to foreign officials in order to 'influence any official act, induce

[60] 28 USC Section 1350; EarthRights International 'The Alien Tort Statute: Holding human rights abusers accountable' <https://earthrights.org/how-we-work/litigation-and-legal-advocacy/> (accessed 18 January 2020).
[61] GC Hufbauer & NK Mitrokostas 'International implications of the Alien Tort Statute' (2004) 16 *St Thomas Law Review* 607 609.
[62] 630 F.2d 876 (2d Cir. 1980).
[63] See *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980).
[64] *Kadic v Karadzic* 70 F.3d 232 238 (2d Cir 1995); Hufbauer & Mitrokostas (n 61 above) 610.
[65] Some of these cases are considered in Section 5.4 below.
[66] Enneking (n 19 above) 46.

unlawful action, or obtain or retain business.'[67] The Foreign Corrupt Practices Act of 1977 (FCPA) was enacted to prevent corporate bribery of foreign government officials. The FCPA empowers the US Securities and Exchange Commission (SEC) to collect information and disclosure reports and the US Department of Justice to indict individuals and corporations that directly or indirectly offer, pay, promise or authorize to pay money or anything of value to a foreign official.[68]

The FCPA also ensures that corporate disclosures are done on the integrity of corporate books and clear standards of internal auditing and accounting controls.[69] In 2007, Jason Steph, an employee of Willbros Group, was convicted under the FCPA for paying bribes to Nigerian government officials between 2003 and 2005 in order to secure a major gas pipeline construction contract in Nigeria.[70] Whilst Willbros Group reached a settlement agreement with the Department of Justice, several employees were convicted based on indicting evidence that Mr Steph, along with employees of German engineering giant, Siemens, had paid various sums of money as bribes to government officials in Argentina, Isreal, Libya, Nigeria, Russia and Venezuela between 2002 and 2006.[71] Although the FCPA made it relatively easier for US regulators to investigate questionable payments made by extractive and non-extractive companies abroad, many TNCs have complained that the FCPA puts them at a peculiar disadvantage in the international business process as 'bribery and kickbacks were a regular feature of commerce in many nations.'[72]

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67 R Koch 'The Foreign Corrupt Practices Act: It's time to cut back the grease and add some guidance' (2005) 28 *Boston College International & Comparative Law Review* 379 383. NB: The FCPA defines a 'foreign official' as 'any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of, any such public international organization.' See FCPA sec 78dd (1)-(3).

68 MB Bixby 'The lion awakes: The Foreign Corrupt Practices Act-1977 to 2010' (2010) 12 *San Diego International Law Journal* 89; HL Brown 'Extraterritorial jurisdiction under the 1998 amendments to the Foreign Corrupt Practices Act: Does the government's reach now exceed its grasp' (2000) 26 *The North Carolina Journal of International Law and Commercial Regulation* 239; T Atkeson 'The Foreign Corrupt Practices Act of 1977: An international application of SEC's corporate governance reforms' (1978) *The International Lawyer* 703-720.

69 FCPA sec 102.

70 Reuters 'US man pleads guilty in Nigerian bribery case' *Reuters* 6 November 2007 <https://www.reuters.com/article/usa-nigeria-bribes/u-s-man-pleads-guilty-in-nigerian-bribery-case-idUKN0531618520071105> (accessed 14 January 2020).

71 US Securities and Exchange Commission 'SEC Charges Willbros Group and Former Employees with Foreign Bribery' 14 May 2008 <https://www.sec.gov/news/press/2008/2008-86.htm> (accessed 15 December 2019); Bixby (n 68 above) 90.

72 Bixby (n 68 above) 98.

More so, following the 2008 global financial crisis caused by the collapse of the too-big-to-fail US financial institutions, the need to regulate the transnational activities of banks and TNCs in terms of disclosure and transparency became even more imperative. After extensive congressional and executive investigations showed the magnitude of financial malpractices and criminal conduct perpetrated by Wall Street and corporate partners, there arose a need to empower regulators to enforce stricter standards on fairness and transparency, and ensure protection of consumers from unanticipated financial risks. The result was a far-reaching statutory and regulatory reform promising accountability of big corporations and greater protection for Americans on many fronts, including with respect to natural resource imports and exports from Africa. The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Act) was enacted to compel American TNCs to make full disclosures on conflict minerals originating from the Democratic Republic of the Congo (DRC) including payments by resource extraction companies.[73]

Concerned that American corporations may have been fuelling violent conflicts in the DRC through the exploitation and trade in conflict minerals, sections 1502 and 1504 was incorporated in the Dodd-Frank Act 2010 as the 'conflict-minerals' rule. The sections make a consequential amendment to section 13 of the Securities Exchange Act 1934 by adding paragraphs (p) and (q). The conflict-minerals rule requires statutory reporting by securities-issuing companies dealing in minerals including tantalum, tin, tungsten and gold (3TG minerals) where such minerals 'are necessary to the functionality or production of a product manufactured by such person.'[74] The objective of the laws is to extraterritorially 'monitor and stop commercial activities involving the natural resources… that contribute to the activities of armed groups and human rights violations in the [DRC]'.[75] Furthermore, section 1504 of the Dodd-Frank Act requires securities issuing extractive companies and their subsidiaries to disclosure in their statutory report to the SEC any payments to a foreign government for the commercial development of oil, gas or minerals. Consequently, the conflict-minerals rule has been the bedrock for the development of international norms on responsible mineral sourcing globally – and has informed

[73] Securities Exchange Act sec 13(p)&(q); Dodd-Frank Act secs 1502 & 1504.

[74] Securities Exchange Act sec 13(p)(2)(B). NB: Conflict minerals disclosure are in practice required to be filed with the SEC under Form SD – see US Securities and Exchange Commission 'Fact sheet: Disclosing the use of conflict minerals' 14 March 2017 <https://www.sec.gov/opa/Article/2012-2012-163htm---related-materials.html> (accessed 24 December 2019).

[75] Dodd-Frank Act secs 1502(c)(1)(B)(i)(I).

many of the standards governing the global supply chain of 3TG and other minerals and metals worldwide.[76]

Pursuant to sections 1502 and 1504 of the Dodd-Frank Act, the SEC enacted the Conflict Minerals Regulations on 12 September 2012, with the effective date being 13 November 2012.[77] The regulations impose a three-part process that securities-issuing companies engaged in minerals from specific conflict-affected countries must undertake to determine whether they have to make disclosures and publish such disclosures on their websites.[78] In the *first* step, the company is expected to determine if the rule applies to it. *Second*, the company is to conduct a reasonable *country of origin* inquiry. If, based on the inquiry, the company discovers or reasonably believes that its minerals originated from a recognised conflict-affected country or region, it must then proceed to *step three*, which is to exercise due diligence on the source and chain of custody of its minerals. Based on the result of its due diligence, the company must file a conflict-minerals report (Form SD). The report required companies to disclose if minerals it dealt with are 'DRC conflict free', 'Not found to be "DRC conflict free"', or 'DRC conflict undeterminable'.[79]

Equally worthy of note is that the US also enacted the Foreign Account Tax Compliance Act of 2009 (FATCA) 'to prevent the avoidance of tax on income from assets held abroad' by American citizens.[80] The FATCA requires every American or permanent resident residing or doing business abroad to disclose information about ownership of foreign bank accounts or other financial assets, interests or substantial ownership of a foreign entity.[81] Under the requirement, it is undoubtedly arguable that oil, gas and mining corporations operating in Africa which are substantially controlled by an American citizen fall within tenure of the FATCA and therefore

[76] D Koch & S Kinsbergen 'Exaggerating unintended effects? Competing narratives on the impact of conflict minerals regulation' (2018) 57 *Resources Policy* 255 256.

[77] 77 Fed Reg 56 274, 56 277-78.

[78] US Securities and Exchange Commission Fact Sheet (n 74 above).

[79] As above. NB: A company's products are 'DRC conflict free' if, based on a independent private sector audit, the minerals are certified to have originated from the covered countries but did not benefit or finance armed groups. If the minerals originated from the covered countries are found to have benefited or financed armed groups, it must be certified 'Not Been Found to Be "DRC Conflict Free"'. And if the company has been unable to determine the origin of the minerals or whether it has benefitted or financed armed groups in the covered countries, then the company must report that the minerals are 'DRC Conflict Undeterminable'.

[80] California Transparency in Supply Chains Act 2010 sec 3; Civil Code sec 1714.43; Revenue and Taxation Code sec 19547.5.

[81] A Christians 'Putting the reign back in sovereign' (2013) 40 *Pepperdine Law Review* 1373 1376, 1385.

liable to disclose all financial assets and remit taxes due to the US.[82] However, the FATCA has been criticised for its unilateral nature and threat to punish foreign tax intermediaries such as local banks in foreign countries which are not under the jurisdiction of the US.[83]

As a frontline US state, the government of California enacted the California Transparency in Supply Chains Act 2010. Entering into force in 2012, the Act compels large manufacturers and retailers to disclose to consumers their efforts to eliminate slavery and human trafficking within their business and supply chains.[84] To fulfil this responsibility, companies which identify as manufacturers or engaged in retail trade in California and grossing over USD100 million in their business are required by law to disclose in writing or on their websites the extent of their effort to personally verify the supply chains of their products in order to assess and address the risks of slavery and human trafficking. The law also mandates manufacturers and retailers to conduct audits of suppliers to assess compliance with their corporate standards on slavery and trafficking in supply chains, require supplier certification that materials traded comply with the Act, and maintain internal standards of accountability for employees and contractors that fail to meet their companies' standards on slavery and trafficking.

For a developing region like Africa, an important implication of these statutes *was originally* the human rights due diligence and accountability measures they established against companies operating in Africa that have no regard for human rights abuses associated with their products and minerals sourcing. As will be explained in section 5.4 below, that may no longer be the case as these reporting requirements in some of these statutes have either been suspended or in the process of being abolished.[85] However, by expanding the regulatory reach of federal and state regulators beyond the physical borders of the US, the FCPA and the Dodd-Frank Act proved to be classic statutes for the extraterritorial exercise of jurisdiction by one state for the protection of human rights in another. Although it is not the focus of this chapter to assess the impact of US laws on African economies, there is no

[82] Christians (n 80 above) 1398.

[83] A Elbra & R Eccleston 'Introduction: Business, civil society and the 'new' politics of corporate tax justice: Paying a fair share?' in R Eccleston & A Elbra (eds) *Business, civil society and the 'new' politics of corporate tax justice: Paying a fair share?* (2018) 1 8-9; D Wigan 'Offshore financial centres' in D Mügge (ed) *Europe and the governance of global finance* (2014) 156 167.

[84] California Transparency in Supply Chains Act sec 3(b); California Civil Code sec 1714.43(b).

[85] Section 5.4.1 below.

doubt that by enforcing transparency rules on TNCs' financial undertakings in Africa and the source of minerals, the above US extraterritorial laws have provided a high threshold of transparency and added protection for human rights in Africa.[86]

(b) Bribery and modern slavery laws of the UK, Canada, and Australia

Bribery is a common feature in state-TNC relations in the developing world.[87] Bribery occurs when a person or corporate organisation offers, promises or gives a financial, material or other advantage to another with the intention of inducing or rewarding the latter to perform improperly a relevant role or activity. To control the routine practice of making illicit payments to foreign government officials and to stop TNCs from seeing bribery as just another line item in corporate expenditure, the governments of the UK and Australia have each, within the last half a decade, adopted similar extraterritorial legislation intended to curb the spate of corporate bribery and modern slavery in their respective countries and abroad.

In 2010, the UK adopted the Bribery Act of 2010 and, subsequently, in 2015 enacted the Modern Slavery Act of 2015 (UK MSA). The essence of both laws is to block illegal financial and harmful labour practices by ensuring transparency by individuals and companies in their business and supply chains.[88] Both pieces of legislation have ramifications for illicit conduct undertaken by investors and corporate entities abroad. However, it is only the Bribery Act that imposes 'extraterritorial corporate criminal liability and includes binding public standards and sanctions for non-compliance'.[89] The UK MSA does not contain the same level of extraterritorial criminal liability for violation by companies operating abroad unless they are UK citizens or carry-on aspects of their business in the UK.[90]

Under the UK Bribery Act, a senior officer as well as the corporation concerned – so long as it is a national, subject, registered in or has close connection with the

[86] Other enactments from the US with an extraterritorial effect include: President of the United States of America 'Executive Order 13126 of June 12, 1999: Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labour' (1999) <https://www.gpo.gov/fdsys/pkg/FR-1999-06-16/pdf/99-15491.pdf> (accessed 3 January 2020); US Department of State 'Responsible Business Conduct: First National Action Plan for the United States of America' 16 December 2016 <https://www.state.gov/e/eb/eppd/csr/naprbc/265706.htm> (accessed 3 January 2020).

[87] See Chapter Four, section 4.5.3-4.5.4 above.

[88] G LeBaron & A Ruhmkorf 'Steering CSR through home state regulation: A comparison of the impact of the UK Bribery Act and Modern Slavery Act on global supply' (2017) 8 *Global Policy* 15 16.

[89] LeBaron & Ruhmkorf (n 88 above) 16.

[90] V Mantouvalou 'The UK Modern Slavery Act 2015 three years on' (2018) 81 *The Modern Law Review* 1017-1045; LeBaron & Ruhmkorf (n 88 above) 21; G Craig 'The UK's modern slavery legislation: An early assessment of progress' (2017) 5 *Social Inclusion* 16 22 & 25.

UK - can be criminally liable for the offence of bribery where the whole or a part of the offence is committed either within or outside the UK or 'would form part of an offence if done or made in the [UK]'.[91] Section 7 of the Bribery Act holds a commercial organisation liable for bribery if a person associated with the organisation (which could be an agent, employee or subsidiary) makes an illicit payment to another for the purpose of obtaining or retaining business or other advantage for the organisation. In the same way, the UK MSA renders criminally liable any person (whether a UK national or non-national) or corporation, who enslaves, initiates the performance by another person of forced or compulsory labour or arranges or facilitates the travel of another person through the UK with a view to enabling the exploitation of that person. Particularly, companies are required to submit a slavery and human trafficking statement for every financial year of steps taken to ensure that slavery and human trafficking does not take place in any part of their business or supply chains.[92] The report must include information about a company's business organisational structure(s), policies and due diligence processes in relation to slavery and human trafficking in its operations and supply chains.[93]

Australia has enacted a similar piece of modern slavery law as the UK. In 2018, the Australian federal government enacted the Modern Slavery Act 153 of 2018 (Australian MSA) to require 'some entities' to report on the modern slavery risks in their operations and supply chains and the measures taken to address them. The law requires TNCs or subsidiaries domiciled or carrying out business in Australia, with an annual aggregate revenue above USD100 million, to submit an annual report on the risk of modern slavery in their business and supply chains, and the measures taken to address them.[94] Companies whose revenue is below the prescribed sum may only do so voluntarily. Unlike the UK MSA, the Australian MSA has a broader definition of *modern slavery* that includes not just slave labour, compulsory labour and human trafficking but also the worst forms of child labour.[95] The law also has an express

[91] UK Bribery Act secs 12 and 14. Section 7(5) of the Bribery Act defines 'commercial organisation' to include 'a body corporate' which is either registered in the UK or elsewhere and carries on business in any part of the UK.

[92] UK MSA sec 54(4). This is discernible from section 54(12) of the UK MSA, which defines 'commercial organisation' to mean 'a body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom' and 'a partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and for this purpose "business" includes a trade or profession'.

[93] UK MSA sec 54(5).

[94] Australia's Modern Slavery Act sec 3

[95] Australia's Modern Slavery Act sec 4.

extraterritorial application. Section 10 of the Australian MSA explicitly stipulates that the provisions of the Act 'extends to acts, omissions, matters and things outside Australia.'[96]

Like the UK and Australia, Canada has also recently introduced its own Modern Slavery Bill S-211 of 2020 to impose a duty on certain entities to report on the actions taken to avoid and decrease the risk that forced or child labour is used at any step in the production of goods in or imported into Canada or elsewhere.[97] The purpose of the law is 'to implement Canada's international commitment to contribute to the fight against modern slavery through the imposition of reporting obligations on entities involved in the production of goods in [or imported into] Canada or elsewhere'.[98] For the purpose of this analysis, it is not necessary to go into any further detail as the Bill is still under consideration.

Nonetheless, the legal implication of these pieces of modern slavery legislation for Africa is that they serve the purpose of curbing the human rights abuses that could be committed in the supply chains of TNCs from Australia, Canada and the UK operating in the extractive industries in Africa. More importantly, it establishes a measure of regulatory checks and corporate accountability through the reporting legal obligations they impose that did not previously exist. By requiring companies operating abroad to report on their (non)involvement in forced labour, human trafficking and child labour, the laws further support the global effort to curtail TNCs human rights abuses in developing countries.

(c) Due diligence laws of France, the Netherlands, and the EU

France has equally taken legislative action to curb the harmful impacts of its corporations abroad. In 2017, the French government enacted Law No 2017-399 of 27 March 2017 on the Corporate Duty of Vigilance (*Loi N° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*).[99] The law imposes express legal obligations on French parent, and direct and indirect subsidiary companies (whose head office is situated on French territory

96 Australia's Modern Slavery Act sec 10.

97 Canada's Modern Slavery Bill-211 of 2020 secs 7 and 8; R Campbell 'Modern slavery legislation in Canada: An update' 24 September 2019 <https://www.dlapiper.com/en/canada/insights/publications/2019/09/modern-slavery-act/> (accessed 13 January 2020).

98 Canada's Modern Slavery Bill-211 of 2020 secs 3, 16 and 17.

99 SA Altschuller & AK Lehr 'The French Duty of Vigilance Law: What you need to know' 3 August 2017 <https://www.csrandthelaw.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/> (accessed 8 March 2020).

or abroad) to establish and implement an effective vigilance plan and disclose their implementation report.[100] The law is applicable to a parent or subsidiary company which, after two consecutive financial cycles, has no less than five thousand employees within the company head office stationed on French territory or no less than ten thousand employees within the parent and subsidiary companies whose head office is situated on French territory or abroad.

Besides its express application to parent and subsidiaries, the French Duty of Vigilance Law applies distinctively to subcontractors and suppliers with whom TNCs and their subsidiaries maintain established commercial relationships.[101] This laudable legislative oversight ensures that both the companies that subcontract employee recruitment, mine or rig operations, mine closure and reclamation, and the subcontractors themselves are liable for any abuses committed.[102] Unlike the UK MSA, the French law does not reduce the corporate obligation to respect human rights to one of reporting or making glib declarations of compliance. Rather, it concretely defines and incorporates the human rights due diligence responsibility articulated in the UNGPs. In the English translation, the Law states:

> The plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls […].[103]

The Corporate Duty of Vigilance Law also requires that a company's vigilance plan must be developed with the involvement of its stakeholders and, where appropriate, take into consideration the multiparty initiatives that exist at the territorial level or in the subsidiaries.[104] This is a remarkable development because it compels corporations to, in a way, conduct stakeholder engagement to secure broad-based community support of extractive projects. More so, where a company fails to comply with the law within a space of three months of receiving a notice to

[100] French Law No 2017-399 art 1. Legifrance 'Law n° 2017-399 of March 27, 2017 relating to the duty of vigilance of parent companies and ordering companies (1)' <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id> (accessed 8 March 2020). For an English translation of the Law, see European Coalition of Corporate Justice 'French Corporate Duty of Vigilance Law (English Translation)' (2016) <http://www.respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf> (accessed 9 March 2020).

[101] French Law No 2017-399 art 1.

[102] As above.

[103] European Coalition of Corporate Justice (n 100 above).

[104] French Law No 2017-399 arts 1-2.

comply, 'any person of legitimate interest' is allowed to make an interlocutory application to a court of competent jurisdiction to enforce compliance.[105] Although the law is not peculiarly applicable to the extractive industries but all sectors, it does apply and can be used to address the many controversies surrounding the abusive activities of French extractive corporations in Africa.

Similarly, the Parliament of the Netherlands adopted the Child Labour Due Diligence Act 401 of 2019 (*Wet Zorgplicht Kinderarbeid*) in May 2019.[106] The law seeks to eradicate the supply of goods and services which have been created with child labour and applies to all Dutch companies that sell or supply goods and services to Dutch consumers, including corporations registered outside the Netherlands.[107] The law requires such companies to evaluate whether child labour occurs in their production or supply chains and, where a reasonable suspicion exists of the likelihood of its occurrence, to develop an action plan to eradicate the menace.[108] Companies are obliged to make a publicly available statement which will be filed with a supervisory registry to be created for the purpose.[109] While old companies are required to submit compliance statement within six months of the date of commencement of the law, new companies are to do so immediately upon registration soon after the law has taken effect. Importantly, foreign companies trading in goods and services are required by the law to submit their statement within a period of six months of trading in goods and services to Dutch consumers.[110]

Although the law was expected to come into force not earlier than 1 January 2020, its effective enforcement date is yet to be determined by Royal Decree.[111] Once operational, it allows for the establishment of a register for companies in

[105] French Law No 2017-399 art 2.

[106] See official statute in Dutch here: Official Gazette of the Kingdom of the Netherlands '401 Act of 24 October 2019 introducing a duty of care to prevent the supply of goods and services that have been created with the aid of child labour' (2019) <https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vl3khw8f3a00/f=y.pdf> (accessed 15 March 2020) [Dutch Child Labour Due Diligence Act].

[107] Dutch Child Labour Due Diligence Act art 4(1); A Hoff 'Dutch child labour due diligence law: A step towards mandatory human rights due diligence' 10 June 2019 <https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/> (accessed 16 March 2020).

[108] Dutch Child Labour Due Diligence Act art 5(1).

[109] Dutch Child Labour Due Diligence Act arts 3 & 4(5).

[110] A Marcelis 'Dutch take the lead on child labour with new due diligence law' 17 May 2019 <https://ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/> (accessed 9 February 2020).

[111] Marcelis (n 110 above).

compliance with the obligations imposed.[112] The law, however, does not expressly stipulate the criteria of a company's assessment of its production and supply chain or the elements of its action plan. Rather, it defers such express conditionalities to the declaration of a general administrative order based on the *ILO-IOE Child Labour Guidance Tool for Business 2015*.[113] All disclosed statements are to be made publicly available by the supervisory authority responsible for maintaining the register, which is yet to be designated.[114] However, the law is the first European law to introduce criminal penalties for a failure to exercise due diligence in addressing the challenge of child labour.[115] Particularly, where a company fails to investigate child labour in its supply chains, establish the necessary action plan or, if it does, where the plan or statement is inadequate or if the company fails to produce the statutory statement, the proposed regulatory authority may impose a symbolic fine of EUR 4 100.[116] Should a company's default persist within five years, non-compliance with the statute will amount to an economic crime under the Dutch Economic Crimes Act and such a company and its officials could face criminal sanctions of up to four years prison sentence, community service or be liable to pay a fine as much as EUR 83 000.[117]

At the continental level, the European Union (EU) has also adopted extraterritorial rules to regulate the importation or dealing in minerals sourced by local and multinational companies from conflict hotspots and high-risk areas. In 2017, it adopted the EU Conflict Minerals Regulation 2017/821 as a regional standard for supply chain due diligence by EU importers, smelters and refiners of 3TG minerals originating from conflict-affected and high-risk areas.[118] The Regulation seeks to

[112] G Oonk 'Child Labour Due Diligence Law for companies adopted by Dutch Parliament' 8 February 2017 <http://www.respect.international/wp-content/uploads/2019/11/170208e.pdf> (accessed 9 February 2020).

[113] Oonk (n 112 above); International Labour Organisation 'ILO-IOE Child labour guidance tool for business: How to do business with respect for children's right to be free from child labour' (2015) <http://www.ilo.org/ipecinfo/product/download.do?type=document&id=27555> (accessed 9 February 2020).

[114] Oonk (n 112 above); Marcelis (n 110 above). Also see Child Labour Due Diligence Act art 1(d).

[115] Hoff (n 107 above); E Van Rhijn 'The possible impact of the Child Labour Due Diligence Act' 31 January 2020 <https://www.nautadutilh.com/en/information-centre/news/the-possible-impact-of-the-dutch-child-labour-due-diligence-act> (accessed 16 February 2020).

[116] Child Labour Due Diligence Act art 7(2)(a).

[117] Child Labour Due Diligence Act art 7(2)(b).

[118] Council of the European Union and European Parliament 'Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas' (2017) <https://op.europa.eu/en/publication-detail/-/publication/8b0e378b-3c59-11e7-a08e-01aa75ed71a1/language-en> (accessed 18 March 2020) (EU Regulation 2017/821).

ensure transparent and responsible sourcing by European TNCs and local companies of rare earth minerals from fragile countries in the Great Lakes Region in Africa, including the DRC and neighbouring states in Central Africa.[119] Like the US conflict-minerals rule, the EU hopes to use this medium of controlling the trade in minerals from conflict areas to eliminate the financing of armed groups, and establish uniform compliance by EU importers of metals and minerals contemplated by the Regulation.

In the particular context of promoting *responsible sourcing* through extraterritorial law making, the EU Conflict Minerals Regulation draws inspiration from the Organisation for Economic Cooperation and Development (OECD) *Guidelines for Multinational Enterprises*, the UNGPs and the Dodd-Frank Act, but more especially the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-risk Areas* (OECD Due Diligence Guidance).[120] Based on the recognition that EU companies operating in or sourcing minerals from conflict-affected and high-risk countries could directly or indirectly support conflicts, the idea of responsible sourcing requires that companies conduct due diligence in their mineral supply chains in such areas.[121] *Conflict-affected and high risk areas* have been defined as states 'identified by the presence of armed conflict, widespread violence or other risks of harm to people.'[122] *High-risk areas* include states that are burdened by insecurity, widespread violence, repression or political instability, institutional weakness, collapse of civil infrastructure and widespread violation of human rights and international or domestic law.[123]

Still, it is consequential to mention that the enactment of the corporate obligation to respect human rights into hard law in the form of the EU Conflict Minerals Regulation transforms the voluntary nature of the obligation under the

[119] EU Regulation 2017/821 art 1(1). The DRC and 11 other countries (Angola, Burundi, Central African Republic, Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia) are members of the International Conference of the Great Lakes and have worked in partnership with developed countries to address the illicit exploitation of natural resources in the Great Lakes Region: see International Conference of the Great Lakes Region 'Lusaka Declaration of the ICGLR Special Summit to fight illegal exploitation of natural resources in the Great Lakes Region' (15 December 2010) <https://www.oecd.org/daf/inv/mne/47143500.pdf> (accessed 26 February 2020).

[120] EU Regulation 2017/821 preamble (paras 4 & 5). See also OECD Guidelines for Multinational Enterprises part VII (paras 76-80); UNGPs principle 7 commentary; OECD Declaration on International Investment and Multinational Enterprises 1976 (amended in 2011) arts 2A(2)&(5) and 4; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997; United Nations Convention against Corruption 2003 art 12.

[121] OECD Due Diligence Guidance, 14.

[122] OECD Due Diligence Guidance, 13.

[123] As above.

UNGPs, the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance to binding legal commitments. This is relevant because the Regulation does not make a conflating distinction between the idea of *obligation* and *responsibility* of EU importers, smelters and refiners.[124] Article 1(2) of the Regulations categorically 'lays down the supply chain due diligence obligations of Union importers of minerals or metals containing or consisting of tin, tantalum, tungsten or gold', while article 14(2) affirms the corporate 'responsibility to comply with the due diligence obligations under this Regulation.'[125] Again, this reaffirms the point in the preceding chapters of this thesis that the distinction in the UNGPs between obligations (or duties) and responsibility is a cosmetic one lacking any legal or theoretical basis in international law.[126]

(d) Chinese human rights due diligence rules

Like its Western counterparts, China is also a key player in the global production and supply chain of oil and gas, metals and minerals and, therefore, worthy of consideration in the exterritorial corporate regulation discourse. China is currently the world's largest metals consumer and one of the biggest importers of solid minerals.[127] Besides holding four percent of the world's copper ore reserves, it relies on Zambia and Tanzania for much of its copper imports used in its electronics industry.[128] With the active support of the Chinese government, state-owned enterprises and private entrepreneurs have penetrated every corner of the international global economy, expanding into developed, emerging, and developing markets including Africa. More so, loan and infrastructure development agreements between China and African countries often incorporate the use of Chinese labour, logistics, equipment, and companies in Africa.[129] This, therefore, begs the question whether Chinese companies can be held accountable in China for human rights violations that have occurred abroad.

[124] EU Regulation 2017/821 preamble (paras 4, 5, 9 & 14), arts 1(2) & 14(2).
[125] Emphasis is mine.
[126] See Chapter 3 above.
[127] S Zadek, M Forstater, H Cheng, J Potts & GA Huppé 'Meeting China's global resource needs: Managing sustainability impacts to ensure security of supply' (2014) 1 & 9-10 <https://www.iisd.org/sites/default/files/publications/china_supply_synthesis_report.pdf> (accessed 29 March 2020).
[128] Zadek *et al* (n 127 above) 9-10.
[129] C Alden & M Davies 'A profile of the operations of Chinese multinationals in Africa' (2006) 13 *South African Journal of International Affairs* 83 92-93. Also see CK Lee 'Raw encounters: Chinese managers, African workers, and the politics of casualization in Africa's Chinese enclaves' in A Fraser & M Larmer (eds*) Zambia, mining, and neoliberalism: Boom and bust on the globalized Copperbelt* (2010) 127 138-139.

Indeed, Chinese inbound and outbound minerals and metals supply chains have generated vast investment and growth opportunities for many African countries. Yet, so too have they created tremendous adverse environmental, social and human rights consequences for countries, individuals and local communities. Chinese companies, as has been established in the preceding chapter, are deeply enmeshed in streaks of human rights and environmental scandals in Africa.[130] As Alden and Davies state, '[p]ressure for greater transparency in the way Chinese firms do business is increasing in some countries where Chinese MNCs are investing' with local human rights, labour, and environmental civil society groups taking the lead.[131] Complaints of employee maltreatment, poor working conditions, official corruption, weak community engagement, land grabs, forced displacement and poor environmental management practices have elicited diverse reactions from human rights watchers all over the world.[132] At the very least, these business engagements outside the Chinese homeland necessitate that in areas where laws and institutions are clearly weak or where African states are patently constrained to act, Chinese laws should step in to fill the regulatory gap extraterritorially to control Chinese citizens and companies conducting business overseas.

At the moment, the Chinese government is gradually – commendably - responding to the human rights concerns raised by its state-owned and private enterprises overseas. Fairly recently, the government-affiliated China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC) adopted several non-binding standards that seek to address the adverse environmental and human rights impacts of Chinese businesses abroad.[133] The CCCMC is a multi-stakeholder industry association for producers, importers and exporters of metals, minerals and chemicals situated as a subordinate unit in the Chinese Ministry of Commerce. Members of the CCCMC comprise government and private companies

[130] See Chapter 4.6.2 above.
[131] Alden & Davies (n 129 above) 89.
[132] T Webster 'China's human rights footprint in Africa' (2012) 51 *Columbia Journal of Transnational Law* 626 628. Also see A Osondu-Oti 'China and Africa: Human rights perspective' (2016) 41 *Africa Development* 49-80; JT Gathii 'Beyond China's human rights exceptionalism in Africa: Leveraging science, technology and engineering for long-term growth (2013) 51 *Columbia Journal of Transnational Law* 664 668-669; CM Shaw 'China's impact on human rights in Africa' (2011) 6 *TEKA: Komisji Politologii I Stosunkow Miedzynarodowych* (Commission of Political Science and International Affairs, Lublin, Poland) 22-40.
[133] K Buhmann 'Chinese human rights guidance on minerals sourcing: Building soft power' (2017) 46 *Journal of Current Chinese Affairs* 135-154.

involved in the business of export and import of non-metallic minerals, ferrous and non-ferrous metals, oil and gas, and other industrial chemicals.[134]

Between 2014 and 2016, the CCCMC adopted a number of human rights due diligence rules to regulate outbound Chinese mining investments and ensure responsible business conduct in minerals supply chains. First is the CCCMC Guidelines for Social Responsibility in Outbound Mining Investments 2014 (GSRM), which was subsequently revised in 2017.[135] The GSRM was jointly developed by the Chinese and German governments as part of the Sino-German Corporate Social Responsibility Project.[136] It is intended to help companies 'thoroughly respect the rights and interests of stakeholders' through the practice of ethical and transparent behaviour, and effectively manage 'the social and environmental impact from mineral exploration, extraction, processing, investment, and related activities and to strive for harmonious mineral development operations.'[137]

Drawing from the UNGPs, the GSRM is anchored on seven core principles: legal compliance, ethical business practices, respect for human rights, protection and conservation of the environment, stakeholder engagement, transparency, and shared responsibility in the extractive industries' value chain.[138] More importantly, however, the GSRM provides for an implementation process that requires the CCCMC to monitor and evaluate the 'CSR [corporate social responsibility] performance of Chinese companies engaged in outbound mining investments'.[139] This implies that under the GSRM, the CCCMC has a supervisory responsibility to monitor the activities and human rights impacts of Chinese companies abroad.

The second guidance document adopted by the CCCMC is the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains 2015 (Chinese Due Diligence Guidelines).[140] The Chinese Due Diligence Guidelines operationalises the

[134] China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters (CCCMC) 'Brief Introduction to CCCMC' <http://en.cccmc.org.cn/aboutcccmc/briefintroductiontocccmc/index.htm> (accessed 2 April 2020).

[135] CCCMC 'Guidelines for Social Responsibility in Outbound Mining Investments (GSRM)' (2016) <http://images.mofcom.gov.cn/csr2/201812/20181224151850626.pdf> (accessed 2 April 2020).

[136] GSRM (n 135 above) 1.

[137] GSRM (n 135 above) 3 [Guideline 1]; Also see the *human rights due diligence* requirement in Guideline 3.4.6 of the GSRM (previously Guideline 2.4.6 in the old version).

[138] GSRM (n 135 above) 3 [Guideline 2(2.1-2.7)].

[139] GSRM (n 135 above) 25 [Guideline 4(4.4)].

[140] CCCMC 'Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains' https://www.oecd.org/daf/inv/mne/CCCMC-Guidelines-Project%20Brief%20-%20EN.pdf> (accessed 2 April 2020)

revised Clause 3.4.6 of the GSRM in terms of the corporate responsibility to conduct risk-based supply chain due diligence 'to prevent conflict, human rights violation and other vicious impacts that are directly or indirectly lead by mining activities.'[141] It lays down a five-step model for corporate due diligence in mineral supply chains that Chinese companies are expected to comply with, to wit:

(a) establish strong company risk management systems;
(b) identify and assess risks in the supply chain;
(c) design and implement a corporate strategic response to identified risks;
(d) conduct independent third-party auditing of identified issues in the supply chain; and
(e) report on the supply chain risk management process and results.[142]

The Chinese Due Diligence Guidelines apply to all Chinese companies that extract, process, trade, transport and use, in anyway, mineral resources or are involved at any stage of the supply chain of mineral resources and allied products.[143] *Chinese companies* here denotes any for-profit legal entities that are registered in China or abroad (including subsidiaries) that are majority or wholly-owned or controlled by a Chinese entity or national.[144] This implies that the Chinese Due Diligence Guidelines are intended to have an extraterritorial effect and are relevant for regulating the conduct of Chinese companies operating in African countries.

Third is the Responsible Cobalt Initiative 2016 (RCI).[145] The RCI is a joint OECD and CCCMC initiative to develop a common strategy for addressing the environmental and social risks in the cobalt supply chain. The aim of the RCI is to have upstream and downstream companies associated with cobalt from the DRC align their cobalt supply chains with both the OECD Due Diligence Guidance and the Chinese Due Diligence Guidelines.[146] The RCI fosters cooperation between companies and the government of the DRC, civil society and affected communities to institute and support actions taken to address the challenges associated with cobalt supply chains. The RCI welcomes both Chinese companies and non-Chinese companies which conduct business in China. Major companies which use cobalt from the DRC such as

[141] GSRM (n 135 above) Guideline 3.4.6].
[142] Chinese Due Diligence Guidelines (n 140 above) 13 [Guideline IV].
[143] Chinese Due Diligence Guidelines (n 140 above) 10 [Guideline II].
[144] As above.
[145] CCCMC 'Responsible Cobalt Initiative (RCI)' 14 November 2016 <http://www.cccmc.org.cn/docs/2016-11/20161121141502674021.pdf> (accessed 2 April 2020).
[146] As above.

Apple Incorporated, Beijing Easpring Material Technology Company Limited, HP Incorporated, Huawei Device Company Limited, Samsung SDI Company, Sony Corporation, Tianjin B&M Science and Technology Joint-Stock Company Limited, and Zhejiang Huayou Cobalt Company Limited, to name a few, have all subscribed to the RCI.[147]

Non-binding Chinese extraterritorial rules for the extractive industries					
S/No	Title	Industry	Initiator	Department	Year
1.	Guidelines for Social Responsibility in Outbound Mining Investments	Extractive	China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCMC)	Ministry of Commerce; Private business	2014, 2017 (revised)
2.	Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains	Extractive	CCCMC	Ministry of Commerce; Private business	2015
3.	Responsible Cobalt Initiative (RCB)	Extractive	CCCMC	Ministry of Commerce; Private business	2016

Table 5-1: Chinese extraterritorial standards.

The table above illustrates the link between the Chinese corporate guidance documents relevant to the extractive industries and the government.

It is worth stating that while China's adoption of 'soft' law for the responsible corporate conduct of Chinese companies overseas is laudable, it remains difficult to gauge the extent to which its local supervisory and adjudicatory bodies are embedded and empowered to hold businesses accountable for human rights and environmental abuses in comparison to its Western counterparts. As a communist state, China is least known for being a human rights champion in its engagement with developing countries in Africa. Although it has adopted a number of core UN human rights conventions and actively supported the business and human rights treaty process, it has no coherent approach to human rights as a fundamental human interest. In the past, it has opted for 'practicality' in its human rights engagements

[147] As above.

and sought to act from the perspective of 'China's national conditions and new realities to advance development of its human rights cause on a practical basis.'[148]

With the ideological divergencies between China's communist leadership and the rest of the world (including Africa) with respect to human rights, democratic governance and the rule of law, China is not exactly emblematic of an open and democratic society that allows civil society to independently engage government on the implementation of the above guidelines and initiatives. Therefore, it is hard to objectively assess the normative contributions of China's due diligence instruments to effective extraterritorial corporate regulation. Short of being intended to appease Western interests or grant China market access to the West and OECD member countries, the guidelines and initiatives provide African human rights institutions and civil society groups some set of normative reference points for constructively engaging Chinese companies on human rights and environmental issues arising from their operations in Africa in addition to international and regional human rights rules.

(e) South Africa's Constitution and King Code of Corporate Governance

South Africa has the most industrialised economy in Africa.[149] It has some of the largest financial institutions and extractive companies on the continent, some of which have become TNCs with subsidiaries in other countries (for example, the Boer Group, AngloGold Ashanti and Gold Fields are some of the biggest South African mining corporations operating overseas).[150] Normatively, South Africa's progressive constitution expressly recognises the corporate obligation to comply with the provisions of the Bill of Rights of the Constitution. Section 8(2) and (4) of the Constitution of the Republic of South Africa (South African Constitution) confers rights and imposes obligations on businesses for compliance with the Bill of Rights. This provision is reinforced by section 7(a) of the Companies Act 71 of 2008 (Companies Act), which provides that the purpose of the Act includes to 'promote

[148] State Council of China 'National human rights action plan (2012-2015)' 11 June 2012 <http://www.china.org.cn/government/whitepaper/node_7156850.htm> (accessed 2 April 2020). See the latest National Human Rights Action Plan where the words 'practicality' and a 'practical basis' have been deleted: State Council of China 'National Human Rights Action Plan of China (2016-2020)' 29 September 2016 <http://english.www.gov.cn/archive/publications/2016/09/29/content_281475454482622.htm> (accessed 2 April 2020).

[149] M Davies 'What China's economic shift means for Africa' *World Economic Forum* 11 March 2015 <https://www.weforum.org/agenda/2015/03/what-the-shift-in-chinas-economy-means-for-africa/> (accessed 2 April 2020) - 'South Africa is undoubtedly the most industrialized country in Africa, with the most internationally competitive business sector.'

[150] G Wood 'South African multinationals in Africa: Growth and controversy' in M Demirbag & A Yaprak (eds) *Handbook of emerging market multinational corporations* (2015) 222-238.

compliance with the Bill of Rights as provided for in the Constitution.' This does raise the question whether the obligations arising from section 8(2) of the Constitution and section 7(a) of the Companies Act have an extraterritorial effect.

There is no doubt that the provisions of the South African Constitution apply to South African companies operating abroad. As all nationals and legal entities registered or domiciled in South Africa are directly bound by all rules applicable to the Republic, in the same way are they bound with regard to conduct undertaken abroad based on the nationality principle. This line of reasoning has been reiterated and reaffirmed in the corporate governance principles adopted by the Institute of Directors in Southern Africa (IoDSA). The King Report on Corporate Governance and the King IV Code of Governance Principles 2016 (King Report and King Code), developed by the IoDSA pursuant to the Companies Act, stipulates recommended standards for private and public corporations in South Africa. The King Reports and King Codes have been periodically revised since they were established. The first King Report and King I Code was adopted on 29 November 1994, the King II Code in 2002, the King III in 2009 and the current King IV Code on 1 November 2016.[151]

The aim of the King Reports and King Codes is to, among other things, establish a set of corporate rules to regulate businesses and ensure responsible corporate conduct by public and private enterprises operating within and outside South Africa. Principle 1(2) affirms the responsibility of the corporation to act as a good corporate citizen. This obligation entails that as an economic institution and citizen of the state, a company has a legal, moral and social standing in the society that attracts rights and responsibilities. For this reason, a corporate board's responsibility is not only to meet the company's financial bottom line but its economic, social and environmental responsibilities to society. The King Reports calls this the *triple-context* approach to good corporate citizenship.[152] For South African companies operating in 'weak governance' zones, the King Report acknowledges the ethical challenges they face that can make them 'unwitting accomplices to human rights abuses'.[153] It reiterates that the *constitutional responsibility* of companies under section 8(2) of the South African Constitution 'extends to operations beyond South

[151] Institute of Directors in Southern Africa (IoDSA) 'King Report on Corporate Governance in SA' (2009) <https://www.iodsa.co.za/page/KingIII> (accessed 28 March 2020).
[152] IoDSA 'King Report on Governance for South Africa' (2009) 22 [para 16] <https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf> (accessed 4 April 2020).
[153] IoDSA (n 152 above) 23 [para 25].

Africa's borders.'[154] It also recognises that the corporate obligation in the Constitution to respect human rights shifts the moral perception of companies to human rights and environmental issues as a key frontier for good corporate citizenship in the society where they operate.

Besides the King Codes is the Guidelines for Good Business Practice by South African Companies Operating in the Rest of Africa 2016 (Guidelines for Good Business Practice). The Guidelines for Good Business Practice requires companies to respect and protect internationally recognised human rights and not be complicit in any human rights abuses in their operations or support civil conflict or take sides in warring factions in order to secure business contracts.[155]

The application of the South African Constitution, the Guidelines for Good Business Practice and the King Code suggests that South Africa has some extraterritorial control over the adverse human rights and environmental impacts of its companies abroad. These standards raise the bar of corporate governance over and above the provisions of the Companies Act, and encourage South African companies to strive to 'achieve the higher aspiration [they set] in the interest of sound governance.'[156] To the extent they refer to the activities of South African companies abroad, these legal documents may provide some degree of transnational corporate regulation and accountability for corporate human rights and environmental abuses within and outside South Africa. However, whether they have been effectively used in advancing actual accountability for victims of corporate human rights abuses again signals the unwillingness or inability of corporate regulators to enforce compliance. The limits of these rules will be looked at in some detail below.

As affirmed by the standards established under international human rights treaties, the Maastricht Principles and decisions of the ICJ, the extraterritorial standards considered above affirm state practice and the increasing role of these rules in global governance. Drawing together the theory, law and practice of

[154] As above.

[155] Guidelines for Good Business Practice by South African Companies Operating in the Rest of Africa 2016 principle 3. See Department of Trade, Industry and Competition 'Guidelines for Good Business Practice by South African Companies Operating in the Rest of Africa' (2016) <http://www.thedtic.gov.za/wp-content/uploads/publication-Business_Practice.pdf> (accessed 4 April 2020).

[156] IoDSA 'King IV Report on corporate governance on South Africa' (2016) 76 <https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf> (accessed 4 April 2020).

extraterritoriality, this section underscores the idea that despite controversies as to its use, extraterritorial regulation by home states is crucial to the global effort to rein in TNCs in abroad, including in Africa.

5.3 Consequences of regulating corporate abuses abroad

Although extraterritorial regulation raises a barrage of concerns over external intervention in the sovereign and jurisdictional competences of other states, its value proposition provides 'a promising avenue to regulate human rights practices within global supply chains.'[157] It is promising not because of the comprehensiveness of one country's domestic law over another but on account of its practicality. Turner argues that extraterritorial regulation is practical because it is 'cognisant of the international community's intransigence and inaction in regulating transnational corporate groups and supply chains.'[158] As the power of sovereign governance over a territory entails the powers to enact, enforce and adjudicate, its practicality is based on the governance and institutional capacities of advanced countries to effectively exercise territorial, including legal, enforcement and adjudicatory control over individuals and corporations that come within their jurisdictions.[159]

Short of any binding international standard of TNC accountability, extraterritorial laws sanitise markets, and empower individuals, groups and organised civil society in the home and host countries with precision tools for ensuring accountability in the public and private sectors. Enforcing mandatory disclosure of payments made abroad or on the source of a company's minerals enables critical stakeholders unfettered access to information even in countries with weak or no disclosure standards and importantly strengthens the democratisation and accountability processes in those countries. It also helps investors diffuse the inherent risks associated with countries where information is inaccessible especially with regards to such issues as child labour, human trafficking, corruption and armed conflicts. As the US Senate Committee on Foreign Relations once stated, the extraterritorial provisions of the conflict mineral rule will:

[157] GA Sarfaty 'Shining light on global supply chains' (2015) 56 *Harvard International Law Journal* 419 427.
[158] Turner (n 9 above) 199.
[159] N Jägers, K Jesse & J Verschuuren 'The future of corporate liability for extra territorial human rights abuses: The Dutch case against Shell' (2013) 107 *American Journal of International Law Unbound* 36 41.

> benefit investors in extractive industry companies, contribute to more functional and secure energy markets, and empower citizens and shareholders in the United States and abroad. Particularly in resource rich but otherwise poor countries, when citizens have such power, they can access information they need to hold their leaders accountable.[160]

For victims of abuses committed in host countries in Africa, the ability of home countries to exercise extraterritorial regulation has two main remedial consequences – institutional control of TNCs and some level of access to home country remedies.

5.3.1 Institutional control of TNCs and regulatory enforcement

Extraterritorial regulations serve the crucial purpose of controlling the abusive tendencies of TNCs domestically and overseas. Some scholars argue that the lack of capacity of host countries to enforce laws or monitor compliance has led the governments of consumer countries to take action to address corporate abuses overseas.[161] This is not the case all the time. In reality, the inclination to enact extraterritorial laws is not often borne out of the generosity of the home country to act where host countries have failed. Rather, home countries have often had to act on the notion that to meaningfully regulate systemic risks within the domestic sphere itself, the state must regulate not only its domestic institutions but often their counterparties or foreign partners as well.[162] In the case of disclosure and transparency laws of Europe and America, it is largely due to the systemic risks from corporate abuses that were revealed after the 2008 global financial crises that necessitated action, and even so, action has been quite slow. As Coffee alludes, the US and Europe have more incentives to want to enact extraterritorial rules because they are more exposed to the risks of corporate financial and human rights abuses, and have been the most affected by the financial irregularities by large corporations that occasioned the 2008 financial crisis.[163]

Extraterritorial rules also restrict the corporate discretion to engage in illegalities outside the territorial state and empower critical civil society actors and stakeholders (individuals and communities) with access to information to hold TNCs accountable. This invariably fosters transactional probity, responsible business

[160] US Senate Committee on Foreign Relations 'SEC issues final rule on Cardin-Lugar effort to increase transparency in US extractive industries' (27 June 2016) <https://www.foreign.senate.gov/press/ranking/release/sec-issues-final-rule-on-cardin-lugar-effort-to-increase-transparency-in-us-extractive-industries-> (accessed 4 April 2020).

[161] Turner (n 9 above) 206-207.

[162] JC Coffee 'Extraterritorial financial regulation: Why ET can't come home' (2014) 99 *Cornell Law Review* 1259 1260.

[163] Coffee (n 162 above) 1267.

conduct and good corporate governance even in countries with a weak regulatory environment. By closing the regulatory gaps between developed and developing countries, the adoption of extraterritorial rules strengthens the protection of human rights and the environment in resource-rich countries through financial transparency, due diligence, and modern slavery laws. This invariably contributes to narrowing the deficits of global governance in relation to corporate corruption, human rights and environmental abuses; especially, where the responsible host state has neglected, failed or refused to act.

Therefore, the control of TNCs by home countries supplements the inadequate regulatory or enforcement regime in host countries with respect to the protection of individuals, communities and the host state from economic and financial abuses by companies.[164]

5.3.2 Provision of some measure of remedial access

Extraterritorial rules provide some degree of remedial access to victims (from the host state where the corporate violations occurred) or other interested parties. By remedial access, I mean avenues by which abuses perpetrated by corporations can be investigated, reviewed, queried, or sanctioned. Remedial access occurs in two forms – one, by instigating a statutory regulator to enforce institutional monitoring and compliance against erring companies, and two, by invoking the judicial powers of the territorial state.

In the first scenario, extraterritorial regulations very often empower a monitoring or supervisory body in the territorial state to monitor and enforce compliance. This is known as the 'enforcement jurisdiction' of the home state.[165] As seen from the different laws and guidelines discussed above, a statutory body-designate or yet to be designated is often expected or contemplated to implement the rules. In the US, it is the SEC and the Department of Justice that are respectively responsible for civilly and criminally enforcing TNC compliance with the disclosure requirements under the Dodd-Frank Act and the FCPA.[166] In France, the Netherlands and at the EU level, it is the bodies established or yet to be designated under the

[164] Turner (n 9 above) 202-205; Coffee (n 162 above) 1274.

[165] P Tran & T Thi 'Extraterritorial jurisdiction: From theory to international practices and the case of Vietnam law' (2020) 13 *Journal of Politics & Law* 151 152.

[166] Dodd-Frank Act secs 2 and 929P; Securities Exchange Act sec 78t(e); WS Dodge 'Chevron deference and extraterritorial regulation' (2017) 95 *North Carolina Law Review* 911 952; RW Tarun & PP Tomczak *The Foreign Corrupt Practices Act handbook: A practical guide for multinational general counsel, transactional lawyers and white collar criminal practitioners* 5th ed (2010) 2.

respective due diligence laws that are responsible for enforcing corporate compliance.[167]

In China, the GSRM and the Chinese Due Diligence Guidelines, which are both voluntary in nature, make provisions for the establishment of an independent oversight body responsible for assessing compliance under the oversight of the CCCMC. The CCCMC as part of the Ministry of Commerce oversees the implementation of the GSRM and the independent third-party audit and certification system to be carried out by the independent oversight body.[168] In South Africa, the appropriate institutions responsible for compliance monitoring are courts, the National Prosecuting Authority, institutional regulators designated under the Companies Act and other domestic legislation or the IoDSA in the case of compliance with the King Report and Code.[169] This implies that victims of corporate human rights abuses from the host country or interested third parties may approach such bodies for the purpose of calling to order or for taking out punitive measures against a TNC or its subsidiary in the home state.

In the second scenario, a more consequential effect of extraterritorial rules is that it confers jurisdictional competence on the courts of the home state over matters that occur abroad. With jurisdiction to hear cases arising from overseas abuses, courts of the home state can allow victims of TNC violations to file claims to prevent, mitigate or remedy the adverse environmental and social impacts of TNCs in the host country or community and get justice. Clear examples of the utilisation of this remedial avenue abound from the several cases of TNC environmental violations in the extractive industries filed by claimants from the DRC, Nigeria, South Africa, Sudan and Zambia in home countries.

[167] S Brabant & E Savourey 'A closer look at the penalties faced by companies' (2017) 50 *Revue Internaionale de la compliance et de l'ethique des affaires--supplement a la Semaine Juridique entreprise et affaires* 1 4 <https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20-%20Penalties%20-%20Int%2527l%20Rev.Compl_.%20%26%20Bus.%20Ethics_.pdf> (accessed 6 April 2020); Dutch Child Labour Due Diligence Act arts 1(d), 3, 4(5) and 7; EU Conflict Minerals Regulation 2017/821 art 10.

[168] GSRM (n 135 above) 25 [Guideline 4]; Chinese Due Diligence Guidelines (n 140 above) 32 [Guideline VIII].

[169] Examples of these regulators include the Department of Trade and Industry, the Companies and Intellectual Property Commission and the Financial Sector Conduct Authority. See South Africa's Companies Act secs 185, 187 and 223 (also see the Companies Amendment Act 3 of 2011); Financial Sector Regulation Act 9 of 2017 sec 56.

Below, I will briefly assess three unique cases that show that home country jurisdictions can be an optional avenue of successful remedial access in victims' quest for corporate accountability and justice. They are unique because they are some of the best-known examples of claims arising from the extractive industries in Africa that resulted in the compensation of the victims through compromise.

(a) Wiwa v Royal Dutch Petroleum, Wiwa v Anderson, and Wiwa v Shell

Following the execution of the 'Ogoni nine' by the Federal Military Government of Nigeria, an account already detailed in the preceding chapter, a stream of cases were instituted by the victims' relatives before US courts to demand Shell's accountability and justice for the deceased.[170] In *Wiwa v Royal Dutch Petroleum Company*, *Wiwa v Brian Anderson*, and *Wiwa v Shell Petroleum Development Company of Nigeria Ltd* (*Wiwa* cases),[171] the Centre for Constitutional Rights sued Shell before US courts on behalf of Saro-Wiwa's relatives. In separate cases filed between 8 November 1996 and April 2004 but subsequently joined and heard as a single action, the claimants claimed that Royal Dutch Petroleum, the parent company, was complicit in the human rights and environmental abuses committed by its subsidiary in the Niger Delta. After over a decade of protracted litigation up to the US Supreme Court, Shell eventually brokered a settlement on 8 June 2009 with a USD15.5 million pay-out to the Wiwa estate when it became apparent that its internal dealings and records were going to be opened to uncapped public scrutiny.[172]

(b) Bodo Community v Shell

This case emerged from the two major oil spills that occurred in Bodo, a small community of about 60 000 people in Rivers State in the Niger Delta region of Nigeria in 2008 and 2009, respectively.[173] Some 15 600 members of the Bodo community, affected by the spill filed a class action in the case of *Bodo Community v Shell*

[170] See Chapter Four, section 4.6.1(d) above.

[171] (SDNY 2002) No 96 Civ 8386 (KMW) 2002 US Dist. Lexis 3293 <http://ccrjustice.org/files/3.16.09%205th%20Amended%20Complaint.pdf> (accessed 22 March 2018). This Settlement Agreement followed a US Court of Appeal ruling vacating the decision of the District Court for declining personal jurisdiction in *Wiwa v Shell Petroleum Company of Nigeria Ltd* 08-1803-cv (2nd Cir) 3 June 2009, and remanded the matter back for further proceedings.

[172] *Royal Dutch Petroleum Co v Wiwa* 532 US 941 (2001) USSC; I Wuerth 'Wiwa v Shell: The $15.5 million settlement' (2009) *Insights* 13 <https://www.asil.org/insights/volume/13/issue/14/wiwa-v-shell-155-million-settlement> (accessed 24 March 2018); D Newman 'Wiwa v Royal Dutch Petroleum Co.' (2002) 2 *Sustainable Development Law & Policy* 3.

[173] Chapter 4.6.1(c) above.

Petroleum Development Company of Nigeria.[174] After persistent denial, Shell subsequently admitted liability for the twin spills on 3 August 2011 after court documents revealed that Shell was aware of the magnitude and scale of the spills and had deliberately made false claims about the size of their impact in Bodo. In January 2015, Shell reluctantly agreed to settle the suit with the payment of £55 million to the community.[175]

(c) Vedanta Resources v Lungowe

In Zambia, the sustained pollution of the Kafue River by the mining activities of Konkola Copper Mines (KCM), a subsidiary of London-listed Vedanta Resources PLC, and the inability of members of the affected Chingola community to obtain justice locally in Zambian courts led to the filing of a claim in the UK.[176] In the case of *Vedanta Resources PLC and another v Lungowe and others* (*Vedanta* case),[177] 1 826 claimants brought a claim against Vedanta before the UK High Court for the despoliation done to their lands and destruction of their source of water and livelihood by Vedanta's KCM Nchanga copper mine. In 2016, the High Court rejected Vedanta's argument that the claim was not eligible for determination in the UK on account of *forum non conveniens*. The Court held that despite the judicial reforms in Zambia, there was a real risk that the plaintiffs would not get justice in Zambia. On appeal by Vedanta against the decision on jurisdiction, the Court of Appeal upheld the lower court's ruling.

The above treated cases serve only to illustrate here the opportunity - rather than the viability - of utilising the remedial access provided by the courts of home countries. Notwithstanding the successes in these cases, there is no evidence

[174] 2017 EWHC 89 (TCC). Also see *The Bodo Community v Shell Petroleum Development Company of Nigeria (The Bomu-Bonny Oil Pipeline Litigation* [2014] All ER (D) 181 or [2014] EWHC 1973 (TCC), [2014] EWHC 2170 (TCC) 4 July 2014, where Lord Akinhead ruled that there was jurisdiction to hear the claim. Based on this notable ruling, Shell quickly moved to settle. J Vidal 'Shell announces £55m payout for Nigeria oil spills' 7 January 2015 <https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills> (accessed 24 March 2018).

[175] AR Oki *Barbarism to decadence: Nigeria and foreign complicity* (2017) 588; H Yusuf & K Omoteso 'Combating environmental irresponsibility of TNCs in Africa: an empirical analysis' (2016) 21 *The International Journal of Justice and Sustainability* 1372-1386. Also see the case filed before the Court of Justice of the Economic Community of West African States, *Social and Economic Rights Action Project v Nigeria & Others* ECW/CCJ/APP/08/09 14 December 2012, which was instituted on account of the human rights and environmental impacts of oil spills in the Niger Delta and shows the inadequacy of the domestic human rights system.

[176] See the case of *Nyasulu and others v Konkola Copper Mines Plc and others* (2007/HP/1286) [2011] ZMHC 86 (31 December 2010) (*Kafue pollution* case), which was determined by the Zambian courts, already discussed in Chapter 4.6.2 above.

[177] [2019] UKSC 20. For the English High Court decision, see: *Lungowe v Vedanta Resources* [2017] EWHC 89 (TCC) para 122.

whatsoever that the claimants would have been successful had the matters been allowed to run their course on the merit of the arguments on account of the doctrine of *forum non conveniens* (see section 5.4.3 below). As I will show in the sections below, granted the plausible role of extraterritorial regulation in narrowing the deficits of transnational corporate governance, many other factors limit its normative reach and regulatory adequacy in curbing violations perpetrated by parent companies outside the territory of the home state. These factors suggest that the inadequacy of both home and host state regulations reinforce the idea of transnational corporate accountability at the regional level.

5.4 Limited promise of home state regulation and litigation

There is no contention that extraterritorial laws make a significant contribution to closing the normative and accountability gaps in transnational corporate governance. In the US and Europe, there is tremendous evidence of the positive interventions of domestic law in the pursuit of transparency and accountability beyond the borders of the home state. Due to strong enforcement actions by the US SEC and the Department of Justice, erring individuals and companies have been punished for violations of the FCPA, the Dodd-Frank Act, the Securities Exchange Act and a host of other US laws with an extraterritorial effect.[178] At the same time, statutes such as the ATS had - for a time only - the effect of not just being a jurisdictional statute but also considered to give rise to causes of action. In essence, extraterritorial laws have enabled home state regulators and courts to scrutinise individuals and corporations for violations of the securities market, anti-corruption, conflict minerals, and modern slavery disclosure laws and generally the criminal laws of the home country.

In Europe, prosecutorial charges have been lodged against senior officials of various European TNCs associated with human rights violations in developing countries. In Germany, a criminal complaint was filed in 2013 against senior officials of Swiss-German timber manufacturer, Danzer group, for aiding and abetting

[178] US Securities and Exchange Commission 'SEC enforcement actions: FCPA cases' <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (accessed 11 April 2020); US Securities and Exchange Commission 'Trading suspensions' <https://www.sec.gov/litigation/suspensions.shtml> (accessed 11 April 2020).

violence against civilian groups in the DRC by the Congolese military and police.[179] In Italy, the chief executive officer and other top officials of Italian-based ENI SPA were charged before Italian courts in 2017 for making illegal payments to government officials in Nigeria in order to secure the controversial ENI and Shell OPL-245 offshore oilfield deal.[180] In Sweden, top executives of Lundin Oil were indicted in 2018 for complicity in the war crimes in Sudan between 1997 and 2003.[181] Even so, the officials of French-based companies, such as Lafarge,[182] BNP Paribas,[183] and Nexa Technologies and Amesys,[184] have respectively been prosecuted for various crimes, ranging from complicity in crimes against humanity in Rwanda and Syria to supplying sophisticated surveillance technologies and weapons to the dictatorial regimes of Egypt and Libya that were responsible for gross human rights abuses in those countries.[185] In the Netherlands and the UK, the Dutch-based metals, minerals and oil trading company, Trafigura Beheer BV, was investigated and prosecuted for the biggest illegal dumping of toxic wastes in history in Ivory Coast in 2006. Although started in 2008, the prosecution was subsequently discontinued in both countries after a settlement for the respective payments of EUR300 000 and EUR67 000 fines was reached in 2009.[186]

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[179] European Center for Constitutional and Human Rights & Global Witness 'Criminal complaint filed accuses senior manager of Danzer Group of responsibility over human rights abuses against Congolese community' 25 April 2013 <http://business-humanrights.org/media/documents/danzer-press-release-2013-04-25.pdf> (accessed 11 April 2020).

[180] E Sylvers & S Kent 'Italian prosecutors request Eni CEO, Shell stand trial: Corruption alleged over Nigerian oil deal' *Wall Street Journal* 8 February 2017 <https://www.wsj.com/articles/italian-prosecutors-request-eni-ceo-shell-stand-trial-1486575214> (accessed 11 April 2020).

[181] Agence France-Presse 'Sweden Oks trial of Lundin oil execs for Sudan war crimes' 18 October 2018 <https://www.justiceinfo.net/en/live-feed/39274-sweden-oks-trial-of-lundin-oil-execs-for-sudan-war-crimes.html#.W8iXXC1zqys.twitter> (accessed 12 April 2020).

[182] S Gless & S Broniszewska-Emdin 'Prosecuting corporations for violations of international criminal law: Jurisdictional issues' (2017) 190 [*International Colloquium Section 4, Basel, 21-23 June 2017*] <https://ius.unibas.ch/fileadmin/user_upload/ius/11_Upload_Personenprofile/01_Professoren/Gless_Sabine/Gless_Emdin__eds.__Prosecuting_Corporations_for_Violations_of_International_Criminal_Law_-_Jurisdicitonal_Issues_RIDP_2017_2.pdf> (accessed 27 March 2020).

[183] Gless & Broniszewska-Emdin (n 182 above) 190.

[184] International Federation for Human Rights (FIDH) 'Sale of surveillance equipment to Egypt: Paris Prosecutor opens a judicial investigation' 22 December 2017 <https://www.fidh.org/en/region/north-africa-middle-east/egypt/sale-of-surveillance-equipment-to-egypt-paris-prosecutor-opens-a> (accessed 12 April 2020); FIDH 'Sale of surveillance equipment to Egypt by French company Amesys: Impunity must end' (5 July 2017) <https://www.fidh.org/en/region/north-africa-middle-east/egypt/sale-of-surveillance-equipment-to-egypt-by-french-company-amesys> (accessed 9 April 2020); FIDH 'The Amesys case' (2014) 4-5 <https://www.fidh.org/IMG/pdf/report_amesys_case_eng.pdf> (accessed 9 April 2020).

[185] Gless & Broniszewska-Emdin (n 182 above) 189-191.

[186] R Evans 'Trafigura fined €1m for exporting toxic waste to Africa' *The Guardian* 23 July 2010 <https://www.theguardian.com/world/2010/jul/23/trafigura-dutch-fine-waste-export>

In addition, extraterritorial laws make civil action possible, which (as seen in the *Wiwa* cases, the *Bodo* case, and the *Vedanta* case) can lead to judicial inquiry and sometimes compensation. However, despite its normative, regulatory and remedial usefulness, the application of home state laws to the activities of TNCs in Africa has several fundamental drawbacks that yet make it an inadequate complement to host country regulation. In this section, I argue that notwithstanding that extraterritoriality enables home state authorities determine the legality of actions undertaken by individuals and companies abroad, the effectiveness of such rules is increasingly being clogged in the wheels of their implementation and application by several claw-back factors that significantly limit their impact, adequacy and dependability in the protection of foreign victims. From, (a) the rollback of extraterritorial rules due to economic nationalism (or protectionism) in the West, to (b) the limited legal protection of victims from developing countries, (c) the procedural or jurisdictional blocks to parent company liability, and (d) practical barriers associated with home country litigation and remedies. These factors each strips extraterritoriality – and, consequently, the victim of TNC abuses abroad - off the garment of human rights protection.

For clarity, I have opted to treat each of these claw-back factors in some detail.

5.4.1 US economic nationalism and reversals on global corporate transparency

If extraterritorial laws have helped narrow the deficits in global governance, then the rise in the US of economic nationalism and the consequential policy reversals on the enforcement of extraterritorial transparency rules may be its greatest undoing. *Economic nationalism,* as used here, is equated to the belief that a nation, its laws and institutions should primarily serve its people, culture, values, ideology and interests - even if to the detriment of the citizens of other countries.[187] It is steeped in protective economics and profoundly based on the ideology that the state should have minimum say in the proprietary interests – home and abroad - of its citizens. In predominantly capitalist societies, this ideology is strongly aligned with the idea that the state as an enabler of private industrial capitalism should not only ensure that

(accessed 15 April 2020); Business and Human Rights Resource Centre 'Trafigura lawsuits (re Côte d'Ivoire)' <https://www.business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire> (accessed 15 April 2020).

[187] G Delanty & K Kumar 'Introduction' in G Delanty & K Kumar (eds) *The SAGE handbook of nations and nationalism* (2006) 4.

the property rights and interests of its nationals and capital-wielding TNCs are protected and preserved, but also maintain a non-interventionist approach in the workings of the free market domestically and globally.[188] Economic nationalism seeks a retreat of the state from interfering in the domestic and global free market and sues for a stop to the enforcement of standards of national or transnational corporate conduct higher than those set by other competing nations.[189]

Economic nationalism takes a contrarian view to the idea that meaningful and sustainable change can be achieved through the unilateral use of domestic extraterritorial laws in curbing illegal conduct abroad, in the absence of any international consensus to that effect.[190] A counterrevolutionary response against globalisation and multiculturalism, it seems selectively opposed to unilateral action through domestic extraterritorial laws in solving the complex problems of global governance. However, it makes no retreat in its unilateralist approach to terrorism or humanitarian intervention, except those aspect that affects its economic interests. As Harmes states, it is 'a protectionist form of economic nationalism' that seeks only to promote such economic interests as trade without having to shoulder the burden of addressing the environmental, labour and human rights costs arising from such undertakings abroad.[191] In other words, it seeks to keep the proprietary benefits accruing from the expansion of global capitalism in the Global South through neo-colonialism, economic imperialism, war and Western-controlled global political and financial institutions. However, it repudiates any form of responsibility for the resulting instability and migration crisis occasioned by wars or the contributions of its TNCs to global inequality, poverty and ecological disasters in weak regulatory environments or developing countries.[192]

To appreciate the threat of economic nationalism to decades of progress in the application of extraterritoriality to global governance, one needs not look any

[188] See Chapter 3.2 above for the different conceptions of *individualism* between the West and Africa. Also see M Mutua 'Human rights in Africa: The limited promise of liberalism' (2008) 51 *African Studies Review* 17 20; C Ake 'The African context of human rights' (1987) 34 *African Today* 5; African Charter on Human and Peoples' Rights Preamble & art 27(1).

[189] AL Parrish '*Kiobel*, unilateralism, and the retreat from extraterritoriality' (2013) 28 *Maryland Journal of International Law* 208 212.

[190] As above.

[191] A Harmes 'The rise of neoliberal nationalism' (2012) 19 *Review of International Political Economy* 59 61.

[192] DL Levy & D Egan 'Capital contests: National and transnational channels of corporate influence on the climate change negotiations' (1998) 26 *Politics & Society* 337; A Moravcsik 'Why is US human rights policy so unilateralist?' in S Patrick & S Forman (eds) *Multilateralism in US foreign policy* (2002) 345-376.

further than the rise of right-wing politics and economics in the US and the steaming debates on everything, from immigration, climate change, free trade to TNC regulation under international law. As economic nationalism takes control of political power structures in developed countries, there is real fear that extraterritorial rules on TNC transparency and accountability in those countries would be relaxed in favour of giving private capitalists a freer and unrestrained hand in global markets. The emergence of Donald Trump as President of the US has reinforced the idea of protectionist governance and put the extraterritorial enforcement of corporate transparency and ethical corporate conduct abroad at the cusp of history. Despite Trump's departure, it is yet uncertain what the Biden Presidency will do to savage the steep road of economic nationalism that the Trump era wrought on the US.

Already in the US, far-reaching political and judicial assaults on extraterritorial transparency and accountability rules impacting TNCs signal that the days of TNC regulation abroad are numbered.[193] In 2015, a constitutional challenge was made against the statutory disclosure requirements under the conflict-minerals rule enforced by the US SEC. In the case of *National Association of Manufacturers & Others v SEC*,[194] the US Court of Appeals of the Second Circuit upheld the appellants' claim that the mandatory disclosure requirements under section 1502 of the Dodd-Frank Act and the Conflict Minerals Regulation 2012 violated their First Amendment right under the US Constitution 'to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have "not been found to be 'DRC conflict free'".'[195]

Politically, the administration of former US President, Donald Trump, vehemently opposed US extraterritorial transparency laws for keeping US companies 'shackled' and unfairly disadvantaged in the world of international trade and business.[196] This view is not exclusively a Trumpian phenomenon. A significant section of the US business community, think tanks, scholars and public officials argue that not only have domestic laws led to higher costs and loss of market share abroad,

[193] HR 4289 - To amend the Dodd-Frank Wall Street Reform and Consumer Protection Act to repeal certain disclosure requirements related to coal and mine safety 115th Congress (2017-2018); HR 4519 - To amend the Securities Exchange Act of 1934 to repeal certain disclosure requirements related to resource extraction, and for other purposes 115th Congress (2017-2018).

[194] 800 F.3d 518 530 (DC Cir 2015).

[195] US Securities and Exchange Commission (n 74 above).

[196] J Sink, E Dexheimer & K Chiglinsky 'Trump to order Dodd-Frank review, halt Obama fiduciary rule' *Bloomberg* 3 February 2017 <https://www.bloomberg.com/news/articles/2017-02-03/trump-to-halt-obama-fiduciary-rule-order-review-of-dodd-frank> (accessed 17 April 2020).

they have disproportionately placed American businesses at a great disadvantage in a way that hurts America's interests.[197] Koch, for example, highlights that due to the effective criminalisation of foreign bribery in the US under the FCPA, American companies have 'consequently suffered a competitive disadvantage to foreign businesses that were uninhibited by laws proscribing bribery in international markets.'[198]

To be clear, the prioritisation of the economic interests of a state is ordinarily not implausible. By default, states prioritise their national and economic interests – including the international investments of their nationals and corporate citizens - over and above any other interest.[199] State policy in this regard may be informed by the rights granted the citizens and the obligations with respect to those rights imposed on state institutions by the constitution or laws of a country. However, it is the ideology that transnational capitalism should have unrestrained leeway in its engagement in the global free market in a way that benefits only the US national interest that threatens the current global order altogether.[200] In September 2019, Trump took a swipe at globalisation and emphasized the primacy of American economic interests during his third address to the UN General Assembly. According to Trump, the future belongs not to globalists but to patriots, and sovereign countries and 'wise leaders always put the good of their own people and their own country first.'[201] Little wonder Delanty and Kumar state that '[n]ationalism in the global age, the age of supranational organisations and transnational corporations is, despite several statements to the contrary, alive and thriving'.[202]

As Trump's 'America first' policy rode roughshod on the back of economic nationalism, one of its first targets was the roll-back on the extraterritorial enforcement of corporate transparency under the conflict-minerals rule. Like the proverbial dog, the enforcement of the conflict-minerals rule was given a bad name in order to hang it. For instance, the anti-bribery and mandatory disclosure provisions

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[197] HL Brown 'The extraterritorial reach of the US Government's campaign against international bribery' (1999) 22 *Hastings International & Comparative Law Review* 407 521; SJ Choi & AT Guzman 'The dangerous extraterritoriality of American securities law' (1996) 17 *Northwestern Journal of International Law & Business* 207 232.

[198] Koch (n 67 above) 382-383.

[199] A McGrew 'Globalisation and global politics' in J Baylis, S Smith & P Owens (eds) *The globalization of world politics: An introduction to international relations* 5th (2008) 14 31.

[200] PS Spiro 'American exceptionalism and its false prophets' (2000) 79 *Foreign Affairs* 9.

[201] K Watson 'Trump says future belongs to "patriots," not "globalists," in UN General Assembly speech' *CBS News* 24 September 2019 <https://www.cbsnews.com/live-news/trump-un-speech-future-belongs-to-patriots-not-globalists-united-nations-general-assembly-today/> (accessed 17 April 2020).

[202] EA Posner *The perils of global legalism* (2009) 228; G Delanty & K Kumar (n 187 above) 4.

of the FCPA, and more especially sections 1502 and 1504 of the Dodd-Frank Act and section 13(p) and (q) of the Securities Exchange Act, have been increasingly labelled a failure on three main grounds. Firstly, that the laws are too restrictive – often described as a 'de facto embargo' on minerals from the DRC - and largely responsible for the pull out of American businesses from markets targeted by their enforcement and compliance provisions.[203] In the DRC, the laws are alleged to have had a ripple effect on the source of livelihood of miners who have been swayed into rebel militia groups, thereby worsening the humanitarian situation in that country.[204] Secondly, that the FCPA and the conflict-minerals rule are propelling the high operational costs of US companies in Africa.[205] Lastly, that the laws have made it impossible for US companies to compete with rival companies from Russia and China, thereby putting US economic interests at a strategic disadvantage.

Based on these concerns, US multinationals, think-tanks, lobbyists, and various special interests exerted pressure on the US government to revise the rules in alignment with America economic interests abroad. Heeding this call, President Trump within weeks of assumption of office adopted, in February 2017, Executive Order 13772 to inoculate American corporations from the extraterritorial curbs imposed on US companies during the President Barack Obama era.[206] Executive Order 13772 seeks to 'enable American companies to be competitive with foreign firms in domestic and foreign markets.'[207] At the signing ceremony of the Order, Trump threatened to suspend the enforcement of the conflict-minerals rule enacted under the Dodd-Frank Act and the US Securities Exchange Act.[208]

[203] D Koch & O Burlyuk 'Bounded policy learning? EU efforts to anticipate unintended consequences in conflict minerals legislation' (2019) *Journal of European Public Policy* 1 8-9.

[204] S Raghavan 'How a well-intentioned US law left Congolese miners jobless' *The Washington Post* 30 November 2014 <https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html> (accessed 16 April 2020).

[205] J Schwartz 'The conflict minerals experiment' (2016) 6 *Harvard Business Law Review* 129 141; MS Harline 'Can we make them obey? US reporting companies, their foreign suppliers, and the conflict minerals disclosure requirements of Dodd-Frank' (2014) 35 *Northwestern Journal of International Law & Business* 439 449.

[206] US Presidential Executive Order 13772 on the Core Principles for Regulating the United States Financial System sec 1(d) (3 February 2017).

[207] As above.

[208] E Pilkington 'Proposed Trump executive order would allow US firms to sell "conflict minerals"' *The Guardian* 8 February 2017 <https://www.theguardian.com/us-news/2017/feb/08/trump-administration-order-conflict-mineral-regulations> (accessed 23 April 2020); SN Lynch & E Stephenson 'White House plans directive targeting "conflict minerals" rule: Sources' *Reuters* 8 February 2017 <https://www.reuters.com/article/us-usa-trump-conflictminerals-idUSKBN15N06N> (accessed 23 April 2020).

The Trump threat has been reinforced by the joint resolution of US Congress of 14 February 2017 disapproving the disclosure requirements under sections 1502 and 1504 of the Dodd-Frank Act and stifling their implementation.[209] The resolution comes on the heels of several pieces of legislation before Congress that seek to prohibit 'the use of funds to implement, administer, or enforce' the conflict-minerals rule by the US SEC or repeal it altogether.[210] The Trump threat was also enlivened by the final judgment of the US District Court on 3 April 2017 in *National Association of Manufacturers and others v SEC*,[211] that set aside the aspects of the conflict-minerals rule that require companies to declare to the SEC and publish on their websites that their products have 'not been found to be "DRC conflict free"' for inconsistency with the First Amendment. Following this decision, the SEC has resolved that it will no longer undertake 'enforcement action' under the reporting and disclosure obligations under the rule.[212]

Interestingly, despite the loud business resistance to US extraterritorial rules on transparency, there is no evidence that compliance with the FCPA and the 'conflict-minerals' rule have had an unfairly detrimental impact on US businesses (in comparison to businesses from other countries) or unfairly affected their profitability abroad. If anything, it has laudably stopped US companies from making illicit payments to foreign government officials and funding violent militias in Africa. The only available evidence on the record shows that since the start of the conflict-minerals rule implementation, a sizeable number of US companies have not complied

[209] US Congress 'Joint resolution providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Securities and Exchange Commission relating to ''Disclosure of Payments by Resource Extraction Issuers''' (14 February 2017) <https://www.congress.gov/115/plaws/publ4/PLAW-115publ4.pdf> (accessed 23 April 2020).

[210] As above; US Congress 'Amendment 441 to HR 3354 — Interior and Environment, Agriculture and Rural Development, Commerce, Justice, Science, Financial Services and General Government, Homeland Security, Labour, Health and Human Services, Education, State and Foreign Operations, Transportation, Housing and Urban Development, Defence, Military Construction and Veterans Affairs, Legislative Branch, and Energy and Water Development Appropriations Act 2018 https://www.congress.gov/amendment/115th-congress/house-amendment/441/all-info> (accessed 23 April 2020) ['Amendment prohibits the use of funds to implement, administer, or enforce a SEC rule pursuant to section 1502 of the Dodd-Frank Act relating to conflict minerals']. Also see Section 1(a)(b) of HR 4519 - To amend the Securities Exchange Act of 1934 to repeal certain disclosure requirements related to resource extraction, and for other purposes 115th Congress (2017-2018).

[211] No 13-CF-000635 (DDC 3 April 2017).

[212] US SEC Division of Corporation Finance 'Updated statement on the effect of the Court of Appeals Decision on the conflict minerals rule' (7 April 2017) <https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule#_ftn2> (accessed 23 April 2020); SN Lynch 'SEC halts some enforcement of conflict minerals rule amid review' *Reuters* 7 April 2017 <https://www.reuters.com/article/us-usa-sec-conflictminerals-idUSKBN1792WX> (accessed 23 April 2020).

with the reporting requirements. According to Global Witness, out of 1 321 companies that filed their inaugural report on conflict-minerals transparency in 2014, only 21 percent of the first 100 sampled cases met the minimum statutory threshold.[213] And if that was too early to make a fair assessment, in its second round of assessments in 2015, Global Witness again observed that 'a majority of companies are still failing to put the proper checks in place to identify and mitigate risks along their entire supply chains, as required by the conflict minerals law.'[214] More recently, Responsible Sourcing Network confirmed in 2019 that 'the lack of efforts of a large number of companies' to implement what is left of the conflict-minerals rule 'continue[s] to weaken efforts to tackle the financing of armed groups in the Democratic Republic of Congo (DRC).'[215] These negative scores, however, have not swayed much of the conservative perceptions on repealing the rule.

Rather, acting on Executive Order 13772 of 2017, the US Treasury recommended 'that Section 1502, Section 1503, Section 1504, and Section 953(b) of Dodd-Frank be repealed and any rules issued pursuant to such provisions be withdrawn'.[216] Only a month later after the Treasury's recommendations, on 2 November 2017, the US formally withdrew from the Extractive Industries Transparency Initiative (EITI) as an implementing country citing vaguely that 'domestic implementation does not fully account for the US legal framework.'[217] The US House of Representatives supported this executive rollback on corporate accountability by barring funds, in 2017 and 2018, 'from being used to implement,

[213] Global Witness 'US conflict minerals law: Section 1502 of US Dodd Frank Act' 15 November 2017 <https://www.globalwitness.org/en/campaigns/conflict-minerals/dodd-frank-act-section-1502/> (accessed 22 April 2020).

[214] C Oboth 'New conflict minerals filings raise too many questions' 10 June 2015 <https://www.globalwitness.org/en/blog/new-conflict-minerals-filings-raise-too-many-questions/> (accessed 9 April 2020).

[215] Responsible Sourcing Network 'Mining the disclosures 2019: An investor guide to conflict minerals and cobalt reporting in year six' (2019) 4 <https://www.sourcingnetwork.org/mining-the-disclosures-2019> (accessed 9 April 2020).

[216] US Department of the Treasury 'A financial system that creates economic opportunities: Capital markets report to President Donald J Trump Executive Order 13772 on Core Principles for Regulating the United States Financial System' (6 October 2017) 29 & 205 <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf> (accessed 8 April 2020); E Grygo 'Trump's Treasury moves to repeal and replace Dodd-Frank' *Financial Technologies Forum News* 10 October 2017 <https://www.ftfnews.com/trumps-treasury-moves-to-repeal-replace-dodd-frank/18899> (accessed 8 April 2020).

[217] GJ Gould 'Letter addressed to Fredrik Reinfeldt, Chair of EITI by the Director of the Office of the Natural Resources Revenue, US Department of the Interior' 2 November 2017 <https://eiti.org/files/documents/signed_eiti_withdraw_11-17.pdf> (accessed 8 April 2020). See the EITI's reaction here: EITI 'EITI Chair Statement on United States withdrawal from the EITI' 2 November 2017 <https://eiti.org/news/eiti-chair-statement-on-united-states-withdrawal-from-eiti> (accessed 9 April 2020).

administer, or enforce' the conflict-minerals rule.[218] Furthermore, current efforts to repeal section 1504 of the Dodd-Frank Act through US House Bill HR 4519 have received the bi-partisan endorsement of the US Congress and the Senate.[219]

To ensure legislative and policy reversals at all cost on the conflict-minerals rule, powerful right-wing organisations and US corporations may have 'weaponised' the policy propositions of US research think-tanks. Stone writes that some corporations funded certain think tanks to reinforce business perspectives in policy debates.[220] As such, many research think-tanks have thus far published a retinue of policy papers discrediting the positive impact of the conflict-minerals rule in Africa, and emphasizing a perverse narrative around its unintended effects. This includes dubiously tying the rule's implementation to far-fetched claims of rising infant mortality and surging armed violence against civilian populations in the DRC.[221] In 2018, for example, research conducted by the Property and Environment Research Center (PERC) outrageously claimed that the Dodd-Frank Act has had the 'effect of more than doubling infant mortality in villages near mining sites' and 'increased militia violence, rather than curbing it.'[222] The PERC is a right-wing funded and controversial US-based think-tank known for trivializing and denying the scientific consensus on climate change.[223]

[218] Interior and Environment, Agriculture and Rural Development, Commerce, Justice, Science, Financial Services and General Government, Homeland Security, Labour, Health and Human Services, Education, State and Foreign Operations, Transportation, Housing and Urban Development, Defence, Military Construction and Veterans Affairs, Legislative Branch, and Energy and Water Development Appropriations Act 2018 (HR 3354) sec 1108; Financial Services and General Government Appropriations Act 2017 (HR 5485) sec 1219.

[219] US House of Representative Committee on Financial Services 'Report together with minority views: Amending the Securities Exchange Act of 1934 to repeal certain disclosure requirements related to resource extraction, and for other purposes' 9 January 2018) 4 <https://www.congress.gov/115/crpt/hrpt500/CRPT-115hrpt500.pdf> (accessed 26 April 2020); US Senate Committee on Foreign Relations 'Cardin statement on Senate repeal of key anti-corruption rule for oil, gas industry' 3 February 2017 <https://www.foreign.senate.gov/press/ranking/release/cardin-statement-on-senate-repeal-of-key-anti-corruption-rule-for-oil-gas-industry> (accessed 26 April 2020).

[220] D Stone 'Think tank transnationalisation and non-profit analysis, advice and advocacy' (2000) 14 *Global society* 153 165

[221] Koch & Kinsbergen (n 76 above) 259.

[222] DP Parker 'The unintended consequences of US conflict-mineral regulation' (2018) 58 *Property and Environment Research Centre Policy Series* 1 2. Also see D Parker, J Foltz & D Elsea 'Unintended consequences of sanctions for human rights: Conflict minerals and infant mortality' (2017) 59 *The Journal of Law and Economics* 731-774; D Parker & B Vadheim 'Resource cursed or policy cursed? US regulation of conflict minerals and violence in the Congo' (2017) 4 *Journal of the Association of Environmental and Resource Economists* 1-49.

[223] Centre for Media and Democracy 'Property and Environment Research Center' 28 September 2017 <https://www.sourcewatch.org/index.php/Property_and_Environment_Research_Center> (accessed 28 April 2020).

Although the PERC's research makes no evidence-based connection between the purport of the conflict-minerals rule and increased infant mortality in the DRC, its brow-raising conclusions on the 'unintended effects' of the rule have been cited repeatedly to discredit the rule's implementation altogether.[224] Yet, the evidence on the ground shows a completely different reality. In the DRC, enforcement of the conflict-minerals rule has had an enormous impact in that it has transformed the way 3TGs and other minerals are sourced by TNCs and significantly limited the free-flow of foreign capital in supporting the murderous activities of militia groups.[225] There is consensus among scholars that the conflict-minerals rule resulted in increased transparency in mineral supply chains. Yet this narrative has been overshadowed by the special-interest narrative of corporate stakeholders about the *unintended consequences* of the rule which has been proven to be often partial, exaggerated and 'actually out of context.'[226] As Koch and Kinsbergen argue

> [t]he narrative of unintended effects of public action has been a pervasive one, and has been used in a variety of domains to argue for a roll-back of regulation or other forms of collective action.[227]

The dominating economic sentiment underlying the chain of activities targeted at rolling back US extraterritorial rules on corporate transparency and accountability in the extractive industries suggests a new form of elevation of American economic interests over and above its historic human rights and transparency values. Already, the muzzling of the SEC's ability to enforce the conflict-minerals rule through the stoppage of government funding, the Trump administration's policy recommendations and withdrawal from the EITI, and the pending bills for the repeal of sections 1502 to 1504 of the Dodd-Frank Act as well as section 13(p) and (q) of the Securities Exchange Act, make it hard to see the US retracing its steps from this path of regulatory perdition.

5.4.2 Inadequate (or non-)protection of victims from developing countries

Much of the considered extraterritorial rules on disclosure of illicit payments, modern slavery, human trafficking, child labour and conflict-minerals seem

[224] See the criticism of Koch & Kinsbergen (n 76 above) 257 (where they claim that 'Parker [from the PERC] and others…used outdated data, to claim that the unintended effects [of the conflict-minerals rule] were still ongoing').
[225] Enough Project 'Progress and challenges on conflict minerals: Facts on Dodd-Frank 1502' 25 July 2017 <https://enoughproject.org/one-pager/progress-challenges-conflict-minerals-facts-dodd-frank-1502> (accessed 27 April 2020).
[226] Koch & Kinsbergen (n 76 above) 257.
[227] As above, 261.

inherently not intended to remedy corporate harm abroad. Rather, the enforcement actions they prescribe for non-compliance by corporate entities tend to be merely regulatory in nature, and often of little or no remedial benefit to victims. The disclosure and due diligence laws considered here have, in fact, had very little effect on actual corporate accountability for human rights violation. This is so because with only 'disclosure obligations' and very minimal or no penalties, the laws limit victims' ability to challenge non-compliance by companies. The laws do not empower victims to hold companies accountable for actual environmental and human rights abuses abroad. I will briefly consider the substantive and procedural limits of the various extraterritorial rules discussed in section 5.2.2 above to justify this assertion.

(a) Alien tort, disclosure, and conflict-minerals statutes of the US

First is the ATS. The ATS was, for some time, the signature extraterritorial statute under which many of the civil claims by foreign victims were instituted in the US.[228] However, recent decisions by the US Supreme Court have invalidated previous decisions of lower courts affirming that the ATS was much more than a jurisdictional statute - it was a statute that could give rise to a cause of action.[229] In *Sosa v Alvarez-Machain* (*Sosa* case),[230] the US Supreme Court held that the ATS is purely a jurisdictional statute. In, at least, two subsequent notable case, the US Supreme Court completed abrogated the ability of foreign victims to litigate corporate liability causes against parent companies in the US.[231]

i *Kiobel v Royal Dutch Petroleum*

This case was instituted in the US District Court by the widow of Dr Barinem Kiobel who was murdered alongside Ogoni environmental activist, Saro-Wiwa. Hounded and persecuted by the Nigerian government and with no hope of getting justice in Nigeria, Esther Kiobel fled Nigeria and obtained refugee status in the US with the support of Amnesty International.[232] On 1 September 2002, Mrs Kiobel instituted a personal action on behalf of herself and her deceased husband, amongst others, against Royal Dutch Petroleum, Shell Transport and Trading Company, and their joint Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Limited

[228] *Doe v ExxonMObil Corp* 393 F Supp 2d 20 (DDC 2005); *Mujica v Occidental Petroleum Corp* 382 F Supp 1164 (CD Cal 2005).
[229] *Kadic* case (n 64 above).
[230] 542 US 692 729 &732.
[231] As above.
[232] Amnesty International 'One woman vs Shell' (2017) <https://www.amnesty.org/en/latest/campaigns/2017/06/one-nigerian-widow-vs-shell/> (accessed 2 May 2020).

(SPDC) before the US courts. In *Kiobel v Royal Dutch Petroleum* (*Kiobel* case),[233] the claimants alleged that Shell aided and abetted the atrocities committed by the Nigerian government. The plaintiffs lost at the district court on the ground that corporate liability for violations occurring abroad were not enforceable in the US. On appeal, the Court of Appeals dismissed the entirety of the plaintiffs' claims, affirming that the law of nations does not recognise the notion of corporate liability. Further appeal to the US Supreme Court failed.

It is useful to note that the Court cited its earlier decision in the *Sosa* case on the presumption against extraterritoriality to determine, not whether a US court can consider a cause of action alleging a violation of foreign or international law but, whether a US federal court 'has authority to recognise a cause of action under US law to enforce a norm of international law.'[234] It was in determining the authority of the court rather than the plausibility of the claimants' action that the presumption was upheld. The Court also stated that in the absence of any direct link between the US and the injury alleged, the US Congress must expressly legislate on a law that gives courts the jurisdiction to hear such claims. Essentially, that decision closed once and for all the door to foreign victims who seek to rely on the ATS in advancing corporate human rights accountability in the US.

ii *Jesner v Arab Bank Plc*

A recent case is even more interesting in terms of the US Supreme Court's total foreclosure of corporate liability claims for human rights violations outside the US based on the doctrine of *forum non conveniens*. In *Jesner v Arab Bank Plc* (*Jesner* case),[235] the claimants instituted an action under the ATS, alleging that their members were killed and some injured by terrorist acts committed abroad by Hamas, and facilitated by the respondent bank – a Jordanian bank with a New York branch. They sought to hold the bank and its senior officials liable under the ATS for allegedly supporting the terror incidents by clearing dollar-denominated transactions and laundering money for a Hamas-affiliated charity based in Texas. Although the case was yet pending before the US District Court when the *Kiobel* case was decided, the *Kiobel* case played an influential role in that Court's decision. The District Court held

[233] 133 S Ct 1659 (2013) or 569 US 108 (2013).
[234] *Kiobel* case (n 233 above) 2 (Syllabus).
[235] 584 US 2018 (Syllabus); 138 SC 1386 (2018).

that the *Kiobel* case was binding precedent and dismissed the case. The Court of Appeals affirmed the District Court's decision.

On further appeal to the Supreme Court, the apex court reiterated that the ATS is 'strictly jurisdictional' and does not give rise to a cause of action for claims alleging violation of international law.[236] Holding that it would be inappropriate for US courts to recognise, under the ATS, the liability of foreign corporations without express action from Congress, the Court held that:

> Petitioner are foreign nationals seeking millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS [Clearing House Interbank Payment System] transactions in Arab Bank's New York branch and a brief allegation about a charity in Texas. At a minimum, the relatively minor connection between the terrorist attacks and the alleged conduct in the United States illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank.[237]

The Supreme Court held that US courts were not well suited to make 'the required policy judgments implicated by foreign corporate liability.'[238] To do otherwise, it considered, would be to trigger serious policies consequences that should ordinarily be differed to the political branches of government. In striking its final blow to corporate liability under the ATS, it declared: 'Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.'[239] Essentially, the US Supreme Court in both the *Kiobel* and *Jesner* cases permanently laid to rest decades of judicial precedents allowing foreign plaintiffs access to justice for wrongful individual and corporate conduct overseas.

Besides the ATS, statutes such as the FCPA, the FATCA, the California Transparency in Supply Chains Act, the Dodd-Frank Act and Securities Exchange Act also do not, legally speaking, give rise to a cause of action enforceable by foreign victims before US courts – and, if at all, quite marginally. The provisions of these laws only create disclosure and reporting obligations for US companies. They do not, by so doing, correlatively create rights that are enforceable by foreign victims. This assertion does not contradict the point made in section 5.3 above that extraterritorial laws create some measure of remedial access. Remedial access should not be equated with remedial outcomes. While providing victims avenues for

[236] *Jesner* case (n 235 above) 2 (Syllabus).
[237] *Jesner* case (n 235 above) 3 (Syllabus).
[238] As above, 3.
[239] As above, 3.

bending the hand of US regulators to monitor the harmful activities of US companies abroad or actually testing the liability of US companies in courts for violations abroad, the laws do not invariably appropriate enforceable rights to foreign victims. So far, there is no evidence of any claims by foreign victims under any of these laws, considering that there is no legal standing (*locus standi*) to maintain such claim before US courts. Assuming there was legal standing to do so, jurisdictional impediments may prove such claims to be unsuccessful.

(b) Bribery and modern slavery laws of the UK and Australia

The weakness in the ability of extraterritorial laws to remedy violations against foreign victims is equally evident in the anti-bribery and modern slavery legislation of the UK and Australia. Three points are important to identify the limits of these countries' laws with respect to the extractive industries. First is the absence in the UK and Australian laws of strong legislative language against the business case for bribery and modern slavery in global supply chains. Extractive businesses often operate on extreme business models anchored on operational cost and risk minimisation, including excessive charges for the provision of ancillary service to workers directly by employers or through casualisation or subcontracting arrangements, the exploitation of workers' immigration status, and market inequalities.[240] All of which frequently underpin the structural complexities of monitoring and enforcing compliance with modern slavery standards in global value chains.

The transparency provisions of section 54 of the UK MSA and section 13 of the Australian MSA all stop at *requiring* compulsory preparation and submission of a modern slavery report for companies with a gross annual revenue of USD100 million. The report must comply with certain legal formalities.[241] However, the laws of both countries fail to impose sanctions on companies for non-compliance, while that of the UK does not impose extraterritorial liability at all. More so, even as the UK MSA codifies the corporate obligation to disclose and report on voluntary efforts to prevent and address forced labour in global supply chains, it does not create extraterritorial liability and binding public standards or sanctions for non-

[240] C Stringer & S Michailova 'Why modern slavery thrives in multinational corporations' global value chains' (2018) 26 *Multinational Business Review* 194 198-199.

[241] Also see UK MSA sec 54(6); Australian MSA sec 16.

compliance.[242] Hence, Mantouvalou asserts that 'the [UK] MSA is too weak in eliminating modern slavery by businesses in their supply chains'.[243]

With respect to Australia, section 6 of the Australian MSA allows companies to 'volunteer to comply' with the reporting requirements by giving a notice to the Minister before the end of a reporting period, and they can revoke that notice before the start of the reporting period. However, it is silent on whether this option to volunteer pertains only to companies that do not meet the US100 million threshold. Moreover, section 16A of the Australian MSA allows companies unrestrained leeway to give 'an explanation for failure to comply' under section 13 or the failure to undertake specified remedial action. This absolute leeway that companies have to *explain away* their non-compliance and the lack of penalty for non-compliance naturally suggests that companies do not have to look over their shoulders even when caught red-handed in modern slavery or human trafficking violations.

The second weakness of both countries' modern slavery laws is the non-provision for the compensation of foreign victims by corporate entities proven to support slavery and human trafficking in their supply chains. Although sections 8 and 9 of the UK MSA make provision for reparation orders against persons convicted for violating the Act, such orders do not pertain to companies and are non-compensatory to the victims. Section 54(11) of the UK MSA which deals with the enforceability of the disclosure duties of companies under the Act does not also impose any penalty for non-compliance. Rather, it defers enforcement of the corporate obligations to the Secretary of State. As Balch states, the UK MSA is 'no radical departure' from the UK's existing business-friendly posture as 'the system is certainly weak, complex and unwieldy'.[244]

Lastly, the disclosure and reporting obligations of companies under both pieces of legislation apply only to a category of companies. In the UK, the reporting obligation only applies to companies engaged in the supply of good and services and that have a total revenue to be specified by regulation.[245] In Australia, the reporting obligation applies only to companies based or operating in Australia, and that have

[242] LeBaron & Ruhmkorf (n 88 above) 16.
[243] Mantouvalou (n 90 above) 1018-1019; Craig (n 90 above) 22 & 25.
[244] A Balch 'Understanding and evaluating UK efforts to tackle forced labour' in G Craig, L Waite, H Lewis & K Skrivankkova (eds) *Vulnerability, exploitation and migrants* (2015) 86 94-95.
[245] UK MSA sec 54(2)(a)(b).

a gross annual revenue of USD100 million.[246] Companies below this threshold, it does seem, have no mandatory obligations to disclose or report modern slavery violations in their supply chains. In criticising these weaknesses in state-mandated transparency requirements for supply chains in places such as the UK MSA, Australian MSA and the California Transparency in Supply Chains Act, Di Martino states:

> the UK Modern Slavery Act corroborates Governments' predilection for transparency laws 'without teeth'. The low level of stringency emerges from two major *indices:* (a) the introduction of a mere disclosure obligation without penalties for failing to adopt concrete measures to tackle modern slavery, and (b) the legislation's limited scope of application.[247]

This sentiment illustrates the weakness and limits of modern slavery legislation, which have been tailored to be consistent with the capitalist outlook of those societies. They were not (and, if at all, only marginally) intended to give compensatory or extraterritorial remedial succour to foreign victims.

(c) The due diligence laws of France, the Netherlands, and the EU

Similarly, the French Corporate Duty of Vigilance Law and the Dutch Child Labour Due Diligence Act have some fundamental setbacks. Under the French Corporate Duty of Vigilance Law, only a specified category of companies has the duty to design and implement a corporate vigilance plan.[248] Secondly, the law only allows claimants to compel companies to implement a due diligence plan in their activities and supply chains. It does not create a right of foreign victims to compensation for violations that occur because of a company's failure to implement the mandatory plan.

Furthermore, the aspects of the Corporate Duty of Vigilance Law that allowed French courts – the only enforcement body recognised by the Law - to impose a civil fine of up to EUR10 million has been struck down by the French Constitutional Council on the grounds that it lacks certainty in law.[249] The Constitutional Council reasoned that the power of courts to impose fine did not clearly state whether the penalty pertained to each breach of the Law or if it was a penalty to be incurred only once,

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[246] Australian MSA sec 5(1).

[247] S Di Martino 'Modern slavery in transnational supply chains. Public national regulations: Words or deeds?' (2020) *TLI Think! Paper 11/2020* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575895> (accessed 3 May 2020).

[248] C Bright 'Creating a legislative level playing field in business and human rights at the European level: Is the French Duty of Vigilance Law the way forward?' (2020) *European University Institute Working Papers MWP 2020/01* 6 <https://cadmus.eui.eu/bitstream/handle/1814/65957/MWP_2020_01.pdf?sequence=1> (accessed 3 May 2020).

[249] French Law No 2017-399 art 3; Conseil Constitutionnel 'Décision n° 2017-750 DC du 23 mars 2017' (2017) <https://www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm> (accessed 3 May 2020).

regardless of the regularity of the breach. With the strike down of article 3 of the Law, this means that companies that fail to comply with the obligation to implement a vigilance plan cannot be sued or penalised.

Under the Dutch Child Labour Due Diligence Act, the corporate obligation to disclose whether child labour has been used in the supply chain of a company only has to be done once, unlike in the UK where the reporting cycle is annual.[250] This reduces the essence of the process to a tick-box exercise as companies that have submitted the report once do not have to do so subsequently even when their supply chains may have been exposed to child labour. More so, the scope of the law only pertains to child labour. It leaves out equally compelling issues of forced adult labour and human trafficking often seen in the extractive industries. The law also does not specify whether victims of child labour from developing countries affected by Dutch companies may institute actions for human rights violations beyond merely allowing complaints that a company has not complied with the disclosure requirements of the law. And with many aspects of the law left largely unspecified until the execution of an implementing decree (including whether its provisions will be extended to small and medium-sized companies), its effectiveness in combatting child labour in supply chains is yet to be seen.

With regards to the EU Conflict Minerals Regulation 2017/821, several limitations on the protection of foreign victims abound. First, the corporate obligation to conduct human rights due diligence in mineral supply chains applies only to importers of 3TG minerals into the EU who meet a particular threshold listed in Annex 1.[251] Second, the Regulation does not establish any penalty for non-compliance. Rather, article 16 of the Regulation defers the rules applicable to infringements to member states. The law does not come into effect until 1 January 2021. Beyond having a four-year regulatory holiday, it is still unclear what the consequences of non-compliance will be for companies that fall short of the Regulation, especially as member states are yet to designate the competent authority responsible for the enforcement of the Regulation. Lastly, the Regulation is loudly silent on any remedial options for foreign victims from conflict-affected and

[250] Dutch Child Labour Due Diligence Act sec 4; UK MSA sec 54(1); Bright (n 248 above) 3; C Bright, D Lica, A Marx & G Van Calster 'Options for mandatory due diligence in Belgium' (2020) 29 <https://lirias.kuleuven.be/retrieve/579879> (accessed 2 May 2020).

[251] EU Regulation 2017/821 art 1(3).

high-risk areas. This means that foreign victims impacted by the import activities in 3TG minerals have no enforceable recourse under the Regulation.

(d) Chinese and South African rules of responsible corporate conduct

The Chinese due diligence standards – that is, the GSRM, the Chinese Due Diligence Guidelines and the Responsible Cobalt Initiative – are voluntary initiatives that offer absolutely no compensatory recourse beyond, perhaps, the non-judicial CCCMC monitoring avenue they offer. They are not underpinned by any substantive Chinese law and, as such, unenforceable by foreign victims affected by Chinese companies abroad. This makes legal action for remedies from Chinese courts procedurally impracticable.

With regards to the limits of South African law, it can be argued that under the provisions of section 8(2) of the South African Constitution and section 7(a) of the Companies Act, opportunities abound for litigation and judicial review. Yet, it is still largely unclear whether foreign victims will have the necessary legal standing to maintain an action for liability of a South African company abroad regarding violations of its obligations under the Bill of Rights and the Companies Act. Further, the King Reports and the King Codes are not law in South Africa, but merely business codes eliciting the voluntary commitments of South African companies. Although the King Codes affirm the extraterritorial obligation of South African companies to abide by the provisions of the Bill of Rights, they are not enforceable against South African companies. So far, there has been no case in which the extraterritorial application of the corporation human rights responsibility of a South African company has been tested by South African Courts. As such, it may be too early to pre-empt the disposition of the court on such issues.

In light of the scope of the above extraterritorial rules from the US to South Africa, one thing is clear: the laws are grossly limited in the extent to which they afford remedies to foreign victims of corporate human rights violations.

5.4.3 Procedural hurdles to parent company liability in home states

The limited protection offered foreign victims under extraterritorial laws may not be as detrimental as the procedural blocks in the judicial systems of home countries. Perhaps, the most critical setback to reliance on extraterritorial laws and home state litigation as a tool for parent company liability is the jurisdictional challenge that victims face in their quest for justice abroad. Owing to complex procedural

requirements for the exercise of judicial discretion, many victims from developing countries find themselves increasingly shut out of the courts of home countries. Some scholars argue that the need to encourage third world countries to develop their own forums has been largely responsible for the reform of jurisdictional rules in home countries.[252] Other scholars argue that it is the unintended '[e]xpansion of personal jurisdiction and the subsequent increased forum shopping' by foreign victims that has necessitated the limits on a claimant's choice of forum.[253] However, whatever position is taken, Enneking rightly asserts that in addition to access to justice challenges suffered in the host country, victims equally face tremendous procedural obstacles to justice in foreign jurisdictions.[254]

So far, save for the few cases settled amicably (such as the *Wiwa* cases and the *Bodo* case), there has arguably not been a single extractive industries-related case successfully litigated on the merit to finality by foreign victims in home jurisdictions.[255] From the US to Canada, Europe and the far-flung courts of Australia, jurisdictional hurdles based on strict legal procedures and technicalities have made sure that not one claim of corporate human rights violations in the extractive industries by foreign victims has succeeded on the merit. This is because, in the judicial systems of these countries or regions, laws, procedural rules and various judicial approaches have been adopted to restrict claims arising from a territory other than the home state.

Much like the ATS, similar adjudicatory rules for claims arising abroad under common law and civil law have also been established for the exercise of national jurisdiction in the European Union (EU). For example, the rules for the exercise of jurisdiction have been codified in the Brussels I Regulation 1215/2012 (Brussels I), Rome II Regulation 864/2007 (Rome II) and the Lugano Convention on Jurisdiction and the enforcement of Judgments in Civil and Commercial Matters 2007 (Lugano Convention). These statutes defined the contours within which European courts may

[252] PJ Carney 'International *forum non conveniens*: Section 1404.5 - A proposal in the interest of sovereignty, comity, and individual justice' (1995) 45 *The American University Law Review* 415 421.

[253] DJ Dorward 'The *forum non conveniens* doctrine and the judicial protection of multinational corporations from forum shopping plaintiffs' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 141.

[254] LFH Enneking 'Multinationals and transparency in foreign direct liability cases' (2013) 3 *Dovenschmidt Quarterly* 134 135.

[255] N Bernaz 'Enhancing corporate accountability for human rights violations: Is extraterritoriality the magic potion?' (2013) 117 *Journal of Business Ethics* 493 509.

competently exercise jurisdiction or resolve conflict of laws over matters that may have arisen within and outside the EU.[256] They significantly restrict the extent to which civil liability claims arising from outside the EU may be adjudicated in Europe. Under Brussels I, Rome II and the Lugano Convention, a person domiciled in a member state may be sued in the courts of the place where they are domiciled or, with respect to matters pertaining to tort, delict, quasi-delict, civil claims for damages or restitution, in the courts of 'the place where the harmful event occurred'.[257]

Besides these binding jurisdictional provisions, national courts in Europe, the US, Canada and Australia have devised different approaches in common law and civil law such as the doctrines of *forum non conveniens* and *forum necessitates*, respectively, to resolve questions of forum and parent company liability in respect of claims arising from host countries. I will now consider the purport of both doctrines on parent company liability in relation to the limits of home country litigation with cases to support my assessment.

First, *forum non conveniens* (meaning, inconvenient forum) is 'a common law doctrine that allows a court in its discretion to dismiss a case within its jurisdiction on the ground that the case can be tried more conveniently in another forum.'[258] Under this doctrine, a foreign claimant must establish a strong link between the operations of a parent company in the home jurisdiction and the injury giving rise to the cause of action.[259] Otherwise, a home country's court can decline jurisdiction over such case where it is shown that the cause of action arose outside its territory. A major consequence of the Brussels I Regulation and the Lugano Convention on claims by victims from developing countries is that a holding that such claims can be determined by the law of *the place where the harmful conduct occurred* will ultimately lead to a denial of justice in the home country. Some scholars have argued that applying the *forum non conveniens* doctrine 'unduly discriminates against

[256] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) L 199/40.

[257] Brussels I Regulation 1215/2012 arts 7(2)-(7) & 8; Rome II Regulation 864/2007 arts 4 & 7; Lugano Convention arts 5(3)-(7) & 6.

[258] LE Miller 'Forum non conveniens and state control of foreign plaintiff access to US courts in international tort actions' (1991) 58 *The University of Chicago Law Review* 1369 1371-1372.

[259] *Kiobel* case (n 233 above).

foreign plaintiffs.'[260] As Dorward notes, the doctrine has been criticized for according greater deference to citizens than foreigners where

> the court may give different treatment to two litigants with the same circumstances except citizenship. Such a result seems unfair given that a domestic plaintiff injured abroad is as likely to forum shop in the United States as is a foreign plaintiff.[261]

For TNCs, the doctrine of *forum non conveniens* is a useful shield against claims by foreign victims to block access to the courts of home countries. So strongly in favour of parent TNCs is this common law principle that the chances of foreign victims are very slim and procedural 'dismissals in favour of foreign forums often constitute victory for the defendants.'[262] In evaluating the chances of citizens from developing countries instituting an action in US courts for the negligent conduct of American companies overseas, Rogge states:

> The experiences of plaintiffs from developing countries show that it is extremely difficult. Almost invariably, in mass transnational tort actions, transnational corporations (TNCs) invoke the common law doctrine of the inconvenient forum – *forum non conveniens* – as a first line of defence. The doctrine has proven time and time again to be a significant obstacle for plaintiffs in developing countries who are seeking to sue a US-based transnational corporation in the United States.[263]

A plausible argument in favour of the *forum non conveniens* doctrine is that it operates as a judicial wedge against creating a diplomatic crisis for the state or incurring into the sovereign competence of the courts of the forum where the injury took place. In many home countries, the dismissal of a foreign claim on account of the doctrine is based on a public interest factor to avoid unnecessary problems in conflict of laws, especially where the claimants and defendants are from different countries and the injury giving rise to a cause of action arose in a third country or more than one country.[264] Consequently, the doctrine has served quite well as a backstop to opening the floodgate to foreign litigants to institute frivolous claims or undertake an abuse of the judicial processes of the home country or even to prevent forum shopping. However, the essence of this assessment is neither to condemn nor applaud the doctrine for its many controversies or remedial frailties. Rather, it is to

[260] Dorward (n 253 above) 165.
[261] As above.
[262] Miller (n 258 above) 1388.
[263] MJ Rogge 'Towards transnational corporate accountability in the global economy: Challenging the doctrine of *forum non conveniens* in *In re:* Union Carbide, Alfaro, Sequihua, and Aguinda' (2001) 36 *Texas International Law Journal* 299.
[264] WW Heiser 'Forum non conveniens and choice of law: The impact of applying foreign law in transnational tort actions' (2005) 51 *Wayne Law Review* 1161 1178.

highlight the glaring extent of its limits in the quest for justice by victims from developing countries.

Second, *forum necessitates* (meaning, forum of necessity) is a growing doctrine developed in roman civil law and employed, in exceptional circumstances by courts of law, to prevent a miscarriage of justice where there is evidence that the claimants are not likely to get justice elsewhere.[265] The doctrine allows a court to determine a claim when confronted with jurisdictional hurdles, 'if there is no other forum where the plaintiff could reasonably seek relief.'[266] Goldhaber argues that unlike *forum non conveniens* that allows a defendant to establish that a court should not hear a case despite the claimant having met the jurisdictional requirement, the forum of necessity doctrine is the opposite in that it allows the court to hear a claim even where the requirement of jurisdiction has not been met.[267]

Even in cases where the doctrine of *forum non conveniens* or *forum necessitatis* has not been expressly pleaded to determine claims for the corporate liable of parent companies, home country courts have frequently narrowed down the question of forum to whether there is a strong causal link between the injury in question and the actions of the defendant parent company in the home state. Below, I will consider, in three categories, several cases lodged by victims from Africa which were determined on the basis of the appropriate *forum* or the connection between the injury and the defendant parent company's actions in the home state.

(a) The US and Canada

i The *Kiobel* case

The *Kiobel case* is a classic case of the procedural obstacle posed by *forum non conveniens* and the presumption against extraterritoriality. In this case, the US Supreme Court considered that all the relevant conduct giving rise to the cause of action took place in Nigeria. The Court held that 'the ATS is a jurisdictional statute that creates no causes of action', and in the absence of any express presumption of extraterritoriality in the ATS, '[n]othing in the ATS's text evinces a clear indication of extraterritorial reach.'[268] The Court also stated that even if Shell conducted some

[265] MC Marullo 'Access to justice and *forum necessitatis* in transnational human rights litigation' (2010) *HURI-AGE, Consolider-Ingenio* 1 2.
[266] MD Goldhaber 'Corporate human rights litigation in non-US courts: A comparative scorecard' (2013) 3 *UC Irvine Law Review* 127 135.
[267] As above.
[268] *Kiobel* case (n 233 above) 2 (Syllabus).

of its business in the US, it was not enough to displace the presumption against extraterritoriality. The Court further stated that 'there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.'[269] This holding, in effect, killed any chances in future of successfully litigating in the US cases of corporate human rights violations (in the extractive industries) by US companies or foreign companies operating in the US. After over 20 years of passionate but futile litigation, the plaintiff has now approached the Dutch courts in further search for justice.[270]

ii *Bowoto v Chevron Corporation*

Also relevant to the discourse of parent company liability is the case of *Bowoto v Chevron Corporation* (*Bowoto* case),[271] which originated from Nigeria. This case was instituted against the defendant corporation in the US by relatives of deceased Nigerian protesters who were murdered at an oil producing facility operated by its subsidiary, Chevron Nigeria Limited, in 1998. The claimants are members of the Ilaje and Ijaw riverine communities in the southern part of Nigeria. Sequel to the environmental and economic harm caused by Chevron's operations in their communities, they organised and staged an unarmed protest at a Chevron offshore oil platform. Although the protests were peaceful, Chevron requested and offered logistical support to Nigerian security personnel to quell the protests at any cost. Some of the protesters were consequently killed, while others were detained and tortured by the Nigerian and Chevron security personnel deployed to the scene of the protests in Chevron-leased helicopters. The claimants approached the US Northern District Court in California in 1999 to hold Chevron Corporation liable for the actions of Chevron Nigeria Limited having 'closely supervised' the abuses by the Nigerian military and its own security personnel. The action was brought against

[269] *Kiobel* case (n 233 above) 3 (Syllabus). *Cf Smith Kline & French Labs Ltd v Bloch* [1983] 1 WLR 730 733-34 (CA) (where Lording Denning celebrated the appeal of the US judicial system thus:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case "on spec" as we say, or on a "contingency fee" as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 percent of the damages, if they win the case in court, or out of court on a settlement.)

[270] O Olawoyin 'Widows of Ogoni leaders killed by Abacha sue Shell in Netherlands' *Premium Times* 29 June 2017 <https://www.premiumtimesng.com/news/top-news/235331-%E2%80%8Ewidows-ogoni-leaders-killed-abacha-sue-shell-netherlands.html> (accessed 2 May 2020).

[271] 621 F.3d 1116 (9th Cir 2010) (10 September 2010).

Chevron under the ATS and the Torture Victims Protection Act (TVPA), both of which incorporate principles of international human rights law.

At the trial, the defendant corporation entered a motion for summary judgment on the ground that the plaintiffs had not proven their claim that by engaging Nigeria's security forces to suppress protest, the defendant US company benefitted from the failure to remediate the harms caused by oil extraction. However, the Court found that the plaintiffs failed to produce evidentiary support to substantiate their claim that 'killing or otherwise suppressing protestors saves defendants money, or otherwise increases their profit margin.'[272] The Court noted that there was no evidence that a sufficient amount of the defendant's conduct occurred in the US and whatever action the defendant took was 'merely preparatory' and an indirect cause.[273] Although the claimants succeeded in seeing the matter through to trial in 2008 (after nine years of tedious procedural hurdles), they were largely unsuccessful on all claims in their quest for justice. The Court found that Chevron Corporation was not liable for the complicity of Chevron Nigerian Limited and the entire claim was dismissed.

On appeal for a retrial to the Court of Appeals, the Court affirmed the decision of the lower court and dismissed the appeal, it was held that the Death on the High Seas Act pre-empts wrongful death and survival claims under the ATS and that the TVPA applies only to individuals and was not contemplated by Congress to apply to corporations. A further appeal to the US Supreme Court was rejected.[274]

iii *The Presbyterian Church of Sudan v Talisman Energy Inc*

The case of *The Presbyterian Church of Sudan v Talisman Energy Inc* (*Presbyterian Church* case),[275] is relevant to illustrate the difficulty in establishing parent company liability under the ATS. In 2001, the plaintiffs instituted a class action against Canadian oil and gas company, Talisman Energy, under the ATS. The plaintiffs, whose churches were destroyed by the Sudanese government, claimed that Talisman Energy had supported the Sudanese government in the creation and operation of buffer zones around oil fields that were used to attack, destroy and displace nearby populations in order to gain access to oil; thereby, aiding and abetting international

[272] See the District Court Judgment in *Bowoto v Chevron Corporation* 481 F.Supp 2d 1010 (ND Cal 2007) (14 March 2007) (District Court decision in the *Bowoto* case).
[273] District Court decision in the *Bowoto* case (n 271 above) 5.
[274] *Bowoto and Ors v Chevron Corp and Ors* (No 10-1536) US Supreme Court (23 April 2012).
[275] 582 F.3d 244 (2d Cir 2009) 2 October 2009.

crimes and human rights violations. The defendant operated in Sudan through a consortium of companies known as the Greater Nile Petroleum Operating Company Limited (GNPOC) registered in Mauritius involving Talisman, China National Petroleum Corporation, Petronas and Sudapet. Although the defendant's motion challenging jurisdiction (based on objections by the US and Canadian governments) failed, the plaintiffs' claims were nonetheless dismissed by the District Court of New York in 2006 and the decision was affirmed on appeal to the Court of Appeals in 2009.[276]

The Court of Appeals held that the action could not succeed because the plaintiffs had presented no evidence that Talisman was aware of the genocide committed by the Sudanese government, or, if it was, that the company intended to support it. The Court, relying on the *Sosa* case, adopted the *purpose* standard rather than *knowledge* alone in establishing accessorial liability for aiding and abetting. The Court stated that the Heglig and Unity airstrips used by the Sudanese military in perpetrating crimes against humanity, the general logistical support and various other acts were owned by GNPOC – not Talisman. And that there was no evidence linking Talisman with the general day-to-day operations of GNPOC.

iv *Khulumani v Barclays National Bank; Ntsebeza v Daimler Chysler*

In South Africa, the business activities of US TNCs undertaken during the apartheid regime have been subject of litigation under the ATS for being in violation of international human rights law. The consolidated case of *Khulumani v Barclays National Bank Limited, Ntsebeza v Daimler Chysler Corporation* (*Khulumani* cases),[277] is relevant here to establish the hurdle of jurisdiction to the claim of foreign victims. In this case, victims of abuses committed by the South African apartheid regime lodged claims against several US corporations under the ATS for complicity in the regime's human rights violations in South Africa between 1948 and 1994. The claimants argued that the regime tracked African demonstrators with IBM computers and shot protesters from cars runs on Daimler-Benz engines, and that the apartheid military maintained its machines with oil supplied by Shell. And that by

[276] See the District Court's decision here: *The Presbyterian Church of Sudan v Talisman Energy Inc* 374 F Supp 2d 331 (SDNY 2005).

[277] 504 F.3d 254 (2d Cir 2007); 12 October 2007 05-2141-cv, 05-2326-cv. 46-47 (2d Cir 2007) (US Court of Appeals for the Second Circuit).

doing business and supporting the apartheid government with vital resources, the companies were in violation of international law.

The plaintiffs lost at the US District Court for lack of subject matter jurisdiction over claims that the defendants aided and abetted the human rights violations committed by the apartheid regime. On appeal, the Court of Appeal disagreed, holding instead that the individual responsibility of a defendant for aiding and abetting a violation of international law falls within the scope of the ATS. However, the Appeal Court affirmed the District Court's ruling that there was no subject matter jurisdiction with respect to corporate liability, and that aiding and abetting violations of international customary law could not manufacture jurisdiction corporate liability in the US. The Court affirmed the Supreme Court's decision in the *Sosa* case that international law had not yet established such liability for non-state actors. As such, several parts of the plaintiffs' claims were dismissed against several defendants, while the District Court's dismissal of the ATS claims was reversed and, along with others, remanded to the District Court.[278]

v *Anvil Mining Limited v Canadian Association against Impunity (ACCI)*

This case was instituted by the relatives of victims massacred by the DRC army with the logistical support of Australian-Canadian company, Anvil Mining, in 2004.[279] It is relevant to establish the jurisdictional hurdle foreign victims face in parent company liability actions before Canadian courts based on the twin doctrines of *forum non conveniens* and *forum necessitatis*. In the case of *Anvil Mining Limited v Canadian Association against Impunity* (*Anvil Mining* case),[280] the plaintiff/respondent organisation filed a class action suit on behalf of the victims of the massacre in Quebec, following their inability to obtain justice at home and in Australia.[281] The

[278] *Khulumani* case (n 277 above) 4; Read the full judgement here*: Khulumani v Barclay National Bank, Ltd., Ntsebeza v Daimler Chrysler* No. 05-2141 (2d Cir. 2007). Also see J Simcock 'Unfinished business: Reconciling the Apartheid reparation litigation with South Africa's Truth and Reconciliation Commission' (2011) 47 *Stanford Journal of International Law* 239-262; C Jenkins 'The jurisprudence of truth? Litigating Apartheid in US Courts' (2009) 4 *Journal of Comparative Law* 110-132; D Cassel 'Corporate aiding and abetting of human rights violations: Confusion in the courts' (2008) 6 *Northwestern Journal of International Human Rights* 304-326.

[279] Chapter 4.6.2 above.

[280] 500-09-021701-115 Court of Appeal, Canada (24 January 2012) (*Kilwa massacre* case).

[281] See the DRC trial of the Army suspects and Anvil Mining Officials in *Public Prosecutor v Adémar Ilunga & Ors* RP Nº 010/2006 27 June 2007 <http://www.internationalcrimesdatabase.org/Case/766/Anvil-Mining-et-al/> (accessed 24 March 2020); A McBeth 'Crushed by an Anvil: A case study on responsibility for human rights in the extractive sector' (2008) 11 *Yale Human Rights and Development Law Journal* 127 147-148. Also see J Kyriakakis 'Australian prosecution of corporations for international crimes: The potential of the Commonwealth Criminal Code' (2007) 5 *Journal of Internal Criminal Justice* 809-826.

plaintiff claimed that Anvil provided trucks, drivers and other logistical support to DRC Army personnel that enabled the latter to commit human rights violations during the massacre. Relying on *forum non conveniens*, the defendant objected to jurisdiction claiming, among other things, that the company was principally based in the DRC and Australia, and not domiciled in Quebec at the time the alleged event occurred; that the events did not occur in Quebec; and that the claim had no connection with Anvil's Quebec activities. As such, Canada was not the appropriate forum.

The Court disagreed, holding that it was not possible to determine that courts in both the DRC and Australia were more suitable to determine the dispute. It considered that if it dismissed the action, 'everything indicates that' it would no longer be possible for the victims to be heard in civil proceedings, and therefore result in a denial of justice.[282] In essence, the court applied the doctrine of *forum necessitates*. On appeal, the Court of Appeal rejected the lower court's decision because it 'failed to link the dispute to any of Anvil's activities in Quebec'.[283] The Appeal Court held that the plaintiff did not 'demonstrate the impossibility of obtaining access to a foreign tribunal and does not establish that the case has a sufficient connection to Quebec' and that Canadian legislation makes it impossible to recognise that Quebec has jurisdiction to hear the case.[284] The further appeal to the Canadian Supreme Court was dismissed.[285]

(b) The UK

i Okpabi v Royal Dutch Shell

In the case of *Okpabi and others v Royal Dutch Shell and another* (*Okpabi* case),[286] the plaintiffs brought this action against Royal Dutch Shell and its Nigerian subsidiary for environmental damages and ongoing pollution caused by oil spills in the Niger Delta pursuant to Nigerian law. The defendant challenged the jurisdiction of the court to hear the matter. In the judgment of 26 January 2017, the trial court held that there was no arguable case that the parent Royal Dutch Shell owed the claimants

[282] *Canadian Association against Impunity* (*CAAI*) *v Anvil Mining Limited* Nº 500-06-000530-101 Quebec Superior Court (27 April 2011) paras 38-39 (*CAAI* case).
[283] *Kilwa massacre* case (n 280 above) para 91.
[284] *Kilwa massacre* case (n 280 above) paras 103 & 104.
[285] *Canadian Association against Impunity v Anvil Mining Limited* (Civil authorization) (34733).
[286] (Rev 1) [2018] EWCA Civ 191 (14 February 2018); Utrecht Centre for Accountability and Liability Law 'Okpabi v Shell: A setback for business and human rights?' (2017) <blog.ucall.nl/index.php/2017/02/okpabi-v-shell-a-setback-for-business-and-human-rights/> (accessed 24 March 2018). *Cf Akpan v Royal Dutch Shell* (30 January 2013) LJN BY9854/HA ZA 09-1580 para 5 (*Akpana* case) District Court of The Hague.

a duty of care and, by order made on 1 February 2017, the court held that by virtue of its civil procedure rules it lacked the requisite jurisdiction to determine the claims against the parent company, there being no real issue between the parent company and the defendants. Any liability, if at all, was only against the Nigerian subsidiary over which it had no jurisdiction.[287]

On appeal, the Court of Appeal considered that the claimants did not sufficiently prove that a duty of care existed between the UK-domicile parent company and the victims to warrant the court's jurisdiction. The appeal was dismissed.[288] On further appeal to the UK Supreme Court, the apex court held on 12 February 2021 that the appellants' claims against Shell were sufficiently arguable to establish that the courts of England and Wales have jurisdiction.[289]

ii The *Vedanta* case

In the *Vedanta* case, the UK Supreme Court similarly considered whether Vedanta - the parent company of the Zambian-based KCM company - owed a duty of care to the claimants that could be effectively determined in England.[290] Dismissing the appellant company's appeal, the Supreme Court held that there was sufficient evidence linking the parent company to the activities of its subsidiary in Zambia to disclose a triable issue. It noted that the fact that Vedanta's published materials, in which it 'asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the Mine', was sufficient level of intervention in the affairs of the mine that disclosed a triable issue.[291] The Court also held that the claimants/respondents' claim was not an abuse of EU regulation on home country litigation and that substantial justice would be best served if the matter proceeded in England.[292]

A word of caution, however, is that the claimants' momentary victories in the *Okpabi* and *Vedanta* cases over UK jurisdictional hurdle is only the first step in the claimants' protracted quest for remedies in the UK. Whether Shell and Vedanta can

[287] See the High Court's decision here: *Okpabi and others v Royal Dutch Shell and another* [2017] EWHC 89 (TCC) paras 119-122.
[288] *Okpabi* case (n 286 above) paras 132-133.
[289] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3 24 (para 98) (12 February 2021).
[290] *Vedanta* case (n 177 above) paras 21-22.
[291] *Vedanta* case (n 177 above) para 61.
[292] *Vedanta* case (n 177 above) paras 100 & 102.

be held liable for the actual human rights violations perpetrated by its subsidiary in Nigeria and Zambia, respectively, is yet to be seen.

(c) The Netherlands

i *Akpan v Royal Dutch Shell; Four Nigerian Farmers v Shell*

In the case of *Akpan v Royal Dutch Shell; Four Nigerian Farmers v Shell*,[293] the plaintiffs – a group of farmers and fishermen resident from three villages in the Niger Delta region and a Dutch-based organisation, Milieudefensie – brought an action before the District Court of the Hague claiming that two oil spills from facilities operated by Shell's Nigerian subsidiary had in 2006 and 2007 polluted water and farmland, thereby affecting the claimants' source of water and livelihood, and amounting to trespass in land. The plaintiffs sought to hold Royal Dutch Shell responsible for the human rights and environmental abuses committed by its Nigerian subsidiary in the Niger Delta. Shell invoked the provisions of article 6(1) of the Brussels I Regulation to challenge jurisdiction. The Court held that it had jurisdiction to hear the case only against Shell's Nigerian subsidiary, there being no duty of care between the parent company and Akpan. And that if any duty at all existed, it was in relation to Shell's subsidiary in Nigeria based on Nigerian law.[294] The Court dismissed all the claims against the parent company.

On appeal, the Court of Appeal set aside the lower court's decision, holding that:

> the Dutch court has international jurisdiction to hear the claims against both the parent company and the (sub) subsidiary SPDC, both in the procedural issue pursuant to art. 843 (a) CCP as in the principal claim.[295]

Following this decision, the case proceeded on the merits at the Appeal Court. On 29 January 2021, the Hague Court of Appeal held that Shell was liable for the twin spills. The Court found that Shell was liable to compensate the affected farmers and to install appropriate industrial equipment to prevent future damage.[296] However, Shell is expected to challenge the decision before the Dutch Supreme Court. Only time will tell what the final outcome would be.

[293] 200126843-01 200126848-01 (18 December 2015); ECLI:NL:GHDHA:2015:3587.

[294] For the District Court's judgment, see: *Akpan v Royal Dutch Shell* (30 January 2013) C/09/337050/HA ZA 09-1580 District Court of The Hague, paras 4.30-4.40 & 5.1.

[295] *Akpan* case (n 292 above) para 8.

[296] E Wifa & T Adebola 'Triumph for farmers and fisherfolks: The Hague Court of Appeal finds Shell liable for oil spills in Nigeria' 1 February 2021 <https://www.abdn.ac.uk/law/blog/triumph-for-farmers-and-fisherfolks-the-hague-court-of-appeal-finds-shell-liable-for-oil-spills-in-nigeria/> (accessed 2 February 2021).

ii. *Milieudefensie v Royal Dutch Shell*

The most recent decision in the case of *Milieudefensie and Others v Royal Dutch Shell*,[297] makes a significant contribution to the question of fossil fuel companies' obligations to cut carbon emissions due to the adverse worldwide impact of oil and gas exploration on the global climate. In that case, the applicants claimed that the total annual volume of carbon emissions into the atmosphere due to the industrial activities and energy products of the Respondent and its corporate associates that form part of the Shell group amounted to unlawful act towards Dutch residents. The plaintiffs, as such, prayed the Court for an order that Shell reduce its carbon emissions volume directly and through its corporate associates in the fossil fuel industry, and that its emissions reduction obligation must be achieved proportionately to its group emissions level in 2019 and in accordance with the global temperature goals of article 2(1) of the Paris Agreement and climate science.

After hearing the parties, the Court held that Shell's reduction obligation arises from the unwritten standard of care stipulated in Dutch Civil Code and that it would be unlawful for Shell to act contrary to what is generally accepted as unwritten law. Relying on the UNGPs, Shell's own policy position, Shell's carbon emissions and its impact on the Netherlands, the right to life and to respect for private and family life of Dutch residents, among other things, the Court held that companies must respect human rights, including the human rights enshrined in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and other internationally recognised human rights instruments such as the OECD Guidelines for Multinational Enterprises.[298]

The Court considered that the Shell group, comprising over 1 100 companies all over the world, is a major player in the global fossil fuel market and responsible for excessive carbon emissions that contribute to global warming and dangerous climate change. As such, it found that Shell had an 'obligation of result for emissions connected to own activities of the Shell group', and a 'significant best-efforts obligation' to cut down carbon emissions generated worldwide by its business associates, including its suppliers and end-users.[299]

[297] NL: RBDHA:2021:5339 (26 May 2021) The Hague District Court.
[298] As above, paras 4.4.
[299] As above, paras 4.4.17, 4.4.23-4.4.24.

Although this judgment marks an important contribution to the discourse on TNC liability for environmental abuses, it is particularly not a good example of a case on home state litigation for abuses arising from Africa because the injuries and harms referenced in the judgment by the Dutch Court are accentuated by the destructive impacts of a Dutch company on Dutch residents. Here, it is not difficult to argue that perhaps a somewhat different conclusion may have been reached had the victims or places alleged to be impacted where any other than Dutch residents or the Netherlands. The sentiment of the Court for the adverse impacts of Shell's fossil fuel business on the global climate was peripheral compared to its sentiments towards the actual impact by a Dutch company on Dutch residents. This, in my view, makes this case a weak but equally relevant decision for the adequacy of home state litigation in the quest for corporate human rights accountability in Africa.

Based on all the cases considered above, it is crystal clear that home country litigation offers a relatively bleak promise in parent company liability claims for victims of human rights abuses from Africa. The US Supreme Court decisions in *Kiobel* and *Jesner* against corporate liability claims under the ATS and the strict jurisdictional rules affirmed by the UK Supreme Court in *Okpabi* have a combined effect of significantly diminishing the prospects of ongoing and future claims before the Dutch and Italian courts. However, at a policy level, there is growing awareness in the EU that procedural blocks against the claims of foreign victims pose significant challenges to fair hearing and access to remedies as required under international human rights standards.

In 2019, an EU-commissioned study on access to remedies for foreign victims of corporate human rights violations assessed some of the cases considered in this chapter and recommended, among other things, that:[300]

(a) the European Commission should approve a proposal to revise the Brussels I Recast Regulation towards:

   i. extending the jurisdiction of EU member states (where parent companies are domiciled) to claims over foreign subsidiaries or

[300] EU Policy Department for External Relations 'Access to legal remedies for victims of corporate human rights abuses in third countries' 1 February 2019 <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf> (accessed 4 May 2020).

corporate partners 'when the claims are so closely connected that it is expedient to hear and determine them together', and

ii. recognising, in addition to the above requirement, the doctrine of *forum necessitates* as an exceptional basis for an EU member state to 'hear a case brought before it when the right to a fair trial or access to justice so requires';

(b) encouraging EU member states to assume criminal or universal jurisdiction over their nationals (natural and corporate) involved in human rights abuses abroad in accordance with international law.[301]

5.4.4 Practical barriers to pursuing home state remedies

Besides the torturous procedural hurdles blocking victims from Africa from successfully litigating parent company liability claims in home countries, there remains practical barriers that generally militate against pursuing claims abroad. Factors such as poverty, distance, high costs of bringing claims, difficulties in getting representation, lack of legal standing, difficulties in gathering evidence, prolonged litigation, direct threats and intimidation of claimants and witnesses by corporate personnel or indirect harassment through state institutions, and delay tactics on the part of corporations, all operate as barriers to access to justice.[302] In the *Anvil Mining* case, the victims could not maintain a civil action in Western Australia against Anvil Mining because they could not foot the cost of the litigation and no other attorneys were available to take up the case.[303] In the *Khulumani* case, the recusal of four justices of the US Supreme Court due to their owning shares in one of the defendant oil companies defeated the claimants appeal. Considering that the Court had no quorum, it had to make a non-precedential order returning the case back to the District Court – thereby, abruptly ending the plaintiffs' cause.[304] Barriers of this nature make home state litigation an arduous and futile exercise.

[301] As above, 112.

[302] International Centre for Non-Profit Law 'Protecting activists from abusive litigation: SLAPPs in the Global South and how to respond' (July 2020) 1, 12-13 <https://mk0rofifiqa2w3u89nud.kinstacdn.com/wp-content/uploads/SLAPPs-in-the-Global-South-vf.pdf> (accessed 22 July 2020); P Kuentak 'Slapped into silence: Malicious lawsuits remain the favourite tool of the powerful to intimidate activists and journalists across Asia' *Bangkok Post* 20 July 2020 <https://www.bangkokpost.com/business/1954199/slapped-into-silence> (accessed 22 July 2020).

[303] *Kilwa massacre* case (n 280 above) paras 35-37

[304] *American Isuzu Motors Inc v Ntsebeza* (2008) 128 S Ct 2424 171 L.Ed.2d 225 (affirming the Appeal Court's decision under 28 USC 2109); P Bond & K Sharife 'Apartheid reparations and the

5.5 Conclusion

By now, it is clear that the principal argument of this chapter (that home state regulation and litigation are largely inadequate for offsetting the corporate accountability deficits in the extractive industries in Africa) is not misplaced. Extraterritorial law does, indeed, create important consequences for the transnational governance of TNCs. With the lack of international consensus on corporate liability for human rights and environmental violations, states which are desirous of controlling the excesses of TNCs have had no other option but to enact far-reaching domestic laws with an extraterritorial effect. From the US to Europe, China, Australia and South Africa, extraterritorial rules have shown incredible promise to hold companies accountable for their business dealing abroad. In these countries, disclosure and due diligence rules have empowered regulators and courts to monitor foreign corporate conduct in order to ensure compliance.

However, as this chapter has shown in granular detail, the promise of extraterritorial laws to ensure accountable corporate conduct has hardly met victims' quest for accountability and justice. In the US, the rollback on the disclosure obligations of companies, the general weak language in many of the modern slavery rules considered, and the limited remedies afforded foreign victims boldly highlights the drawbacks of extraterritorial laws. In the few instances where foreign victims have been able to initiate remedial actions against abusive corporate conduct in Africa, long-winded procedural hurdles and practical barriers have operated to thwart their quest for justice. The limited promise of home country regulation and litigation invites more centres of normative authority like regional (and international) institutions to help offset the deficits of individual state regulations. In this next chapter, I will consider the avenue of the African regional human rights procedures in further narrowing the regulatory and remedial deficits of host states and remedying human rights breaches.

contestation of corporate power in Africa' (2009) 36 *Review of African Political Economy* 115 117; L Greenhouse 'Justices' conflicts halt apartheid appeal' *New York Times* 13 May 2008 <https://www.nytimes.com/2008/05/13/washington/13scotus.html> (accessed 4 May 2020).

PART III

Regional accountability of corporations

6.1 Introduction

To offset the deficits of host and home countries' responses in addressing the environmental, social and human rights challenges in the extractive industries, urgent institutionalised action is desperately needed beyond the level of the state. Where domestic systems manifestly fail to prevent or adequately address corporate violations, international systems of accountability can become important supplementary buffers in the pursuit of accountability and social justice.[1] This chapter proposes that if the failure of domestic systems is not to permanently block victims from righting corporate wrongs and remedying injuries in the extractive industries, systems of accountability at the regional level may be a meaningful way to engage the *human rights obligations* of states and corporate entities in Africa.

Historically, international systems of accountability and justice have been established to address transnational concerns that have not been adequately resolved at the domestic level.[2] From the international criminalisation of high crimes to the establishment of international tribunals and institutions of accountability, the failure of domestic responses or the lack of it to egregious violations has always

1 MJ Ezeudu 'Revisiting corporate violations of human rights in Nigeria's Niger Delta region: Canvassing the potential role of the International Criminal Court' (2011) 11 *African Human Rights Law Journal* 23 45; SJ Kobrin 'Private political authority and public responsibility: Transnational politics, transnational firms, and human rights' (2009) 19 *Business Ethics Quarterly* 349 350; J Ruggie 'Business and human rights: The evolving international agenda' (2007) 101 *American Journal of International Law* 819 830.

2 L Van den Herik & JL Černič 'Regulating corporations under international law: From human rights to international criminal law and back again' (2010) 8 *Journal of International Criminal Justice* 725 725-727; E Duruigbo 'Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges' (2008) 6 *Northwestern Journal of International Human Rights* 222 254-256.

precipitated concerted international action.[3] Yet, gross human rights violations have not been the only igniting factor leading to the adoption of international norms and the establishment of supranational mechanisms. The ongoing United Nations (UN) negotiation process for a legally binding instrument to regulate and remedy abuses by transnational corporations (TNCs) and other business enterprises is a testament that the international community is fed up with unending corporate abuses and impunity.[4] Before this latest intervention, violations bordering on racial discrimination, women's rights, the rights of persons with disabilities, corruption, transnational organised crimes, and toxic pollution at sea have each been hurtful enough to spur swift international action to regulate conduct and remedy abuses.

If these important thematic issues have drawn the earie of human rights activist forces the world over, then the severity of human fatalities and rights abuses in the extractive industries can neither be relegated nor trivialised. I argue that the dilemma of regulating local companies and TNCs and of remediating injuries is no longer merely a domestic issue.[5] It is now an international crisis begging for a compassionate international solution. As established in the preceding chapters, the weak and inadequate responses of individual states - at both the host and home country level - to recurring incidents of abuse in the sector leave victims helpless to the vagaries of government and commercial interests often with no adequate or effective remedies in sight.

Formed as neutral mechanisms in international relations, international human rights bodies exist to monitor the human rights situation in the territory of state parties, assess compliance and remedy violations. As individual states prove increasingly helpless in regulating the complex relationships between subsidiaries and parent companies, international systems of accountability must be empowered to address the challenges of transnational governance. Since they monitor multiple countries, they can substantially resolve the territorial and regulatory limits faced

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3 WA Schabas *An introduction to the international criminal court* (2011) 190-191; A Clapham 'Human rights obligations of non-state actors in conflict situations' (2006) 88 *International Review of the Red Cross* 491-523. 'High crimes', as used here, refers to piracy, torture, war crimes, crimes against humanity, crimes of aggression and terrorism.

4 K Mohamadieh 'A legally binding instrument on business and human rights to advance accountability and access to justice' (2019) 255 *Columbia FDI Perspectives* 1 <https://academiccommons.columbia.edu/doi/10.7916/d8-6fmn-gg32/download> (accessed 24 June 2020); D Bilchitz 'The necessity for a business and human rights treaty' (2016) 1 *Business and Human Rights Journal* 203 219.

5 E Morgera *Corporate environmental accountability in international law* 2nd Edition (2020) 57; Ruggie (n 1 above) 830.

by domestic law in the governance of TNCs. In the African context, the weak capacity of countries to single-handedly regulate and sanction TNCs and the lack of global consensus at the UN level make unilateral state action difficult. These factors take the corporate accountability debate beyond the exclusive purview of single states in Africa in favour of a concerted regional effort to address the weighing problems.

The African regional human rights system, as a functioning apparatus within the international human rights superstructure, complementarily provides a useful *normative and institutional* framework for regulating conduct, assessing violations and remediating injuries in the extractive industries.[6] The African human rights system was established in 1981 to promote and protect individual and group rights in Africa. It was created with the adoption of the African Charter on Human and Peoples' Rights 1981 (African Charter) and the establishment of a continental monitoring mechanism, the African Commission on Human and Peoples' Rights (African Commission). Although the African Charter initially created only the Commission, it ostensibly recognised the need to adopt supplementary protocols and establish other 'bodies to promote and protect human and peoples' rights' in Africa.[7]

Based on this recognition, the system was gradually expanded to include other supplementary regional human rights instruments and mechanisms. In 1990, the African Charter on the Rights and Welfare of the Child (African Children's Charter) was adopted to protect children's rights.[8] The Children's Charter established the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) to promote and protect the rights and welfare of children in Africa. In 1998, the African human rights system came full circle with the establishment of an African regional human rights court under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998 (African Court Protocol).[9]

6 F Viljoen 'Review Essays: Exploring the theory and practice of the relationship between international human rights law and domestic actors' (2009) 22 *Leiden Journal of International Law* 177.

7 African Charter Preambular para 2.

8 Although the African Children's Charter is a free-standing instrument as against a protocol made pursuant to the African Charter, it is nonetheless complementary to the latter. See African Children's Charter preamble, arts 11(2)(b) & 46.

9 NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights & Development Law Journal* 45. *Cf* G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the interests of African states' (2007) 51 *Journal of African Law* 151-172.

With this expansion and the sporadic assignment of human rights functions to other bureaucratic organs and departments of the AU Commission, the African human rights system today embodies the entire gamut of normative frameworks and institutional mechanisms for the promotion and protection of human and peoples' rights established under the authority of the AU and its predecessor, the Organisation of African Unity (OAU). The system includes AU organs such as the AU Assembly, the Executive Council, the Peace and Security Council, the fused African Court of Justice and Human and Peoples' Rights (future African Court), and all such other intended human rights-role performing bodies within the AU superstructure.[10]

In this chapter, I argue that where abuses in the extractive sector remain unaddressed domestically, the African human rights system offers a complementary supervisory and remedial platform to regulate corporations and remedy injuries. Given its continental operational outlook, the system is in good stead to rein in abusive corporate conduct and address violations in extractive industries. I justify this assertion on the basis that the existing roles and responsibilities of notably the African Commission and the African Children's Committee through their respective state reporting processes, complaints mechanisms and special procedures, as well as the decision-making authority of the African Court each provide a regional pathway for ensuring corporate human rights accountability and environmental justice.

Yet, the proposition that corporate accountability can and should be pursued at the regional level may seem provocative in itself. For many prominent scholars of the African human rights system, international human rights institutions are 'basically weak and ineffectual'.[11] Since its inception, the African human rights system has been discredited as being 'far weaker' than other regional and international human rights systems.[12] As far back as 1984, Okeke considered that the African Charter was a defective document whose 'congenital defects in no small way account for the near irrelevance of the Charter and its institutions to Africa's political

[10] Viljoen (n 6 above) 177-178; E Baimu 'Human rights in NEPAD and its implications for the African Human Rights System (2002) 2 *African Human Rights Law Journal* 301-319.

[11] MW Mutua 'Looking past the Human Rights Committee: An argument for demarginalizing enforcement' (1998) 4 *Buffalo Human Rights Law Review* 211. Also see JS Watson *Theory and reality in the international protection of human rights* (1999) 4; L Henkin 'Preface' in L Henkin & JH Hargrove (eds) *Human rights: An agenda for the next century* (1994) vii; AF Bayefsky 'Making the human rights treaties work' in L Henkin & JH Hargrove (eds*) Human rights: An agenda for the next century* (1994) 229 238; R Brody 'Improving UN human rights structures' (1994) 26 *Studies in Transnational Legal Policy* 297 307-308; J Donnelly *International human rights* (1993) 12, 79 & 83.

[12] CE Welch 'The African Commission on Human and Peoples' Rights: A five-year report and assessment' (1992) 14 *Human Rights Quarterly* 43.

life.'[13] Trailed by extensive criticisms for relying on the same delinquent states and weak domestic institutions for its enforcement, there has been much cynicism about its effectiveness altogether. For example, Mutua wonders how the post-colonial state as an egregious human rights violator can be expected to create an effective regional human rights system when it is generally not inclined to be restrained and bound to 'use these weaknesses as a pretext for non-compliance.'[14] Okafor similarly maintains that international human rights bodies are 'weak attempts at commanding obedience' and have very limited successes at 'cajoling compliance'.[15]

Without shying away from this important debate, the primary focus of this thesis is not the issue of effectiveness per se. Rather, it is the necessity for developing the African regional human rights system as a complementary layer of corporate regulation and access to justice for victims. Much of the literature on the effectiveness of the African regional system have mostly, if not only, often dealt with the performance of the African Commission as *the* yardstick for discrediting the system in its entirety. Logically, that is quite insufficient to wholly ground such an argument, and significantly falls short in its outlook of the bigger picture. The more specific issue of state compliance fundamentally pertains to final determinations and resolutions by African human rights mechanisms. This presupposes that such mechanisms must first have addressed corporate violations in the extractive industries in a specific way. As Buergenthal argues, normative and institutional leaps in human rights protection 'should not blind us to the fact that the effective implementation of human rights takes time and vast resources.'[16] Presently, the relationship between the African system and corporations is still at a developmental stage to warrant a wholly premature evaluation on its effectiveness.

Hence, this chapter adopts a six-section structure. This introductory section has highlighted the rationale for considering regulatory and remedial actions to address extractive industries-related abuses on a regional scale. The next section will consider the normative authority of the AU and the African human rights system over corporations operating in Africa as the basis for taking regulatory measures

[13] BO Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141 158. Also see R Gittleman 'The Banjul Charter on Human and Peoples' Rights: A legal analysis' in CE Welch Jr & RI Meltzer (eds) *Human rights and development in Africa* (1984) 152 159.

[14] Mutua (n 11 above) 213.

[15] OC Okafor *The African human rights system, activist forces and international institutions* (2007) 1.

[16] T Buergenthal 'The normative and institutional evolution of international human rights' (1997) 19 *Human Rights Quarterly* 703 723.

against corporations at the regional level. The third section will discuss the procedures of African regional human rights mechanisms and how they can contribute to strengthening corporate regulation and access to justice domestically and regionally. This will include an assessment of the jurisdiction of the future African Court to try direct corporate liability cases at the regional level based on article 46C of the Statute of the African Court of Justice and Human and Peoples' Rights 2014 (amended Statute), as well as the role of judicial bodies of regional economic communities (RECs). The fourth section will, thereafter, address the role of activist forces such as national human rights institutions (NHRIs), civil society actors, and victims in the pursuit of corporate human rights accountability. The fifth section will explore the opportunities for curbing future corporate abuses and impunity through innovative rulemaking. The last section will conclude the chapter.

6.2 Authority of the African human rights system over corporations

Although corporations are not often correlated with the affairs of the African human rights system, they are not excluded from it. A cursory look at the language of AU governance and human rights instruments suggests that corporations, like individuals, are also the targets and objects of the AU's normative and institutional authority. Businesses are expressly recognised to have a role in the implementation of AU decisions, policies and programmes and the work of its organs.[17] Under AU instruments, corporations are represented in the notion of *business* (encapsulating public and private enterprises) or the *private sector*.[18] The AU defines 'private sector' as 'the sector of a national economy under private ownership in which the allocation of productive resources is controlled by market forces'.[19] Hence, it categorically counts businesses in the composition of the AU Economic, Social and Cultural Council (ECOSOCC).[20]

The authority of the African human rights system over corporations operating in Africa must be considered within the framework of the AU and its continental governance outlook. The system operates under the auspices of the AU and draws its normative and institutional authority over corporations from the AU and its

[17] Protocol relating to the Establishment of the Peace and Security Council of the African Union 2002 art 21(2).
[18] AU Constitutive Act preamble; Statutes of the Economic, Social and Cultural Council of the African Union 2004 preamble & art 2(2).
[19] African Union Convention on Preventing and Combatting Corruption 2003 art 1.
[20] Statutes of the Economic, Social and Cultural Council of the African Union 2004 arts 3(2)(b) & 2(3).

constituent states, on the one hand, and from African human rights instruments, on the other. As such, the foundation for theorising corporate human rights accountability on a regional scale in Africa is underscored by the congenial relationship between the African human rights system, the AU, member states, civil society and the private sector.

6.2.1 The AU's regional governance of corporations and the environment

The conceptualisation of corporate accountability at the regional level is premised on the notion that human rights accountability generally exists at two fundamental levels of governance - the domestic (that is, the state) and the international. At the domestic level, the state through the law-making authority of government enacts local rules - ideally, a bill of rights incorporated in the constitution or enacted by legislation - that guarantees the rights and freedoms of all persons within its territory. Corporations, as legal persons, become bound and accountable for human rights abuses within the framework of domestic law and institutions. At the international level, the absence of a central authority responsible for making and enforcing rules implies that no one entity can appropriate to itself the role of norm-making or compliance monitoring.[21]

The international legal system is fashioned by and depends on states for its legitimation.[22] International human rights standards are essentially an aspect of international law. They are formulated and articulated within the framework of international systems and institutions created by states. Over the past several decades, international norms have been developed through the consensus-building processes of inter-governmental organisations (IGOs).[23] IGOs are formed only by states and function at three categorical sub-levels of the international legal order – the global, the regional and the sub-regional.[24] This categorisation is important because at the global sub-level is the UN and its specialized agencies and mechanisms. At the regional level are institutions *no less in substance*, but which

[21] N Jägers 'The legal status of the multinational corporation under international law' in MK Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 259 262

[22] N Krisch 'International law in times of hegemony: Unequal power and the shaping of the international legal order' (2005) 16 *European Journal of International Law* 369-408.

[23] JE Oestreich *Power and principle: human rights programming in international organizations* (2007) 158; A Buchanan & RO Keohane 'The legitimacy of global governance institutions' (2006) 20 *Ethics & international affairs* 405 406; M Merlingen 'Governmentality: Towards a Foucauldian framework for the study of IGOs' (2003) 38 *Cooperation and Conflict* 361-384.

[24] R Thakur & L Van Langenhove 'Enhancing global governance through regional integration' (2006) 12 *Global Governance* 233 234.

often defer to the UN, such as the AU,[25] the Arab League, the European Union (EU), and the Organization of American States (OAS). Each of these organisations has its own organs and specialist mechanisms established to address specific thematic issues suitable to the development of that region.[26] And then, there exists sub-regional institutions operating within the geo-political zone of a region or continent such as the Economic Community of West African States (ECOWAS) or the Association of South East Asia Nations (ASEAN).

IGOs such as the AU operate within the broader international legal system and claim, to varying degrees, the mandate to promote and protect human rights and pursue international peace, security, and development.[27] The AU's authority over corporations draws from its mandate under the Constitutive Act to pursue the objectives of eradicating poverty, promoting peace and security, good health and sustainable development, and human and peoples' rights. By virtue of its universal ratification by all African member states, the Constitutive Act confers unanimous authority on the AU to set continental standards applicable not only to states but also to all segments of the African populace. As such, although states retain primary regulatory control over the persons and corporate entities resident in their respective territories, states have equally bestowed on the AU the authority to formulate common standards in this respect for the continent. This reasoning is supported by the Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004 in which African states, representatives of the African Commission, NHRIs and civil society organisations (CSOs) called upon *regional and international organisations* to '[t]ake measures to regulate trade in extractive industries (such as oil, mining) that are exploitative, corrupt and fuel conflicts in Africa' and address illicit financial (out)flows from Africa.[28]

Today, the role of the AU in the continental governance of corporations and the extractive industries in Africa is manifestly relevant in two ways.

[25] The AU was established in 2000 as the successor to the defunct Organisation of African Unity (OAU), which was established on 25 May 1963.

[26] Thakur & Van Langenhove (n 24 above) 235-236.

[27] F Viljoen *International human rights in Africa* (2012) 563; AU Assembly 'Decision on the progress report of the Commission on the implementation of previous decisions on the International Criminal Court (ICC) Doc. Assembly/AU/18(XXIV)' Assembly/AU/Dec.547(XXIV) para 17(c) 24th Ordinary Session 30-31 January 2015 Addis Ababa, Ethiopia.

[28] Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004 preamble, para 11(f)(v)&(vi).

First is the ability of the AU to act as a platform for narrowing ideological conflicts and consensus building among member states on hot issues where the UN has persistently failed to muster global accord. The AU presents a 'concentric circle' of sorts for member states to narrow the governance gaps that subsists at the regional level. The lack of any dominating state, the commonality of the challenges across African countries and the shared values that bind AU member states make consensus much more realisable at the AU. This is unlike the UN where the multiplicity of conflicting interests and ideological rivalry between the West and the East often subdue the faint voices of comparably smaller African countries.[29]

The AU is also suitably positioned to address the human rights and environmental challenges in the extractive industries in Africa based on best practices on continental regulation and comparative lessons from the EU. As has been seen in the EU in the recent past, the challenges of frequent online data breaches involving information technology companies and the illicit transnational funding of armed conflicts in conflict-affected and high-risk areas led to the EU's adoption of the General Data Protection Regulation 2016/679 (GDPR) and the Conflict Minerals Regulation 2017/821. Both documents are a regional effort by Europe to regulate the harmful impact of big technology companies to the EU's regional economic interests. The EU also has regulations on civil liability, the exercise of civil jurisdiction and other material respects. These instances of regional regulation present valuable lessons and best practices for the AU to pursue similar continental measures to regulate the abusive activities of corporations in Africa.

Second is the ability of the AU to adopt continent-wide norms and make binding policy decisions that apply to states, individuals, CSOs and corporations operating in Africa.[30] Since its establishment in 2000, the AU has consistently affirmed and exercised its decision-making authority over all categories of persons,

[29] JG Ruggie 'The social construction of the UN Guiding Principles on Business & Human Rights' in S Deva & D Birchall (eds) *Research Handbook on Human Rights and Business* (2020) 63 67-68. The International Labour Organisation's Indigenous and Tribal Peoples Convention 169 of 1989 remains one of the least of its ratified conventions because of similar objections and contestations among states. See S Deva 'Scope of the legally binding instrument to address human rights violations related to business activities' (2017) 4 <https://www.escr-net.org/sites/default/files/scope_of_treaty.pdf> (accessed 26 August 2020); M Davis 'To bind or not to bind: The United Nations Declaration on the Rights of Indigenous Peoples five years on' (2012) 19 *Australian International Law Journal* 17 37-38; P Simons 'International law's invisible hand and the future of corporate accountability for violations of human rights' (2012) 3 *Journal of Human Rights and the Environment* 5 14; S Jerbi 'Business and human rights at the UN: What might happen next?' (2009) 31 *Human Rights Quarterly* 299 316.

[30] African Convention on the Conservation of Nature and Natural Resources 2003.

including corporations.[31] From taking decisions incorporating private sector participation in AU processes to setting standards and coordinating the private sector on a continental scale. The AU established the African Private Sector Forum in 2005, the African Economic Forum for African Business in 2015, the Continental Business Network, and contemplates the establishment of an African Business Council.[32] Not only that, both the Assembly and the Executive Council have repeatedly required the private sector to implement AU decisions and policies on human rights and responsible business practices.[33]

For instance, Executive Council Decision 424 on private sector development called on the private sector 'to pursue good corporate governance, socially responsible business practices, transparency, and the respect of laws, rules and regulations'.[34] Furthermore, in the Solemn Declaration on the 50th Anniversary of the OAU/AU, the AU Assembly equally reiterated the need for the African private sector to ensure 'socially responsive business, good corporate governance and inclusive economic growth' in Africa.[35] These, in effect, require corporations operating in Africa to comply with human rights laws and policy decisions of the AU. However, while such decisions cannot be simplistically considered as non-binding, it is yet to be seen whether they are in fact binding. So far, the relationship between the AU power structures and corporations have been constructed in terms of a partnership for development, which may be intended to enable the AU source funds

[31] AU Assembly 'Decision on climate change and development in Africa Doc Assembly/AU/12 (VIII)' Assembly/AU/Dec.134 (VIII) para 5 8th Ordinary Session 29–30 January 2007 Addis Ababa, Ethiopia.

[32] AU Executive Council 'Decision on the institutionalization of the African Private Sector Forum Doc. Ex.Cl/153 (VI)' Ex.Cl/Dec.183 (VI) 6th Ordinary Session 24–28 January 2005 Abuja, Nigeria; AU Executive Council 'Decision of the Sandton ministerial retreat of the Executive Council on the first 10-year implementation plan of Agenda 2063 Doc. Ex.Cl/899(XXVII)' Ex.Cl/Dec.894(XXVII) para 5(2) 27th Ordinary Session 7 – 12 June 2015 Johannesburg, South Africa; AU Assembly 'Decision on the New Partnership for Africa's Development (NEPAD) Doc. Assembly/AU/7(XXVII)' Assembly/AU/Dec.618 (XXVII) para 16 27th Ordinary Session 17–18 July 2016 Kigali, Rwanda.

[33] AU Assembly 'Solemn Declaration on the 50th Anniversary of the OAU/AU' Assembly/AU/Decl.3(XXI) para D(iv) 21st Ordinary Session 26-27 May 2013 Addis Ababa, Ethiopia [that anchors the African private sector's development on the basis of 'socially responsive business, good corporate governance and inclusive economic growth'].

[34] AU Executive Council 'Decision on private sector development Doc Ex.Cl/414(XIII)' Ex.Cl/Dec.424 (XIII) para 4 13th Ordinary Council 24–28 June 2008 Sharm El-Sheikh, Egypt; AU Executive Council 'Decision on the report of the second ordinary session of AU Conference of Ministers responsible of mineral resources, December 2011 Doc Ex.Cl/749(XXI)' Ex.Cl/Dec.714(XXI) para 5 21st Ordinary Session 9-13 July 2012 Addis Ababa, Ethiopia; AU Executive Council 'Decision on the 20th ordinary session of the Conference of AU Ministers of Industry (CAMI XX) Doc. Ex.Cl/811(XXIV)' Ex.Cl/Dec.796(XXIV) para 5 24th Ordinary Session 21–28 January 2014 Addis Ababa, Ethiopia.

[35] n 31 above; African Union 'Addis Ababa Declaration on building a sustainable future for Africa's extractive industry – From vision to action' (2011) preamble [page 2] 2nd AU Conference of Ministers responsible for mineral resources development 15-16 December 2011 in Addis Ababa, Ethiopia.

from the private sector without friction. That is not to say that in future corporations indicted by the AU for heinous crimes or gross human rights violations will not fall victim to its sanctioning authority.

In pursuit of an efficient continental governance of the extractive industries and consistent with its call for responsible business conduct by companies, the AU in 2009 adopted the African Mining Vision (AMV).[36] The AMV seeks to promote broad-based growth and socio-economic development that eliminate conflicts and human rights abuses in the extractive industries by ensuring

> a sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities.[37]

In 2019, the AU also adopted the African Minerals Governance Framework (AMGF).[38] The AMGF serves as a regional pathway for African countries to implement the AMV in a way that promotes greater transparency in the management of mines (including oil and gas) and mineral rights, and the adverse environmental, social and human rights impacts on affected communities.

To give practical effect to both the AMV and the AMGF, the AU also adopted the AMV Private Sector Compact to commit extractive companies to a set of 12 principles for operating in the sector.[39] The AMV Private Sector Compact primarily applies to oil, gas and mining companies, chambers of mines and other relevant mining associations.[40] Under Principle 10 of the Compact, extractive companies 'commit to the "polluter pays" principle and to adhere to environmental sustainability, best practices, national policy and legislation and regional agreements and protocols'.[41] Although the AMV Private Sector Compact is a regional imitation of the UN Global Compact, it is – unlike the UN Global Compact - poorly worded in the

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36 African Mining Vision 2009.

37 African Mining Vision page v.

38 African Union 'Africa Mining Vision: African Minerals Governance Framework' (2017) <https://www.uneca.org/sites/default/files/PublicationFiles/african_mining_vision_african_mineral_governance_framework.pdf> (accessed 26 August 2020); AU Executive Council 'Decision on the reports of the Specialised Technical Committees (STCs)' Ex.Cl/Dec.1032(XXXIV) para 41(iii)(iv) 34th Ordinary Session of the Executive Council, 7-8 February 2019, Addis Ababa, Ethiopia.

39 AU Executive Council Decision 1032 (n 38 above); African Union & UN Economic Commission for Africa 'African Mining Vision – Looking beyond the vision: An AMV Compact with private sector leaders' (2017) 8-10 <https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_compact_full_report.pdf> (accessed 27 August 2020).

40 African Union & United Nations Economic Commission for Africa (n 39 above) 6.

41 As above, 9.

human rights lexicon as it does not make a single mention of human rights in its entirety probably to get business buy-in. Nonetheless, it is arguable that the commitment to comply with *regional agreements and protocols* ostensibly contemplates compliance with the African Charter and supplementary human rights protocols; thus, making all three documents (the AMV, the AMGF and the Compact) human rights-friendly documents.

The effect of the AU's normative instruments and policy decisions on corporations is that like states and individuals, AU standards equally apply to corporations operating in Africa on penalty of sanctions. Unlike the defunct OAU which had no sanctioning authority, norms adopted and decisions made by the AU carry enormous weight as they are underscored by the threat of sanctions.[42] With the increasing organisation of the private sector under its authority, the AU is legally able to compel compliance with its decisions and institutional policies through its sanctioning authority. This can have tremendous implications for corporations that violate its foundational principles, conventions and policy decisions relating to human rights. More importantly, this authority of the AU sets the scene for specifically considering the authority of the African human rights system.

6.2.2 The African human rights system's authority over corporations

The African human rights system encompasses the entire framework for promoting and protecting human and peoples' rights in Africa. At present, it is marked by the human rights standards and activities of the key African human rights institutions such as the African Commission, the African Children's Committee, and the African Court. Each of these institutions has a specific mandate to promote and protect human rights within the context of their enabling instruments. This suggests that the relationship between the system and corporations, and the authority that characterises it is two-dimensional: normative and institutional.[43] The African human rights system offers an important *norm-making and institutional platform* to evaluate the domestic measures for safeguarding the rights of affected individuals and communities and the responsibilities of states and corporations for the adverse

[42] AU Constitutive Act art 23(2); Rules of Procedure of the AU Assembly 2002 rules 4(1)(g) & 33(2); Viljoen (n 27 above) 158.

[43] K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African human rights law Journal* 97-117.

impacts of the extractive industries.[44] And its instruments provide precision tools for gauging responsible corporate conduct and guiding accountability before its mechanisms.

(a) Normative authority

The normative authority of the African human rights system is underscored by its unique prescriptive contributions to international human rights law. The African Charter, for example, is on record for being the only one of its kind in terms of its comprehensiveness and scope in at least four material respects. Firstly, it affirms the interdependence and indivisibility of rights by enshrining in one document all categories or generations of rights – civil and political rights, economic, social and cultural rights, and collective or solidarity rights.[45] Second, the Charter confers duties on the state, the community, and the individual with respect to the rights enshrined, in a way that leaves no vacuum in the protection of rights.[46] This unique recognition of the duties of states and private actors ensures that African instruments comprehensively apply to all categories of duty-bearers in a way that leaves no lacuna in the protection of human rights on the continent. Third, the Charter affirms the collective rights of peoples to development, control over their natural resources, and a general satisfactory environment.[47] The recognition of individual and collective rights by African human rights instruments creates a firm legal basis for individuals and local communities affected by the extractive industries to seek protection and access remedies. Last, the Charter does not allow for a derogation.[48]

In the case of *Centre for Minority Rights Development (Kenya) and Another v Kenya* (*Endorois* case),[49] the African Commission noted that 'the African Charter is

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[44] J Biegon & M Killander 'Human rights developments in the African Union during 2009' (2010) 10 *African Human Rights Law Journal* 212 212-213

[45] CH Heyns & M Killander 'The African regional human rights system' in FG Isa & K De Feyter (eds) *International protection of human rights: Achievements and challenges* (2006) 509 516; *Social and Economic Rights Action Centre v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 68 (*SERAC* case):

> Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa… It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.

[46] African Charter arts 27-29 & the preamble ['the enjoyment of rights and freedom also implies the performance of duties on the part of everyone'].

[47] African Charter arts 21, 23 & 24; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 155 ['the African Commission wishes to emphasise that the Charter recognises the rights of peoples'] (*Endorois* case).

[48] *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 67 ['In contrast to other international human rights instruments, the African Charter does not contain a derogation clause']. Also see *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41.

[49] *Endorois* case (n 47 above) para 149.

an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of peoples.' In the process of its normative and jurisprudential evolution, the Charter and its supplementary protocols are constantly tested for the ability to respond appropriately to new and urgent issues not categorically addressed either in the Charter itself or other regional human rights instruments. This begs the question whether African human rights instruments apply to corporations in a way that can foster corporate human rights accountability.

Until recently, the nature of the relationship between the African human rights system and corporations, and the consequences this might have on the conceptualisation of corporate human rights accountability at the African regional level was largely unclear. From the outset, the express attribution of obligations only to states tended to becloud the horizontal application of the notion of duties under African human rights instruments. However, as corporate abuses in the extractive industries reverberated across Africa and globally, it prompted the African Commission to take a critical look at its normative framework and the extent of its interpretive authority.

Today, there is no doubt that the normative authority of the African human rights system is quite expansive and exemplified by the prescriptive reach of its human rights instruments that enshrine rights, prescribe duties and define the mandate of the relevant human rights mechanisms.

i The African Charter and supplementary protocols

The African Charter and its supplementary protocols are the basic continental instruments guaranteeing human and peoples' rights, including the rights of women, persons with disabilities and the elderly in Africa.[50] Besides the logic that human rights carry correlative duties that may have legal implications for corporations, the African Charter does prescribe duties for all categories of actors capable of impacting the enshrined rights and fundamental freedoms. This includes the categorical recognition of the *obligations* of state parties to promote, protect, respect and fulfil the rights stipulated in the Charter, on the one hand, and the *duties* of individuals (natural and juristic) to respect the human rights of others, on the other.

[50] Each of the supplementary protocols to the African Charter are discussed below.

Under African human rights instruments, corporations are implied duty-bearers and potential objects of accountability. The rights of individuals as employees of companies to be treated with dignity and equality, to fair hearing in cases of internal investigations, to work under satisfactory and equitable conditions, to equal pay for equal work or to the highest attainable state of physical and mental health, or the collective right of resource-rich communities to enjoyment of their natural resource wealth and a general satisfactory environment, create obligations for both state parties and corporations under African human rights standards.

Under article 21 of the African Charter, for example, the right of peoples to freely dispose of their natural resource wealth is guaranteed. This right is required to be 'exercised in the exclusive interest of the people.'[51] The primary implication of this right is that the collective proprietary ownership of communal wealth and natural resources in Africa is not only recognised by law but creates corresponding duties for both states and extractive businesses. First of all, the legal recognition of ownership of natural resource wealth as a collective right under the Charter is the basic beacon of protection for resource-rich communities. However, this right of communities as a 'people' is often contrasted by the developmental right of the nation. In other words, a key issue that often arises under article 21 of the Charter is whether the right of 'all peoples' to freely dispose of their resources pertains to only resource-rich host communities or the nation state as a whole.

In the case of *Gunme v Cameroon*[52] and *Endorois* case,[53] the African Commission noted the controversial nature of the concept of 'peoples' rights' as used in articles 19 to 24 of the African Charter and emphasised the need to strike a delicate balance between the interests of resource-rich communities and those of the nation as a whole. It clarified that 'people' as used in the Charter refers to any group of persons who self-identifies as a people or who have a common historical tradition, ethnical or racial identity, linguistic unity, cultural homogeneity, religious and ideological affinities, territorial connection and common economic life or other bond they enjoy together. In the *Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 'people' is further defined as '[a]ny groups or communities of

[51] African Charter art 21(1).
[52] (2009) AHRLR 9 (ACHPR 2009) para 170.
[53] *Endorois* case (n 47 above) para 151.

people that have an identifiable interest in common, whether this is from the sharing of an ethnic, linguistic or other factor.'[54] In both senses, these broad characteristics of a 'people' encapsulate both host communities as a collective of right-holding individuals who are connected to land and its underlying resources, on the one hand, and the right of the nation state as a whole, on the other. For this reason, the Commission declares that '[t]he rights of the people of the State as a whole may not detract from the specific rights of affected people who are directly impacted by extractive industries to benefit from the exploitation of natural resources.'[55] The abovementioned characteristics only serve as a guide for determining a people; They are not a hard and fast rule for the Commission.[56]

Equally underlying a people's freedom to 'freely dispose' of their natural resource wealth in article 21 of the Charter is the element of free, prior and informed consent (FPIC). By virtue of article 21, communities which own or are closely connected to land and natural resources have an implied right to voluntarily give or withhold their free, prior and informed consent to any extractive-related project intended to be carried out on their communal property. And this right elicits not only an express obligation from the state but also an implied obligation to respect from corporate entities. For example, in the *Guidelines on the Right to Water in Africa 2019*, the African Commission declared that '[n]on-state individual and corporate actors shall respect the right to water and ensure due diligence in accordance with Guideline 29 for abuses of the right to water.'[57]

This conceptualisation is quite different from Western notions of the concept of FPIC as only applicable to indigenous peoples. Specifically, the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) attributes FPIC only to indigenous groups. Under the UNDRIP, indigenous peoples are attributed with the right to not be forcibly relocated or removed from their land without their free, prior and informed consent.[58] The UNDRIP requires that states ensure that indigenous peoples whose spiritual, intellectual, religious and cultural property has been taken, occupied or damaged without their free, prior and informed consent or in contravention of their laws, customs and traditions be granted redress through

[54] Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 2011 para 1(c).
[55] Guidelines on the Right to Water in Africa 2019 para 29.4.
[56] *Gunme* case (n 52 above) para 170.
[57] Guidelines on the Right to Water in Africa 2019 para 10.1.
[58] UNDRIP art 10.

effective mechanisms.[59] The UNDRIP also requires that no only should states adequately consult indigenous peoples in order to obtain their free, prior and informed consent before initiating any developmental projects or legal and policy reforms that may affect them, but also prevent any storage or disposal of dangerous contaminant or hazardous materials on their territories without their free, prior and informed consent.[60] No other UN human rights instruments seems to extend the FPIC requirement to vulnerable and marginalised communities which may not to be 'indigenous' properly so called.

The African regional system, however, adopts a more adaptive approach. The African Commission's first comprehensive study on the subject of indigenous peoples undertaken in 2003 makes absolutely no reference to FPIC so as not to suggest that it was intended only to be narrowly attributed to indigenous peoples.[61] Rather it extends to vulnerable, marginalised and disadvantaged communities, which may or may not be indigenous. This is because under article 21 of the Charter, the stipulation that peoples 'freely dispose' of their natural resources is understood to underscores the requirement of FPIC as well. Under this article, FPIC is in no way restricted to only indigenous communities; but rather, extends to all peoples, including vulnerable, marginalised and disadvantaged resource-rich communities. The African Commission defines 'vulnerable and disadvantaged groups' as people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights.'[62]

In the particular context of natural resources in Africa, article 21 of the African Charter can and should be read together with the provisions of articles 16 and 17 of the revised African Convention on the Conservation of Nature and Natural Resources 2003 to show that FPIC applies to vulnerable and disadvantaged host communities rather than only indigenous peoples.[63] Both provisions require state parties to adopt legislative and other measures to ensure dissemination and access to environmental information, participation by vulnerable local communities in decision-making on projects with potentially significant environmental impact, and

[59] UNDRIP arts 11(2) & 28(1).
[60] UNDRIP arts 19, 29(2) & 32(2).
[61] African Commission 'Working Group on Indigenous Populations/Communities and Minorities in Africa' <https://www.achpr.org/specialmechanisms/detailmech?id=10> (accessed 22 September 2020).
[62] Principles and Guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 2011 para 1(d).
[63] The first version of this convention was OAU Convention on the Conservation of Nature and Natural Resources 1968.

obtain 'prior informed consent of the concerned communities' with respect to issues affecting their traditional and intellectual property rights.[64] It is for this reason that in the *Endorois* case, the Commission noted that 'while the terms "peoples" and "indigenous community" arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems' and that 'many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated.'[65]

In relation to implied duties of extractive corporations, article 21 (read together with article 14) of the Charter, on the one hand, guarantees that resource-rich communities have fundamental proprietary, cultural, social and human interests in their natural resource wealth,[66] and on the other hand, forbids despoliation or destructive extraction of natural resources. The Charter declares that people (or communities) who have been dispossessed of their natural resources are entitled to lawfully recover them and adequate compensation.[67] The Charter also prevents state parties from permitting foreign economic exploitation by TNCs in resource-rich communities in a way that deprives them of the benefit derivable from their natural resources. In the *SERAC* case, the Commission held that 'the destructive and selfish role played by oil development in Ogoniland, along with the repressive tactics of the Nigerian government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of article 21.'[68] Here, it is crystal clear that the contextual reference to the 'role of oil development' was in no uncertain terms a direct allusion to the destructive activities of oil companies in Ogoni. This, in my view, was akin to finding that oil companies violated article 21 of the Charter.

Furthermore, the right of communities to freely dispose of their resources is interconnected with the right to their economic, social and cultural development guaranteed in article 22, the right to the best attainable standard of physical and mental health in article 16, and the right to a general satisfactory environment enshrined in article 24 of the Charter.[69] In the *SERAC* case, these rights were

64 African Convention on the Conservation of Nature and Natural Resources 2003 arts 16-17.
65 *Endorois* case (n 47 above) para 148.
66 *SERAC* case (n 45 above) paras 55-63.
67 African Charter arts 21(2) & (5).
68 *SERAC* case (n 45 above) para 55.
69 *SERAC* case (n 45 above) para 54.

considered to impose obligations on governments to take reasonable measures to prevent environmental degradation and pollution, to promote conservation, and secure a climate-friendly sustainable development and use of natural resources. The rights also obligate governments to refrain from directly violating the rights of individuals and communities to the health and environment. The Commission declared that by virtue of articles 16 and 24, governments have a responsibility to ensure independent scientific monitoring of endangered environments, require and publish environmental and social impact assessments before any major industrial project are undertaken, ensure adequate regulatory monitoring and access to information for communities and individuals exposed to life-threatening industrial activities, and guarantee meaningful opportunities for individuals to participate and be heard in the development decisions affecting their communities.[70]

In 2017, the African Commission declared that 'extractive industries have the legal obligation to respect the rights guaranteed in the African Charter'.[71] This was followed by a further amplification of articles 21 and 24 of the Charter in 2018 with the adoption of the *State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Human Rights and the Environment 2018* (SRGPs). In the SRGPs, the Commission declares that article 27 of the Charter provides 'a clear legislative basis' for the human rights obligations of corporations under the Charter.[72]

In a 2019 advisory note to the African Group involved in the UN negotiation process for a legally binding instrument on business and human rights, the African Commission emphatically iterated:

> Under the African Charter, obligations of business enterprises towards rights holders have a clear legislative basis. Article 27 of the African Charter provides for the duties of individuals and its sub-provision 2 lays down the obligation to exercise rights 'with due regard to the rights of others'. Clearly, if this obligation can be imposed on

70 *SERAC* case (n 45 above) para 53.

71 African Commission 'Resolution 367(LX)2017: Resolution on the Niamey Declaration on ensuring the upholding of the African Charter in the extractive industries sector' (2017) preamble 22 May 2017 60th Ordinary Session Niamey, Niger.

72 African Commission 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Human Rights and the Environment' (2018) para 56 <https://www.achpr.org/legalinstruments/detail?id=1> (accessed 1 September 2020) (SRGPs). Also see Chapter 3.2.1 above.

> individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies.[73]

Consequently, the Commission called upon the treaty negotiation process to recognise the legal obligations of business enterprises in the substantive section of the draft treaty text rather than make a mere glib affirmation in the preamble.[74]

In its General Comment No 3 on the right to life under article 4 of the African Charter, the African Commission declares that private military and security corporations are legally liable under the Charter for the arbitrary deprivation of a person's right to life in the territory of a state party.[75] In addition to the liability of corporations, the Commission calls on state parties to hold any individual or private military or security personnel to account for any domestic or extraterritorial violation. The Commission also declares that states have an obligation to safeguard individuals from threats or actual violations 'at the hands of other private individuals or entities, including corporations.'[76] This responsibility includes the duty to prevent, investigate, prosecute and remedy killings, forced disappearances or other violations committed by private individuals.[77]

Also, in its General Comment No 4 on the right to redress of victims of torture or cruel treatment under article 5 of the African Charter, the Commission declares that:

> Non-State actors are individuals, organisations, institutions and other bodies acting outside the State and its organs. Non-State actors through their behaviour, actions or policies can impact the enjoyment of human rights and can therefore occasion a violation of Article 5 of the African Charter.[78]

That said, the notion of the corporate duty to respect human rights implied under article 27 of the Charter is not forfeited under its supplementary protocols. Under the Protocol to the African Charter on Human and Peoples' Rights on the Rights

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73 African Commission 'Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)' (4 November 2019) 4 <https://www.achpr.org/news/viewdetail?id=206> (accessed 7 September 2020). Underlining mine.

74 As above.

75 African Commission 'General Comment No 3 on the African Charter on Human and Peoples' Rights: The right to life (Article 4)' (2015) paras 18 & 27 57th Ordinary Session 4-18 November 2015, Banjul, The Gambia.

76 African Commission (n 55 above) para 38

77 African Commission (n 55 above) para 39.

78 African Commission 'General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)' paras 72-73 <https://www.achpr.org/legalinstruments/detail?id=60> (accessed 7 June 2020). *Cf* African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009 art 1(n).

of Women in Africa 2003 (African Women's Protocol), the human rights responsibility of corporations is emphasised.[79] For example, the African Women's Protocol affirms the right of women to 'adequate and paid pre- and post-natal maternity leave in both the private and public sectors'.[80] The Protocol further expressly stipulates that 'the state and the private sector have secondary responsibility' for the growth and development of children in Africa.[81]

Also, in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa 2016 (Older Persons' Protocol) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2018 (African Disability Rights Protocol), private entities are prohibited from interfering with the rights of older persons and persons with disabilities. The African Disability Rights Protocol prohibits 'any person or entity' from interfering with the right of a person with disability to appoint a party of his or her choice to carry out his or her instructions.[82]

Similarly, the Older Persons' Protocol prohibits 'discrimination on the basis of disability by any person, organisation or private enterprise' and requires that 'public authorities, institutions and private entities act in conformity with the Protocol'.[83] This Protocol requires state parties to 'promote the employment of persons with disabilities in the private sector' and ensure that '[n]on-state actors' do not violate the right of persons with disabilities to exercise legal capacity.[84] The Protocol also prevents 'any person or institution' from forcibly confining or otherwise concealing a person with disability.[85] Thus, the express allusions to the *private sector, entity, non-state actors,* or *person* in the supplementary protocols to the African Charter all

[79] These Protocols have been developed as supplementary instruments to give effect to the provision of article 18(4) of the African Charter. Also see AU Executive Council 'Decision on the Report of the third session of the African Union Conference of Ministers of Social Development Doc.Ex.Cl/769(XXII)' (2013) Ex.Cl/Dec.750(XXII) para 2 Executive Council 23rd Ordinary Session 21–25 January 2013 Addis Ababa, Ethiopia; Continental plan of action on the African Decade of Persons with Disabilities 2010-2019; African Union Social Policy Framework 2009 sec 2.2.11; African Union Disability Architecture; Kigali Declaration on Human Rights 2003 para 20; African Union Policy Framework and Plan of Action on Ageing 2002 para 4.1; Madrid International Plan of Action on Ageing 2002; United Nations Principles for Older Persons 1991; United Nations Proclamation on Ageing 1992.

[80] African Women's Protocol art 13(i).

[81] African Women's Protocol art 13(l).

[82] African Disability Rights Protocol art 5(1).

[83] Older Persons' Protocol art 4(f)&(g).

[84] Older Persons' Protocol arts 19(2)(e) and 7(2)(b).

[85] Older Persons' Protocol art 9(2)(b).

operate to reaffirm the argument in this thesis that African human rights rules apply to corporate businesses in Africa.

ii The African Children's Charter

The African Children's Charter provides the normative framework for the protection of the rights of children in Africa. It similarly recognises that rights are correlative of duties as it copiously provides for the duties of children. However, unlike the African Charter, the African Children's Charter does not expressly contain the language of respect that applies to corporations as individuals by which a horizontal relationship could have been attributed. That notwithstanding, it can be implied from the African Children's Charter that corporations have human rights responsibilities towards children under several articles of the Charter.

Firstly, article 4 of the African Children's Charter on the best interest of the child can be said to apply to companies.[86] The article provides that '[i]n all actions concerning the child undertaken by *any person* or authority, the best interest of the child shall be the primary consideration.'[87] In the case of *Centre for Human Rights (University of Pretoria) and Another (on behalf of Senegales Talibés) v Senegal* (*Talibés* case),[88] it was held that the contextual reference to 'any person' in article 4 is broadly interpreted and includes any natural and juristic person whether private or public whose actions can adversely impact the wellbeing of the child. In clarifying this position, the African Children's Committee declares that '[t]here are no conditions attached to this principle which could dilute its scope, reach or standard of application' as 'it applies to both private and public institutions'.[89]

More so, article 15 of the African Children's Charter guarantees the protection of children from 'all forms of economic exploitation' and hazardous or physically, mentally, morally, socially or spiritually abusive work. Exempting no class of actors, employers of labour that may be state-owned or private corporations are prohibited from economically exploiting or subjecting children to child labour. Similarly, article 22 which guarantees the protection and care of children impacted by armed conflict

[86] Also see Older Persons' Protocol art 28(3).
[87] African Children's Charter art 4. Emphasis mine.
[88] *Communication No 003/Com/001/2012* 23rd Ordinary Session 15 April 2014 Addis Ababa para 35.
[89] African Committee of Experts 'General Comment No 5 on "State party obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection' (2018) para 11 <https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf> (accessed 11 July 2020).

can similarly be interpreted to imply the corporate responsibility to refrain from financing or sponsoring armed violence in high-risk and conflict-affected areas. The African Children's Committee recently issued a general comment to the effect that 'actions that perpetuate the continuance of armed conflict and the violation of the rights of a child shall make the private actors responsible for the violations.'[90] The Committee further declares that:

> private actors have an obligation not to supply arms that would be used to lead to armed conflict. Private actors that train the military have a role to ensure that the protection of children forms part of the syllabus.[91]

In *Communication 1/2005, Michelo Hunsungule v Uganda* (*Hansungule* case),[92] the issue of whether the Government of Uganda could be held accountable for violations by the Lord's Resistance Army (LRA) – a rebel group operating in the northern part of Uganda - was considered *obiter* based on an admission by the Ugandan government. The Ugandan government had acknowledged in its respondent's brief that although the alleged violation of the African Children's Charter arising from the violent activities of the LRA may be imputed to the Ugandan state, the various measures it had taken towards addressing the violations mitigated that liability.[93] Without deciding whether the government could be held accountable for the abusive acts of private persons, the African Children's Committee stated that the government of Uganda has nonetheless a due diligence obligation under the African Children's Charter to implement the right to a remedy, which is inclusive of the right to reparation.[94] The Committee stated that the due diligence obligation

> entails providing reparation to victims for acts or omissions that can be attributed to the State, or for their failures to meet their international obligations even when substantive breaches originate in the conduct of private persons.[95]

To be clear, the *Hansungule* case did not affirm that the government was directly responsible for the abuses committed by private actors (that is, the LRA in

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90 African Committee of Experts 'General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: "Children in Armed Conflict"' (2020) para 76 <https://www.acerwc.africa/wp-content/uploads/2020/01/Draft-General-Comment-on-Article-22_English.pdf> (accessed 11 July 2020). Also see A Clapham 'Extending international criminal law beyond the individual to corporations and armed opposition groups' (2008) 6 *Journal of International Criminal Justice* 899 922.

91 African Committee of Experts (n 90 above) para 77.

92 Communication No 1/2005 21st Ordinary Session 15-19 April 2013.

93 *Hansungule* case (n 92 above) para 29.

94 *Hansungule* case (n 92 above) para 51.

95 *Hansungule* case (n 92 above) para 51; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 143.

this case).[96] Rather, it stated that the government has a responsibility under the Children's Charter to prevent violations from occurring or, where they occur, investigate and punish offenders and provide reparations even when the substantive breaches originated from the direct conduct of private parties. In the case of *Institute for Human Right and Development in Africa and Another v Cameroon* (*Cameroon rape* case),[97] the African Children's Committee held that *the failure to investigate* all violations whether committed by agents of the state or private actors amounts to a violation of a state's international due diligence responsibility.[98]

There is also the issue of child trafficking, sale or abduction by companies either directly or indirectly involved in or associated with the extractive industries. Article 29(a) of the African Children's Charter prohibits 'the abduction, sale of, or traffic in children for any purpose or in any form, by any person'. Again, the reference to *any person* can be progressively interpreted to include corporations so as to imply that corporations are also prohibited from the abduction, sale and trafficking of children. Although a general comment is yet to be issued by the African Children's Committee on article 29, this interpretation is consistent with its earlier imputation of the responsibility of private actors under the African Children's Charter, even though no such express stipulation is made by the Charter itself.

iii The African anti-corruption convention

Corruption has a tremendous impact on the realisation of socio-economic rights in Africa. As has been articulated in this thesis, corporate corruption results in state capture and denies the citizenry of the developmental benefits of resource exploitation.[99] The AU Convention on Preventing and Combating Corruption 2003 (African Anti-corruption Convention) speaks to the responsibility of the private sector for corruption and related offences as a human rights issue.[100] To be absolutely certain whether the African Anti-corruption Convention is a human rights instrument and therefore relevant to this analysis, a look at the jurisprudence of the African Court will offer sufficient guidance.

[96] See Chapter Three, section 3.4.2 above.
[97] Communication No 006/Com/002/2015, Decision No :001/2018 *Institute for Human Right and Development in Africa & Anor on behalf of TFA (a minor) v Cameroon* (2018) paras 45, 54, 55, 63 & 74-75 31st Ordinary Session Bamako, Mali May 2018 (*Cameroon rape* case).
[98] *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 143.
[99] See Chapter Four, section 4.5.3.
[100] African Anti-corruption Convention art 2(1).

In *Actions Pour la Protection des Droits de L'Homme v Cote D'Ivoire* (*APDH* case),[101] the African Court held that a convention will be considered a human rights instrument if, based on its objectives and principles, it can be said that its purpose is intended to enunciate individual and group rights, or the obligations of state for the realisation of human rights. Article 3(2) of the Convention states that the Convention is based on the principle of respect for human rights in line with the African Charter and other relevant instruments, which suggests that the Convention is a human rights instrument and therefore rightly within the scope of this analysis.

Of relevance to corporations is that the African Anti-corruption Convention defines *corruption* to include the direct or indirect offer, grant, promise, acceptance or solicitation of

> any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties.[102]

This definition includes the promise of any advantage by or to any person who confirms or asserts that he or she is capable of improperly influencing the decisions of a person exercising an official function in the private or public sector whether or not the improper influence is beneficial to him or her and irrespective of the final outcome of the result.[103] What this means is that the African Anti-corruption Convention is expressly applicable to officials acting on behalf of public or private companies operating in the extractive industries in Africa.

Specifically, article 11 of the Convention is dedicated to preventing and combatting corporate corruption and allied crimes in or by agents of companies. The article requires states to adopt measures that encourage the private sector to respect property rights and tender processes and participate in the fight against unfair competition. It also requires states to adopt measures 'to prevent companies from paying bribes' in tender processes.[104] Importantly, the Convention also addresses the issue of bank secrecy often deployed by corporations in the illicit transfer of capital out of Africa. Article 17(3) of the Convention requires that state parties shall not apply any bank secrecy commitments in the fight against corrupt acts and related crimes under the Convention.

[101] Application 001/2014 Judgment of 18 November 2016 para 57.
[102] African Anti-corruption Convention art 4(1)(e).
[103] African Anti-corruption Convention art 4(1)(f).
[104] African Anti-corruption Convention art 11(1)-(3).

iv The African Governance Charter

The African Charter on Democracy, Elections and Governance 2009 (African Governance Charter) is also relevant to the discourse on the normative authority of African human rights instruments. This is because as part of its objectives, the African Governance Charter not only espouses the universal value of respect for human rights, but also promotes the fight against corruption, the objective of gender equality, accountability and good corporate governance. In the *APDH* case, the Court upheld the view that the African Governance Charter is a human rights instrument within the meaning of article 5 of the African Court Protocol.[105]

Under the African Governance Charter, gender equality in private and public institutions is affirmed as a fundamental principle of good economic and corporate governance.[106] State parties have an obligation to institutionalise good economic and corporate governance. This includes the obligation to create an enabling legislative and regulatory environment for private sector development, the equitable appropriation of the nation's wealth and natural resources, and the creation of an effective and efficient tax system that is anchored on accountability and transparency.[107]

v The Kampala Convention

One of the prominent causes of forced displacement and involuntary social mobility in resource-rich communities in Africa is the poor management of environmental and social risks in the extractive industries. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009 (Kampala Convention) seeks to address this problem by demanding human rights accountability from private actors responsible for forced displacement in communities. Under the Convention, state parties are responsible for ensuring that TNCs and private military or security companies are accountable for complicity in or direct acts of arbitrary displacement.[108] The Convention declares that states parties must, as much as possible, prevent displacement caused by projects carried out by private or public actors.[109] In addition to carrying out environmental and social impact assessments,

[105] *APDH* case (n 101 above) paras 57, 65.
[106] African Governance Charter art 3(6).
[107] African Governance Charter arts 27(6), 28, 33(6)(8)(13).
[108] Kampala Convention art 3(1)(h)(i).
[109] Kampala Convention art 10(1). In *Communication 279/03-296/05: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) para 224 45th Ordinary Session 13-27 May 2009 Banjul, The Gambia, the Commission held that '[t]he attacks and forced displacement

the Convention requires that development projects that have a potential to adversely affect communities should only be undertaken after feasible alternatives have been explored, and after full information and due consultation have been availed those likely to be affected by such projects.

Although the obligation to prevent forced displacement is expressly attributed to state parties, the argument can be made here that corporations have an implied obligation to prevent or, where they are likely to occur, mitigation the adverse impacts of their operations on the domain of local communities proximate to extractive activities. In the SRGPs, the dispossession of land and forced displacement of communities are recognised as some of the principal human rights abuses that occur in new areas of discovery of oil, gas and minerals.[110] For this reason, the African Commission recognises that article 21 of the African Charter is underscored by the principles of effective participation and prior consultation of communities in the decision-making processes affecting them and their habitations.[111] The Commission asserts that international investment agreements for the exploitation of natural resources must be compliant with article 21 of the African Charter.[112] Of particular importance is the recognition by the Commission that multilateral development banks and development finance institutions have a legal responsibility to ensure compliance with international human rights standards.[113]

Each of the African human rights instruments considered here and the jurisprudence developed by the respective protection mechanisms with regards to non-state actors reaffirm the normative authority of the African human rights system over corporations. Collectively, these instruments demonstrate that the African regional system was designed to brook no lacuna in the promotion and protection of human and peoples' rights in Africa. Yet, despite the emphatic recognition of the corporate obligation for human and peoples' rights, a possible issue that critics may raise concerning the normative authority of the African regional system is the nature

of Darfurian people denied them the opportunity to engage in economic, social and cultural activities' and therefore violated their collective rights under article 22 of the Charter. See: *Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons* 2005 para 5.4; United Nations Office of the High Commissioner for Human Rights 'Housing and property restitution for refugees and displaced persons: Implementing the "Pinheiro Principles"' (2007) 19, 37, 39 <https://www.ohchr.org/Documents/Publications/pinheiro_principles.pdf> (accessed 6 September 2020).

[110] SRGPs para 15.

[111] SRGPs paras 20-21.

[112] SRGPs paras 16-18.

[113] African Commission Advisory note (n 73 above).

of its application to corporations. In other words, do African human rights instruments apply directly or indirectly to businesses?

As a matter of law, there is no question that corporations have human rights obligations under African human rights instruments. So, the issue of whether the obligations apply directly to corporations is not as relevant as its enforceability. For the purpose of scholarship and the avoidance of any doubt, two theoretical arguments can be put forward here to show that the normative authority of African human rights instruments directly applies to businesses operating in Africa.

Firstly, the corporate obligation under African regional instruments can be theorised to apply directly to corporations in states that consider international law to be an integral part of domestic law. Such states are otherwise known as *monist states*.[114] For this category of states, the implication is that upon duly ratifying any of the African human rights treaties considered above, they become self-executing, and the duty to respect human rights will apply directly to corporations registered or operating from such a ratifying country.[115] The limitation to this view, however, is that for dualist states – that is, states which must first domesticate treaties through local legislation before they can take effect domestically – it may be possible for businesses to argue that there is no obligation to comply with African human rights standards until international treaties have been domesticated.[116]

The second and more preferred argument is that African human rights instruments, once ratified by a state, can be considered to directly apply to all companies operating in the state concerned regardless of domestication. This is possible to conceptualise not only on account of the universality of human rights and the universal ratification of the African Charter by all African countries, but also because the consent of private actors is not required for regional and international human rights treaties to apply directly to them.

A more material question should be whether the corporate obligations under African human rights instruments are directly enforceable against businesses at the regional level and what impact their (non)enforceability would have on corporate

[114] AM Slaughter & W Burke-White 'The future of international law is domestic (or, the European way of law)' (2006) 47 *Harvard International Law Journal* 327 (n1).

[115] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 1 16-17.

[116] HH Koh 'Transnational public law litigation' (1991) 100 *Yale Law Journal* 2347 2349 n10.

accountability in the region. At the moment, it is only state parties that are attributed with enforceable obligations for human rights under the African human rights system.[117] Here, the operative word is '*enforceable*'. Although African regional instruments may be understood as *directly applicable* to corporations, they are *not directly enforceable* before African human rights mechanisms.

This distinction between *applicability* and *enforceability* needs to be understood in that context as neither the African Charter and its supplementary protocols nor the African Children's Charter expressly recognises that corporation may be held liable for human rights abuses procedurally before the respective monitoring mechanisms. That is not to say, however, that African regional mechanisms are precluded from adopting human rights rules and standards of conduct that directly regulate the activities of corporations in Africa.

(b) Institutional authority

The institutional authority of the African human rights system is manifested by the operational scope and activities of its monitoring mechanisms. Under the respective African human rights instruments, the trio of the African Commission, the African Children's Committee and the African Court play a critical role in the promotion and protection of human and peoples' rights in Africa. Each of these mechanisms provides an accessible regional platform for assessing compliance, investigating allegations of violations, adjudicating claims and redressing abuses.[118] Although the respective mechanisms engage states through the periodic reporting process, promotional and investigative missions, special procedures and the complaint procedures, they nonetheless have a general mandate to consider the harmful impacts of the activities of all actors – including businesses and other non-state actors - on the enjoyment of human rights and fundamental freedoms in the extractive industries.

In essence, the institutional authority of African human rights mechanisms stems from the mandate to strengthen domestic human rights institutions, develop human rights principles, consider human rights issues arising from the territories of

[117] Viljoen (n 27 above) 340-342.

[118] SM Weldehaimanot 'Towards speedy trials: Reforming the practice of adjudicating cases in the African Human Rights System' (2010) 1 *The University for Peace Law Review* 14; GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 442 448.

state parties and make informed decisions.[119] Generally, the mechanisms can be categorised as judicial and quasi-judicial in nature. Definitionally, a quasi-judicial mechanism is such that can consider complaints and make non-binding (or recommendatory) decisions; whereas a judicial mechanism has the power to consider complaints and make binding decisions. While the African Commission and the African Children's Committee are quasi-judicial bodies without a mandate to making binding decisions, the African Court is currently the only continental judicial mechanism in operation with binding decision-making powers.[120]

It should be noted however that the institutional authority of these mechanisms with regards to states and corporations is quite nuanced and characteristically reflected through the kind of decision made by each body. For instance, *with respect to state parties,* decisions made by the African Commission and the African Children's Committee may be concluding observations on state reports, resolutions in the form of session declarations, guidelines offering procedural guidance, legal principles in general comments and model laws, or recommendations made after considering communications. Such decisions are directly applicable to states – even though non-binding. In the case of the African Court, decisions are made in the form of judgments and advisory opinions.[121] Decisions made by the Court are considered binding on the state party concerned that has ratified the African Court Protocol.[122]

With respect to corporations, the institutional authority of African human rights mechanisms applies in two ways – directly, but in a limited way, and indirectly.

First, concluding observations and decisions made by monitoring bodies in a complaint against a state party may not be directly applicable to corporations. This is because such decisions directly target the state party concerned which bears primary responsibility for domestically regulating the affairs of businesses on its territory. By default, such decisions would only apply to corporations indirectly. In several communications filed before the various African human rights mechanisms, the government of the states concerned were requested to take all appropriate

[119] MW Mutua 'The African human rights system: A critical evaluation' *Prepared for United Nations Development Programme, Human Development Report 2000* (2000) 1 32 <https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1015&context=other_scholarship> (accessed 23 September 2020).
[120] Weldehaimanot (n 118 above) 17-18.
[121] African Court Protocol arts 4 & 28.
[122] African Court Protocol art 30.

measures to prosecute and punish state officials and staff of public and private companies implicated in the African Charter's violation.[123] Hence, depicting the indirect application of the institutional mandate of such bodies.

However, it must be clearly emphasised that there is nothing - so far - stopping African human rights mechanisms from expressly requiring individuals or corporate entities to comply with specific aspects of a decision regarding a state party. Neither the African Charter nor any other African human rights instrument prohibits African regional mechanisms from directly communicating with individuals or businesses. As I will show later on, the Commission has already started taking the unusual step of corresponding with a company for the latter's complicit role in the human rights violations by a state.[124] In future, it is a realistic possibility that decisions of the African Court will directly address or admonish private corporations operating in a state concerned for violations of the African Charter or other relevant international human rights instruments.

Second, resolutions, general comments and legal principles enunciated by African human rights mechanisms are authoritative interpretations of African human rights instruments and, as such, may apply directly to corporations. Under the relevant African human rights instruments, both the African Commission and the African Children's Committee have an express mandate to formulate and lay down legal principles targeted at solving legal problems, authoritatively interpret the substantive provisions of the respective charters, investigate, and remedy human rights abuses concerning businesses engaged in the extractive and other industries.[125] One way these bodies formulate legal principles and authoritatively interpret the provisions of African human rights instruments is through the adoption of general

[123] African Commission: *SERAC* case (n 45 above) paras 71-72; *Sudan Human Rights Organisation & Anor v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 229(1)&(3); Communication 393/10, *Institute for Human Rights and Development in Africa (IHRDA) v Democratic Republic of Congo (DRC)* (2016) 20th Extraordinary Session 9-18 June 2016 (*Kilwa massacre* case) para 154(i). African Children's Committee: *Cameroon rape* case (n 77 above) para 84(a); Communication 005/Com/001/2015 Decision 002/2018 *African Centre for Justice and Peace Studies & Anor v Sudan* (2018) para 105(A) 31st Ordinary Session Bamako, Mali May 2018; Communication 007/Com/003/2015 Decision 003/2017 *Minority Rights Group International & Anor on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* (2016) para 98(A)(E)-(G) 30th Ordinary Session Khartoum, Sudan 15 December 2017. African Court: Application No 006/2012 *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017) Judgment of 26 May 2017 para 201.

[124] African Commission 'Letter to Anvil Mining Company on its role in human rights violations in the DRC' 19 December 2017 <https://www.achpr.org/pressrelease/detail?id=65> (accessed 22 September 2020).

[125] African Charter art 45(1)(b), (2)&(3); African Children's Charter art 42(a)(ii), (b)&(c).

comments, resolutions, guidelines, and principles which may directly apply to corporations.[126]

Rules, guidelines and principles formulated by the African Commission and the African Children's Committee may apply directly to corporations even though not directly enforceable. The implementation and enforcement of such rules remain the responsibility of state parties. That responsibility includes the regulation of business conduct, prevention, investigation, punishment and remediation of abuses, and the enforcement of decisions against states concerned that implicate corporations in their respective domains.[127] Whilst reliance on states for the enforcement of the human rights obligations of companies or decisions of African regional mechanisms is a blind spot in this regard, it is not sufficient to defeat the call for a continental regime of corporate human rights accountability.

In sum, the conceptualisation of the normative and institutional authority of the African human rights system lays the foundation for considering in some detail the functions and activities of each of the respective regional mechanisms and the opportunities that these create for the advancement of corporate human rights accountability in Africa.

6.3 Accountability through African human rights mechanisms

African human rights mechanisms play a very important role in 'providing individual and structural remedies for human rights violations and in the development of international human rights law.'[128] By virtue of their monitoring role in Africa, they not only ensure that human and peoples' rights are promoted and protected by states, they offer a strong indication that corporations engaged in abusive business practices and egregious human rights violations can also be monitored and regulated. In this section, I will consider the specific mandates of the various human rights bodies and the respective activities by which they execute their responsibilities in

[126] African Commission 'Resources' <https://www.achpr.org/resources> (accessed 26 September 2020); African Children's Committee 'General comments' <https://www.acerwc.africa/general-comments/> (accessed 26 September 2020).

[127] *Hansungule* case (n 92 above) para 51. *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 143

[128] M Killander 'Interpreting regional human rights treaties' (2010) 13 *SUR-International Journal on Human Rights* 145; C Heyns & M Killander 'Towards minimum standards for regional human rights systems' in MH Arsanhani, J Cogan, R Sloane & S Weissner (eds) *Looking to the future: Essays on international law in honour of W Michael Reisman* (2011) 527.

order to buttress the path they offer to corporate human rights accountability in Africa.

6.3.1 The African Commission on Human and Peoples' Rights

The mandate of the African Commission as established under the African Charter is primarily promotional, protective, and interpretive in nature.[129] The promotional element of this mandate is three-fold. First, it entails the responsibility to research, document and study human rights challenges, convene symposia, conferences and seminars, propagate information, support domestic human rights institutions, and issue recommendations to governments. With regards to corporate abuses in the extractive industries, this mandate allows the Commission to conduct research, convene scholarly conferences, engage domestic human rights institutions and make recommendations to governments on how to address problems. Since 2009, the Commission has undertaken several studies and research on the impact and liability of corporate entities for environmental and human rights abuses, illicit financial (out)flows and climate change in Africa.[130] Based on such studies, the Commission declared in 2013 that it was:

> [c]onvinced of the need for an improved protection of human rights, especially through the development of jurisprudence on holding non-state actors accountable for human rights violations in Africa.[131]

The second promotional responsibility of the Commission entails enunciating human rights principles, guidelines, rules, and model laws 'upon which African governments may base their legislation[sic]'.[132] One of the principal challenges that prevents African countries from enacting human rights rules for business is the fear

[129] African Charter art 45(1)(2)(3).

[130] African Commission 'Resolution 148(XLV1)2009: Resolution on the establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2009) paras i-vi 46th Ordinary Session Banjul, The Gambia 11-25 November 2009; African Commission 'Resolution 153(XLV1)2009: Resolution on climate change and human rights and the need to study its impact in Africa' (2009) para 4 46th Ordinary Session Banjul, The Gambia 11-25 November 2009; African Commission 'Resolution 236(LIII)2013: Resolution on illicit capital flight from Africa' (2013) 53rd Ordinary Session 23 April 2013 Banjul, The Gambia; African Commission 'Background study on the operations of the extractive industries sector in Africa and its impacts on the realisation of human and peoples' rights under the African Charter on Human and Peoples' Rights' (2019) <https://www.achpr.org/public/Document/file/English/Background%20Study%20on%20the%20Operations%20of%20the%20Extractive%20Industries%20Sector%20in%20Africa_ENG.pdf> (accessed 18 September 2020).

[131] African Commission 'Resolution 253(LIV)2013: Resolution on the renewal of the mandate of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2013) preamble 54th Ordinary Session 22 October-5 November 2013 Banjul, The Gambia. Also see African Commission 'Resolution 353(EXT.OS/XX)2016: Resolution on the renewal of the mandate of the Expert Members of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2016) preamble 20th Extra-Ordinary Session Banjul, The Gambia 9-18 June 2016.

[132] African Charter art 45(1)(b).

that such rules are not yet mainstream globally and may negatively impact foreign direct investments in their countries. The Commission's formulation of rules regulating business conduct will in effect create a continental standard and template for African states to enact domestic legislation protecting human rights in the sector and signal to business that such rules are not exclusively targeted at particular businesses but continental standards to guide responsible business conduct.

The third promotional responsibility of the Commission includes working and cooperating with other African and international human rights bodies in the promotion and protection of human and peoples' rights. In the discharge of this responsibility, the Commission collaborates with the UN and other international human rights bodies.[133]

The protective element of the Commission's mandate involves safeguarding human and peoples' rights in accordance with the Charter and other regional and international human rights instruments.[134] The Commission protects human and peoples' rights in a number of ways: through its investigative missions to states, by granting provisional measures during the course of its communications procedure, and making final recommendations on actions needed to be taken by African governments.[135] Since its establishment, the Commission has undertaken several investigative missions, adopted provisional measures in urgent situations and issued recommendations to government aimed at the protection of human rights in the states concerned.

Finally, the interpretive element of the African Commission's mandate entails the responsibility to clarify the provisions of African human rights instruments. The Commission does this by way of guidelines, declarations, principles, general comments and decisions when it adjudicates over communications submitted to it for determination.[136] It exercises this responsibility of its own volition or, if in respect of a communication, at the behest of an applicant or a state party, the AU or an African organisation recognised by the AU.[137]

[133] African Commission 'Resolution 301(EXT.OS/XVII)2015: Resolution on the World Bank's draft Environmental and Social Policy (ESP) and associated Environmental and Social Standard (ESS)' (2015) 17th Extraordinary Session 19-28 February 2014 Banjul, The Gambia.
[134] Viljoen (n 27 above) 300-348.
[135] As above
[136] African Charter art 45(3).
[137] As above.

In addition to the three elements of the mandate, the Commission may perform such other responsibilities with which it may be entrusted by the AU Assembly.[138]

Although aided by a professionally resourced Bureau in the execution of its day-to-day activities, the Commission frequently interacts with states and civil society actors at its ordinary and extraordinary sessions.[139] In 2018, the Commission organised a side event during its 63rd Ordinary Session in Banjul, The Gambia, to sensitise state parties and CSOs on the SRGPs.[140] The opportunity of this frequent interaction and the extensiveness of the Commission's mandate present practicable avenues for addressing the problem of corporate human rights violations and advancing accountability in the extractive industries – even if in an indirect way.

The respective avenues by which accountability can be pursued at the regional level include the Commission's state reporting process, the communication procedure, the special procedures, the Commission's investigative and promotional missions, and the interpretive declarations of the Commission. These will be briefly considered.

(a) State reporting

Under the African Charter and its supplementary protocols, state parties are obliged to submit periodic reports to the Commission every two years.[141] The purpose of such reporting is to assess the legislative and other measures adopted to give domestic effect to the rights and freedoms guaranteed under African human rights instruments. Since 2018, such periodic reports are now required to comply with the SRGPs in terms of the format for reporting state party compliance with articles 21 and 24 of the Charter. The table below shows what the report should contain.

[138] African Charter art 45(4).

[139] C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27 33; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 117; BR Dinokopila 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights' (2020) 10 *African Human Rights Law Journal* 26-52.

[140] African Commission 'Press statement on the side event of the Working Group on Extractive Industries, Environment and Human Rights in Africa at the 63rd Ordinary Session of the African Commission on Human and Peoples' Rights' (2018) <https://www.achpr.org/pressrelease/detail?id=18> (accessed 12 September 2020).

[141] African Charter art 62; African Women's Protocol art 26; Older Persons' Protocol art 22(1); African Disability Rights Protocol art 34(1).

Table 6-1: The reporting requirements of the SRGPs.

The state reporting process presents an important avenue for the indirect accountability of extractive corporations at the regional level. By requiring that states report on compliance by state-owned companies and private enterprises engaged in the extractive sector, the reporting process can ensure down-the-line accountability for human rights abuses in the sector. Since reporting on financial and tax transparency as well as the environmental, social and human rights impact assessments undertaken in the extractive sector will (in)directly draw from compliance with domestic rules, the reporting process promises ultimately to engender a culture of responsible corporate governance, good environmental and social risk management, and internationally acceptable business and financial reporting practices by companies. In the long run, it will usher in a cultural of probity, sustainable resource governance and accountability in African countries.

(b) Communication procedure

Under the African Charter, any individual, group, non-governmental organisation (NGO) or a state party who alleges that any portion of the Charter has been, is being or likely to be, violated may approach the African Commission by way of a *communication*. The Commission can deal with communications filed before it where the author(s) of the communication has complied with all the conditions of admissibility set under article 56 of the Charter, has exhausted local remedies or can show that the process for doing so would be inordinately prolonged.[142] In several decided communications, the Commission held that local remedies may be dispensed with if it is shown that they are not available, adequate or effective.[143]

In situations of forced displacement (which are nearly often precipitated by the economic activities of private actors in the extractive and infrastructure development sectors), the Commission held that victims of forced displacement who are compelled to flee 'after suffering harassment, eviction, looting, extortion, arbitrary arrests, unjustified detentions, beatings and rapes' are not required to satisfy the requirement of exhaustion of local remedies.[144]

[142] African Charter art 50.

[143] *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) paras 28-34; *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996); *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 50; *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) para 27.

[144] *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) paras 33-36.

Again, this procedure provides a useful avenue for indirect corporate accountability at the regional level. Where communities and victims have been adversely affected by the activities of extractive industries and have exhausted local remedies (or show that local remedies are unavailable, ineffective, inadequate), they may approach the African Commission for remedies. The advantage of this regional access to justice is that it may be used to seek provisional measures to stop the forced eviction or displacement of communities from their ancestral land or to approach a neutral source of remedies especially where the state and corporations collaborate in the violations of the rights of individuals and communities. In at least two notable cases associated with the *Kiobel* and *Kilwa* massacre cases which were litigated at the host and home country levels of the companies involved,[145] the African Commission proved its readiness to rise up to the occasion of addressing egregious human rights violations in the extractive industries that had not been adequately addressed by both host and home countries.

First is the case of *SERAC v Nigeria* (*SERAC* case),[146] which originated from the environmental and social abuses perpetrated by a Shell-operated joint-venture in Ogoniland in the Niger Delta region of Nigeria and the ruthless operations of the Nigerian Military Government. In this case, the plaintiffs alleged that the oil-consortium conducted its activities without regard for the health and environmental wellbeing of the Ogoni communities. They alleged that with the support of the Nigerian government, the consortium disposed toxic wastes into the environment and water courses such that contaminated the soil, air and water with serious and long-lasting health impacts, including respiratory and gastrointestinal ailments, skin infections, reproductive and neurological problems and increased risks of cancer. They claimed that not only did the government deny access to vital information on the devastating impacts of oil activities, but they were also neither consulted nor involved in the decisions concerning their community's development. They also argued that the military's destruction of their community residences and refusal to allow them to rebuild it violated their right to housing.

In a landmark decision, the African Commission held that even though local remedies had not been exhausted with respect to the substantive human rights issues alleged, the communication was nonetheless admissible considering that the military

[145] See Chapter Four, section 4.6.2; Chapter Five, section 5.4.3(a)v.
[146] *SERAC* case (n 45 above).

regime in Nigeria had ousted the jurisdiction of the courts through decrees and thereby deprived the Nigerian people of 'the right to seek redress in the courts for acts of government that violate their fundamental human rights.'[147] The Commission declared that the responsibility of state parties to protect human and peoples' rights entails a duty to do so not only through appropriate legislative and enforcement action, but also by protecting citizens from the destructive and abusive acts of private actors.[148] The Commission stated that Nigeria's obligation to protect right-holders against other subjects by legislation and provision of effective remedies requires it to take protective measures against economic, political and social interferences in favour of beneficiaries of the protected rights.

In determining the destructive impact of the extractive industries on the right to food of the Ogonis, the Commission held that as a minimum core obligation, the government 'should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves.'[149] The Commission addressed TNCs on the need to earn their social licence to operate through ethical conduct by noting that multinational corporations may be a potentially positive force for development if '[they] are ever mindful of the common good and the sacred rights of individuals and communities.'[150] The Commission therefore found that Nigeria's treatment of the Ogonis was in violation of articles 2, 4, 14, 18(1), 21 and 24 of the Africa Charter, and recommended, among other things, that Nigeria:

(a) Stop all attacks on the Ogonis by its security forces, investigate the allegations of human rights violations and prosecute those responsible;
(b) Adequately compensate victims of violations, provide relief, and undertake a comprehensive clean-up of areas damaged by oil operations;
(c) Ensure that appropriate environmental and social impact assessments in relation to future oil development are prepared and that the safety of such operation is guaranteed through effective and independent oversight; and

147 *SERAC* case (n 45 above) para 41; Okafor (n 15 above) 138.
148 *SERAC* case (n 45 above) para 57; *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 116; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 143; *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) paras 18-22.
149 *SERAC* case (n 45 above) para 65.
150 *SERAC* case (n 45 above) para 69.

(d) Provide information to affected communities on the health and environmental risks, including on the relevant decision-making and regulatory bodies.

This decision is important to the discourse on corporate human rights accountability at the regional level because it highlights the protective role of African regional human rights mechanisms in the indirect accountability of corporations in Africa. Moreover, much of the Commission's language in the SRGPs can be gleaned from the decision in the *SERAC* case.[151] The decision set the scene for further developing continental rules and the Commission's jurisprudence on the extractive industries, environment and human rights.

Second is the case of *Institute for Human Rights and Development in Africa v Democratic Republic of Congo* (DRC) (*Kilwa massacre* case),[152] which arose from the Kilwa massacre incident of 2004 considered distinctively in the previous chapters.[153] The Kilwa victims alleged that at the behest of and with the logistical support of Anvil Mining, the Congolese military forcefully invaded their community 'bombing homes and conducting arbitrary arrests, unlawful detentions, torture, pillage and summary executions' of no less than 73 people.[154] Although criminal charges were preferred against eight military officers and three Anvil Mining staffers before a military court, they were all cleared of any wrongdoing. The victims approached the African Commission after they could not get justice in the DRC, Australia and Canada, claiming that the DRC had violated articles 1, 4, 5, 6, 7(1), 14 and 26 of the African Charter.

After careful consideration of the complaint, the Commission found that the DRC violated all the stated provisions of the African Charter. It accordingly recommended that the DRC:[155]

(a) employ all diligent measures to investigate, prosecute and punish all state agents and the Anvil Mining personnel who were involved in the massacre;
(b) pay an aggregate sum of $1.2million as compensation to the victims;

[151] SRGPs paras 17-34, 40.
[152] Communication 393/10 20th Ordinary Session 9-16 June 2016.
[153] See Chapter Five, sections 5.4.3(a)v & 5.3.2(c), Chapter Four, section 4.6.2.
[154] Institute of Human Rights and Development in Africa 'Communication 393/10: *IHRDA, ACIDH and RAID v DR Congo* communication filed before African Commission' 10 March 2011 <https://www.ihrda.org/2011/03/ihrda-acidh-and-raid-file-communication-against-drc/> (accessed 21 August 2020).
[155] *Kilwa massacre* case (n 152 above) para 154.

(c) formally tender and publish, by way of collective reparation, an apology to the people of Kilwa;
(d) independently investigate for the purpose of clarifying the fate of persons who might have disappeared and pay compensation to their successors-in-title;
(e) identify all victims who are not party to the communication in order to compensate them for the prejudices suffered;
(f) exhume all bodies in the Nsensele mass graves to accord them a dignified burial, and build a memorial in Nsensele to honour the dead;
(g) provide adequate psychosocial assistance to the victims and other Kilwa inhabitants to help them deal with the trauma subsequent to the events;
(h) ensure that the Commission's decision is implemented by establishing a monitoring committee that is inclusive of victims and their successors as well the Commission; and
(i) submit a written report within 180 days of notification of the decision on the measures taken to implement the recommendations.

This case is again significant to the discourse of corporate human rights accountability at the regional level because for the first time, the Commission went a step further to categorically berate a company for its role in the Kilwa massacre. The Commission stated that '[a]t a minimum, [corporations] should avoid engaging in actions that violate the rights of communities in their zones of operation. This includes not participating in, or supporting, violations of human and peoples' rights.'[156] Consequently, the Commission called for the prosecution of those Anvil Mining personnel involved in the violations.

The decisions in the *SERAC* and *Kilwa massacre* cases underscore the evolving jurisprudential trajectory of the Commission in relation to business and human rights. The SERAC decision on the failure of government and business to consult the people in matters affecting their development has also influenced the decision of the African Court in the case of *African Commission on Human and Peoples' Rights* v *Kenya* (*Ogiek* case).[157] In the *Ogiek* case, the Court held that the Kenyan government's expulsion and continuous eviction of the Ogiek people from the Mau forest in favour of private commercial interests without the people's prior consultation or participation in the government's socio-economic programmes

[156] *Kilwa massacre* case (n 152 above) para 101.
[157] Application 006/2012 Judgment of 26 May 2017 (*Ogiek* case).

negatively affected their rights to economic, social and cultural development contrary to articles 14 and 22 of the Charter.[158]

When this trajectory of jurisprudential developments is assessed against the backdrop of the Commission's SRGPs and the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* (Principles and Guidelines on Socio-Economic Rights), it is not hard to see the rapidly developing continental body of knowledge on state and corporate accountability for human rights in the extractive industries.[159]

(c) Special procedures

Special procedures are ad hoc sub-mechanisms of human rights bodies setup to undertake thematic or issue-specific tasks. Under the African Charter, the African Commission's mandate of formulating legal principles, inquiring into abuses and making recommendations to governments includes the prerogative to draw up its own rules and utilise 'any appropriate method of investigation' in its execution.[160] By virtue of this enabling provision, the Commission has set up special mechanisms consisting of committees, working groups and special rapporteurs under its rules of procedure.[161] Special rapporteurs are single mandate holders appointed from among the rank and file of commissioners, focusing either on particular themes or countries. That is to say, while committees and working groups are composed of members of the Commission and (external) independent experts, special rapporteurs are appointed only from amongst the Commission's members.[162] There are currently twelve special mechanisms with a thematic mandate for human rights.[163]

[158] *Ogiek* case (n 157 above) paras 131, 210.

[159] African Commission 'Resolution 386(LXI)2017: Resolution on the renewal of the mandate and reconstitution of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2017) preamble 61st Ordinary Session 1-15 November 2017 Banjul, The Gambia [which emphasises the need for 'developing effective continental mechanisms for monitoring the human rights impact of the activities of the extractive industries and the development of jurisprudence on holding non-state actors accountable for human rights violations in Africa'].

[160] African Charter arts 42(2), 45, 46.

[161] Rules of Procedure of the African Commission on Human and Peoples' Rights 2020 rule 25(1); Standard Operating Procedures on the Special Mechanisms of the African Commission on Human and Peoples' Rights 2020 paras 1-12.

[162] African Commission 'Resolution 175(XLV111)2010: Resolution to increase the membership of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' (2010) 48th Ordinary Session Banjul, The Gambia 10-25 November 2010.

[163] African Commission 'Addressing human rights issues in conflict situations: Towards a more systematic and effective role for the African Commission on Human and Peoples' Rights' (2019) 63 [para 159] <https://www.achpr.org/public/Document/file/English/ACHPR%20Conflict%20Study_ENG.pdf> (accessed 2 September 2020); African Commission 'Special mechanisms' <https://www.achpr.org/specialmechanisms> (accessed 2 September 2020).

Special procedures play an important role in the Commission's work of safeguarding human rights and ensuring accountability in the extractive sector. Sometimes, the works of the various special procedures overlap and may have a bearing on the extractive industries. For instance, as shown above, the Commission's General Comments 3 and 4 prepared by the Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa and the Committee on the Prevention of Torture in Africa, respectively cover the activities of private security companies engaged in torture or extrajudicial killings.[164] However, for the purpose of this analysis, only three special mechanisms will be considered here. These are the working groups on extractive industries, indigenous populations, and socio-economic rights.

i Working Group on Extractive industries

To address abuses in the extractive industries, the Commission established the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (WGEI) in 2009 to, among other things:

a. Study the impact of extractive industries in Africa with regards to the African Charter;
b. Research the issues impinging on the right of peoples to freely dispose of their natural resource wealth and to a general satisfactory environment, including violations by non-state actors;
c. Request, collect, gather and share information and materials from all appropriate sources on human and peoples' rights violations by non-state actors in Africa;
d. Notify the Commission on the potential liability of corporate actors for violations of human and peoples' rights;
e. Make recommendations and proposals on appropriate preventive and remedial measures for human and peoples' rights violations by extractive businesses in Africa.[165]

Since its establishment, WGEI has done considerable work geared towards realising its mandate. By virtue of Commission Resolution 364 on the development of

[164] African Commission General Comment No 3 (n 75 above); African Commission General Comment No 4 (n 78 above).
[165] African Commission Resolution 148(XLV1)2009 (n 130 above). Also see African Commission Resolution 153(XLV1)2009 (n 130 above).

reporting guidelines regarding the extractive industries, it developed the SRGPs in 2018 which enunciates principles on the human rights obligations of business.[166] It has undertaken studies and adopted declarations affecting the extractive industries, including on the impact of illicit financial flows and climate change on human rights in Africa.[167] It has also investigated and directly engaged companies on the need for accountability in their operations. For example, following the Commission's decision in the *Kilwa massacre* case, the WGEI took a further unprecedented step; it wrote a letter inviting Anvil Mining to take responsibility for its complicity in the Kilwa massacre through the issuance of a public statement accepting responsibility and contribute to the reparations that the African Commission granted to the victims.[168] There is no indication that a response was ever received. However, by deploying a special procedure to invite a company to take responsibility for wrongdoing, the Commission sets a novel precedent on the direct engagement between an international mechanism and non-state entities – in this case, a corporation - in the advancement of corporate accountability in Africa.

The WGEI has been responsive to recent human rights violations in the extractive industries in state parties. From calling on the Kenyan government to ensure that trade negotiations with the US are not lob-sided or such that could potentially make Kenya a dumping ground for US plastic waste to pushing for the 'full corporate accountability and appropriate responsibility' of Mitsui OSK Lines - the operator of the ship responsible for the recent oil spill off the coast of Mauritius – the Commission continues to leverage on its continental role to demand corporate accountability.[169] On reports of the surging cases of the Novel Coronavirus 2019 (COVID-19), the Commission noted 'the imperative for the state and mining

[166] African Commission 'Resolution 364(LIX)2016: Resolution on developing reporting guidelines with respect to the extractive industries' (2016) 59th Ordinary Session 21 October-4 November 2016 Banjul, The Gambia.

[167] African Commission Resolution 367(LX)2017 (n 71 above); African Commission 'Resolution 271(LV)2014: Resolution on climate change in Africa' (2014) 55th Ordinary Session 28 April-12 May 2014 Luanda, Angola; African Commission Resolution 236(LIII)2013 (n 130 above); African Commission 'Resolution 342(LVIII)2016: Resolution on climate change and human rights in Africa' (2016) para iii 58th Ordinary Session 6-20 April 2016 Banjul, The Gambia.

[168] African Commission 'Letter to Anvil Mining Company on its role in human rights violations in the DRC' 19 December 2017 <https://www.achpr.org/pressrelease/detail?id=65> (accessed 22 September 2020).

[169] African Commission 'Statement of the African Commission on Human and Peoples' Rights on protecting the right to environment in Kenya' 1 September 2020 <https://www.achpr.org/pressrelease/detail?id=531> (accessed 21 September 2020); African Commission 'Press statement on oil spill and the environmental pollution affecting the Republic of Mauritius' 11 August 2020 <https://www.achpr.org/pressrelease/detail?id=526> (accessed 21 September 2020).

companies' to adopt protective measures that safeguard the safety and health of miners and host communities.[170] On the reported deaths of 43 miners at a collapsed DRC mine, the Commission also reiterated that mining companies in the DRC have 'obligations to safeguard mines from accidents claiming lives' and compensate the family members of the victims.[171]

ii Working Group on Indigenous Populations

Considering that ethnic minorities, marginalised populations and indigenous people are often situated on land and coastal areas rich in natural resources, the Working Group on Indigenous Populations or Communities and Minorities in Africa (WGIP) is yet another very important special procedure relevant to state and corporate human rights accountability in the extractive industries. Established in 2000, the mandate of this group of African experts includes the responsibility to promote the identity and cultural development, conduct studies, and monitor and protect the rights of indigenous communities.[172] In the course of its work, it has steered clear of making any fine distinctions between 'minority' and 'indigenous' in light of the contentions that most of the African populations are indigenous to the land they inhabit, and opted instead for a flexible approach predicated on a pragmatic assessment of the human rights issues at stake.[173] However, for a people to be considered *indigenous*, three elements must generally be satisfied: (a) self-identification as such a group, (b) dependence on the land and natural resources on which they reside for their survival, and (c) evidence of sustained marginalisation, discrimination, subjugation or exclusion.[174]

[170] African Commission 'Press statement of the African Commission on Human and Peoples' Rights on the human rights of mine workers and mining affected communities during the COVID-19 pandemic in South Africa' (7 May 2020) <https://www.achpr.org/pressrelease/detail?id=502> (accessed 21 September 2020).

[171] African Commission 'Press statement of the African Commission on Human and Peoples' Rights on the death of 43 artisanal miners in a mine collapse in the DRC' 29 July 2019 <https://www.achpr.org/pressrelease/detail?id=431> (accessed 22 September 2020).

[172] African Commission 'Resolution 51(XXVIII)2000: Resolution on the rights of indigenous peoples' Communities in Africa' (2000) paras 1-5 28th Ordinary Session 23rd October-6th November 2000 Cotonou, Benin.

[173] African Commission 'Working Group on Indigenous Populations/Communities and Minorities in Africa' <https://www.achpr.org/specialmechanisms/detailmech?id=10> (accessed 22 September 2020).

[174] *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (2007) para 12 41st Ordinary Session May 2007 Accra, Ghana; African Commission & International Labour Organisation 'Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries' (2009) 5 <https://www.achpr.org/public/Document/file/Any/report_international_labour_org.pdf> (accessed 24 September 2020).

Within the context of protecting the rights of indigenous and marginalised resource-rich communities, the WGIP has been at the forefront of assessing the impact of extractive projects on the culture, life and welfare of such communities. In 2017, the WGIP conducted a study to assess the extent to which extractive corporations are held accountable for their adverse environmental, social and human rights impacts on the rights of indigenous and marginalised populations. The WGIP decried that indigenous people were being forcibly evicted from their territories and ancestral lands without proper consultation or their free, prior and informed consent (FPIC) to give way to the construction of infrastructural projects and the exploration of natural resources by extractive companies.[175] The study found that regardless of the nature of extractive operations, the locality or country concerned, 'extractive industries pose the greatest challenge to the land rights and survival of indigenous communities' culture and way of life in present day Africa.'[176]

The WGIP asserts that the absence of adequate normative and procedural guarantees against land dispossession, the deficit of laws to regulate egregious violations of human rights in the sector and the collaboration between state and business 'threatened the existence and survival of indigenous communities across Africa.'[177] More importantly, the study categorically reaffirms the responsibility of business enterprises to respect the international human rights of indigenous and marginalised resource-rich communities irrespective of whether the rights are expressly recognised by the governments concerned.[178] On the need for corporate accountability in the sector, it asserts the responsibility of business to

> [s]ubmit to independent and credible monitoring and ensure full transparency in all aspects of their operations, and especially ensure affected communities have full access to information in forms and languages they can understand.[179]

The study also called upon international financial institutions that finance extractive projects and infrastructure that may cause harm to indigenous populations to

[175] African Commission 'Extractive industries, land rights and indigenous populations'/Communities' Rights - East, Central and Southern Africa: Report of the African Commission's Working Group on Indigenous Populations/Communities' (2017) 8 <https://www.achpr.org/public/Document/file/English/report_on_extractive_industries_land_rights_and_indigenous_populations_communities_rights_eng.pdf> (accessed 24 September 2020).
[176] As above, 8.
[177] As above, 8.
[178] As above, 134.
[179] As above, 134.

establish grievance and accountability mechanisms for such communities and give trainings on how to use them.[180]

iii Working Group on Socio-economic Rights

An equally relevant special procedure of the Commission is the Working Group on Economic, Social and Cultural Rights in Africa (WGES). This group of experts was established in 2004 and has a mandate that applies to the extractive industries.[181] This has led to several meaningful normative and procedural achievements. Firstly, the WGES supervises the African Commission's studies and research on specific economic, social and cultural rights issues. Hence, in 2016, the WGES was co-commissioned with WGEI to undertake studies on climate change in Africa.[182]

Secondly, the WGES developed the Principles and Guidelines on Socio-Economic Rights. The Principles and Guidelines on Socio-Economic Rights is relevant to accountability in the extractive sector because it affirms the minimum core obligation of states to protect water sources from being contaminated by harmful substances and ensure the 'strict controls of the use and pollution of water resources' in the extractive industries in rural enclaves.[183]

Lastly, the WGES was also responsible for elaborating the current State Reporting Guidelines relating to Economic, Social and Cultural Rights 2011 (Tunis Reporting Guidelines). These Guidelines require state parties reporting under the African Charter and its supplementary protocols to report on the measures taken to promote and protect the right of individuals and local communities to water and sanitation, including actions taken to prevent, mitigate and remediate pollution by extractive corporations.[184] What this means is that state parties are expected to

[180] As above, 135.

[181] African Commission 'Resolution 73(XXXVI)2004: Resolution on economic, social and cultural rights in Africa' (2004) para 4 36th Ordinary session 23rd November-7th December 2004 Dakar, Senegal. Also see Pretoria Declaration on Economic, Social and Cultural Rights in Africa para (c)(i)(ii).

[182] African Commission 'Resolution 153(XLV1)2009 (n 110 above). Also see African Commission 'Resolution 262(LIV)2013: Resolution on Women's right to land and productive resources' (2013) preamble 54th Ordinary Session 22 October-5 November 2013 Banjul, The Gambia; African Commission Resolution 342(LVIII)2016 (n 147 above) para iii; African Commission 'Press release on the joint special mechanisms meeting between the Working Group on Extractive Industries, Environment and Human Rights in Africa and the Working Group on Economic, Social and Cultural Rights, Banjul, The Gambia' (2019) <https://www.achpr.org/pressrelease/detail?id=5> (accessed 3 September 2019).

[183] Principles and Guidelines on Socio-economic Rights para 92(n).

[184] Tunis Reporting Guidelines para I(iii)(c). Also see African Commission 'Guidelines on the Right to Water in Africa' (2019) paras 16.4, 29.4 & 39.3 26th Extra-Ordinary Session 16-30 July 2019 Banjul, The Gambia.

report on measures taken to regulate the use and pollution of water resources by oil, gas and mining companies and ensure their accountability for abuses.

The work of these three working groups overlaps and sometimes interact with the single mandates of special rapporteurs or committees in the pursuit of human rights accountability in the extractive industries. For instance, issues around the protection of human rights defenders addressed by the *Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa* or protection of persons living with HIV/AIDS in the extractive industries addressed by the *Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV* are directly correlated to the work of the working groups. [185]

(d) Missions and workshops

The African Commission conducts advocacy visits, fact-finding missions, sensitisation workshops, dialogues, seminars and country visits in fulfilment of its promotional and protective mandates. Through the work of its special procedures, it has conducted about a dozen missions to several African states to investigate abuses and promote the respect of rights in the extractive industries. It has also collaborated with state parties and CSOs in Africa to sensitise target groups on its mandates regarding the protection of people affected by mining, oil and gas activities.[186] From the DRC to Zambia, the Commission has undertaken various promotional and investigative missions to assess the impact of mining on individuals and local communities and advocated for the accountability of state and non-state actors in the sector.[187]

[185] African Commission 'Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa' <https://www.achpr.org/specialmechanisms/detail?id=4> (accessed 25 September 2020); African Commission 'Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV' <https://www.achpr.org/specialmechanisms/detail?id=15> (accessed 25 September 2020).

[186] See C Okoloise (1) 'African Mining Vision and the State Reporting Guidelines: Synergies and linkages' AND (2) 'How NGOs can use the Guidelines – A tool for advocacy' presented by this author on the invitation of the African Commission at the Zimbabwe Environmental Lawyers' Association's Sensitisation Workshop for the Southern African Development Community on the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Environment and Human Rights, held on 30 August 2019 Johannesburg, South Africa. Also see African Commission 'Newsletter of the Working Group on Extractive Industries, Environment and Human Rights' (2019) 3 <https://www.achpr.org/public/Document/file/English/WGEI%20Newsletter%20Issue%202_October_2019_ENG.pdf> (accessed 25 September 2020).

[187] African Commission 'Press release on the advocacy visit of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to the Republic of Niger' 9-10 December 2019 <https://www.achpr.org/pressrelease/detail?id=468> (accessed 25 September 2020); African Commission 'Press statement at the conclusion of the promotion mission of the African

In its missions to Ethiopia, Nigeria, South Africa, and Zambia, the Commission has categorically emphasised the need for the respective governments of these countries to adopt laws and policies that hold corporate actors to account and ensure strong enforcement of environmental and transparency standards in the extractive sector.[188] While these engagements are laudable, the active direct engagement with businesses during such meetings remains a blind spot in these missions. Only actively engaging state organs and CSOs while leaving out businesses, its workshops and missions have improperly isolated critical businesses from the discourse of accountability in the extractive sector. This needs to be addressed.

(e) Resolutions, guidelines, general comments, and model laws

Some of the Commission's most utilised modes of elaborating on the rights and freedoms enshrined in African human rights instruments and the correlative obligations they create for state and non-state actors are thematic resolutions, guidelines, principles, general comments and model laws. These modes of formulating authoritative legal rules have been used to elaborate in great detail particular substantive rights and define the obligations of actors in that respect. For example, the Commission has used general comments to offer clarity on the nature and scope of particular substantive rights and the consequential obligations arising from a single provision of an African human rights instrument. Model laws, however, are now being used by the Commission to provide a minimum law-making template upon which states can base their national legislation.[189]

Each of these means of enunciating authoritative principles and elaborating standards is relevant to the corporate accountability discourse at the regional level because such normative declarations have a direct application to rightsholders and duty-bearers in Africa. The Commission's SRGPs, general comments and principles

Commission on Human and Peoples' Rights to the Kingdom of Swaziland' 11 March 2016 <https://www.achpr.org/pressrelease/detail?id=142> (accessed 25 September 2020).

[188] African Commission 'Communique on the advocacy visit of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa to the Federal Democratic Republic of Ethiopia' 23 December 2019 <https://www.achpr.org/pressrelease/detail?id=471> (accessed 25 September 2020); African Commission 'Press statement at the conclusion of the promotion mission of the African Commission on Human and Peoples' Rights to the Federal Republic of Nigeria' 2 December 2016 <https://www.achpr.org/pressrelease/detail?id=107> (accessed 25 September 2020); African Commission 'Press release on the promotion mission to the Republic of South Africa' 24 August 2018 <https://www.achpr.org/pressrelease/detail?id=29> (accessed 25 September 2020); African Commission 'Press statement on the research and information mission of the African Commission Working Group on Extractive Industries, Environment and Human Rights in the Republic of Zambia' 27 January 2014 <https://www.achpr.org/pressrelease/detail?id=233> (accessed 25 September 2020).

[189] See, for example, the Model Law on Access to Information for Africa 2013; African Charter 45(1)(b).

considered above, and the several resolutions relevant to the extractive industries highlight the importance of clarifying the implied obligations of corporations in African human rights instruments. More so, the ability of the Commission to design model laws is particularly useful for addressing the dilemma that African governments face with respect to defining through regulation the environmental and human rights responsibilities of private commercial actors in international investment agreements and domestic legislation.

6.3.2 The African Committee of Experts on the Rights and Welfare of the Child

Like the African Commission, the African Children's Committee has a three-fold mandate: to promote and protect children's rights and welfare, monitor state party implementation, and interpret the provisions of the African Children's Charter. By the tenor of this mandate, the Committee is first and foremost responsible for safeguarding the fundamental rights and freedoms of children and ensuring that their welfare and best interest are adequately protected, in the 49 African countries that have ratified the African Children's Charter.[190] This function is supported by the responsibility to monitor compliance by state (and non-state actors) with international and regional standards on children's rights, and enunciate principles of law and standards that elaborate on the substantive rights enshrined in the African Children's Charter.

The Committee carries out these responsibilities through a state reporting process for children's rights, a complaints procedure, special procedures, missions and declaratory resolutions. I argue that these monitoring and compliance avenues offer an equally veritable platform for addressing the menaces of child labour, slavery, prostitution, exploitation and exposure to industrial hazards which often occur in extractive industries.

(a) State reporting

Under the African Children's Charter, state parties have an obligation to submit periodic reports to the African Children's Committee every three years.[191] Reports submitted are required to contain sufficient information to afford the Committee a

[190] African Children's Committee 'Ratifications table: Lis of countries which have signed, ratified/acceded to the African Charter on the Rights and Welfare of the Child' (2020) <https://www.acerwc.africa/ratifications-table/> (accessed 24 October 2020).

[191] African Children's Charter art 43(1)(b); J Sloth-Nielsen 'Regional frameworks for safeguarding children: The role of the African Committee of Experts on the Rights and Welfare of the Child' (2014) 3 *Social Sciences* 948 953-954.

full understanding of a state party's implementation of the Children's Charter, including the issues and challenges impeding the fulfilment of the state's obligations.[192] This process allows the Committee to consider the impact of state and non-state actors on the realisation of children's rights. Within the context of the numerous reports of child labour and exploitation in the extractive industries, the state reporting process affords the African Children's Committee a unique opportunity to assess the implementation of the provisions of the Children's Charter, by considering the quality of domestic legislation, regulations, policies, remedies and administrative enforcements in relation to child rights.[193]

The reporting process is quite useful for the indirect accountability of corporate actors engaged in the extractive industries for child-related abuses. This is particularly so because the Committee's ability to review domestic laws and institutional measures taken by state parties, and make recommendations puts pressure on state parties to adopt children's rights-friendly laws and regulatory actions that secure the rights of children and promote responsible business practices down the production and supply chains. Anticipated periodic reporting also increases the odds of a self-awareness on the part of states that can lead to the adoption of domestic rules enforcing mandatory corporate reports on the due diligence measures taken to prevent child exploitation and abuses in their production and supply chains.[194] The impact of that is potentially the gradual institutionalisation of due diligence practices in the production and supply processes and the accountability of corporate entities.

However, for that to happen, it is expected that the African Children's Committee will borrow a leaf from the African Commission by adopting fresh state reporting guidelines or amending the existing reporting guidelines to require state parties to report on the measures adopted to prevent or mitigate child abuse or exploitation in the extractive industries. The necessity for this is even more pressing

[192] African Children's Charter art 43(2)(a)(b).

[193] BD Mezmur & J Sloth-Nielsen 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596 602; BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update: Recent developments' (2006) 6 *African Human Rights Law Journal* 549 558-562; A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *The International Journal of Children's Rights* 179-198; L Wakefield & UM Assim 'Dawn of a new decade? The 16th and 17th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2011) 11 *African Human Rights Law Journal* 699-720.

[194] Viljoen (n 27 above) 350; Mezmur (n 193 above) 559.

because at the moment there is no such provision in the guidelines for state party reporting and CSOs' complementary reports under the African Children's Charter.[195]

(b) Communication procedure

The African Children's Committee also functions as a continental adjudicatory body for allegations of children's rights abuses. Under the Children's Charter, it is empowered to receive communications from 'any person, group or non-governmental organisation' recognised by the AU, a state party or the UN relating to any issue covered by the Charter. This ensures that children or interested parties may pursue claims against a state party or parties on whose territory children's rights have been violated for the failure to adopt adequate laws or necessary enforcement measures to protect them.

The Committee's communication procedure is a great way to bend the hands of African governments to take adequate regulatory action to enforce the responsible conduct and accountability of companies for child rights abuses. In two decided cases, the Committee affirmed the indirect liability of state parties for the failure to exercise due diligence to curtail the abusive acts of private actors. In the *Talibés* case, the applicants claimed that the respondent state, Senegal, was responsible for violations of various articles of the African Children's Charter for failing to prevent the abuse and exploitation of children by Senegalese Islamic teachers. The Committee held that a state may be held accountable or otherwise complicit for acquiescing or consenting to the impermissible acts and violations undertaken by private actors.[196] It declared that

> a State Party has the obligation to ensure the consideration of the best interest of the child in all actions taken by "any person" or authority affecting the life of the child. In this context, "any person" is broadly interpreted and entails that[sic] the principle of the best interest of the child must be applied in all actions concerning children, regardless whether those actions are undertaken by private or public entities.[197]

Similarly, in the *Hansungule* case, the Committee held that the protection of children's rights should not only lead to the welfare and wellbeing of children, but

[195] African Children's Committee 'Reporting Guidelines' <https://www.acerwc.africa/initial-reports-guidelines/> (accessed 30 September 2020); African Children's Committee Guidelines on the form and content of Periodic State Party Reports to be submitted pursuant to Article 43(1)(b) of the African Charter on the Rights and Welfare of the Child 2020; African Children's Committee Civil society organizations, complementary report, conduct and participation of CSOS in ACERWC pre-session Guidelines 2012.

[196] *Talibés* case (n 88 above) paras 66, 80.

[197] *Talibés* case (n 88 above) para 35.

also 'promote and improve the lived reality of children on the ground.'[198] For this reason, the Committee found that the due diligence obligation of the Ugandan government included the obligation to provide reparations to child victims even for substantive violations originating from private actors such as the LRA.[199]

These jurisprudential developments fundamentally highlight the essence of the Committee's communication procedure to preventing and remedying child rights abuse in the extractive industries. With particular respect to corporations and child exploitation in the sector, the communication procedure can prove to be a useful platform for recommending specific legislative and administrative measures towards addressing child labour, child prostitution, child harm and child trafficking issues in the sector. In 2016, the Committee's communication procedure proved effective in bending the hands of Malawi to take more decisive action against a repugnant provision in the latter's constitution that permitted child marriage with parental consent, after a communication was file by the IHRDA. In the case of *IHRDA v Malawi* (*Child marriage* case),[200] Malawi opted for an amicable resolution of the matter to avoid negative press coverage and immediately undertook constitutional changes to rectify the contravening section 22(6) of the Constitution of the Republic of Malawi 1994. In the same way, the communication procedure can be strategically used by victims and public interest litigants to sway state actions that instigate legal reforms to protect children's rights in the extractive sector.

(c) Special procedures

Based on the authority to draw up its own rules and deploy any appropriate method of human rights investigations, the African Children's Committee has established several special mechanisms to fulfil specific tasks.[201] Under the revised Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child 2015 (Rules of Procedure of the African Children's Committee), the Committee may set up specific mechanisms manned by individual members or group of members with responsibility for the preparation of its sessions and the execution of special studies, projects and programmes.[202]

[198] *Hansungule* case (n 92 above) para 38.
[199] *Hansungule* case (n 92 above) para 51.
[200] A Smaak 'Malawi amends Constitution to remove child marriage loophole' 23 February 2017 <https://www.hrw.org/news/2017/02/23/malawi-amends-constitution-remove-child-marriage-loophole> (accessed 8 October 2020).
[201] African Children's Charter arts 38(1) & 45(1).
[202] Rules of Procedure of the African Children's Committee rule 58.

There are currently nine thematic special rapporteurs with cross-cutting mandates and three recently established working groups.[203] While the various thematic and country rapporteurs are naturally expected to address some of the pressing issues affecting children in the extractive industries such as armed conflict, environmental pollution and project-induced displacement already covered by their mandates,[204] the establishment of specific working groups on children's rights and business, children's rights and climate change, and the implementation of the Committee's recommendations are particularly relevant to the discourse on the environmental and social impacts of business in the sector.[205] The working groups provide a platform for enriching the technical capacity of the Committee to examine the adverse impacts of business on children's rights, set standards, and engage states, NHRIs, CSOs and other local and international stakeholders on business and human rights issues.[206]

(d) Missions

As part of its mandate, the Committee or its special mechanisms may undertake country visits and investigative missions to state parties.[207] Such missions present a valuable opportunity for the Committee to assess the situation of children's rights and welfare in the state concerned. They also present the avenue to evaluate allegations of child exploitation or child labour by companies in resource-dependent countries, and press the government concerned on adopting and enforcing relevant laws targeted at the protection of children and the accountability of state and non-state actors implicated in violations.

Under the Committee's guidelines for conducting investigative mission, missions are intended to 'conduct in-depth and impartial investigations' on

[203] African Children's Committee 'About special rapporteurs' <https://www.acerwc.africa/about/> (accessed 3 October 2020); African Children's Committee 'Terms of reference for country and thematic rapporteurs of the ACERWC' (2019) <https://www.acerwc.africa/wp-content/uploads/2019/10/ToR_establishing_the_Offices_of_rapportuers_of_the_ACERWC.pdf> (accessed 3 October 2020); African Children's Committee 'Working Groups: ACERWC establishes Working Groups under its special mechanisms' (2020) <https://www.acerwc.africa/working-groups/> (accessed 3 October 2020).

[204] As above.

[205] African Children's Committee 'Resolution on the establishment of a Working Group on Implementation of Decisions and Recommendations' (2020) <https://www.acerwc.africa/working-groups/> (accessed 3 October 2020).

[206] African Children's Committee Standard of operating procedures for Working Groups as Special Mechanisms within the African Committee of Experts on the Rights and Welfare of the Child 2020 para II (a)-(g).

[207] African Children's Charter art 45.

allegations of children's rights violations.[208] In doing so, the Committee's investigative mission may meet public and private organisations, the media, non-governmental organisations (NGOs), witnesses, those responsible for victimized children and their families, and the appropriate implementation and monitoring body or bodies responsible for children or the human rights of children in a particular country. Although its recommendations are primarily addressed to the state party concerned, such recommendations will 'also be sent to other public and private institutions responsible for the monitoring and implementation of the rights of the child recognized in the Charter.'[209] Given this, it is arguable that private entities with obligations to respect children's rights or responsible for their violations may be attributed specific responsibilities in implementing the Committee's recommendations.

So far, the Committee has undertaken three of such investigative missions to Tanzania, South Sudan and Central African Republic with no clear linkages to the extractive industries.[210] However, in future, it is expected that the Committee will open the focus of such interventions to include the violation of children's rights in the sector.

(e) Resolutions, guidelines, general comments, and model laws

One of the institutional value propositions of the Committee is its ability to formulate rules and lay down principles for the protection of children's rights in Africa.[211] In fulfilment of this function, it has adopted resolutions, guidelines and general comments enunciating or elaborating on the provisions of the African Children's Charter. For instance, as already pointed out above, the Committee's General Comment 5 and the General Comment on article 22 of the African Children's Charter both importantly enunciate the human rights responsibilities of business towards children generally or those impacted by conflict.[212] These normative inroads on the obligations of business for children's rights provides a blueprint for the further

[208] African Children's Committee 'Guidelines on the conduct of investigations by the African Committee of Experts on the Rights and Welfare of the Child' (2018) arts 15(3) & 23(2) <https://www.acerwc.africa/wp-content/uploads/2018/07/ACERWC_Guidelines_on_Investigation.pdf> (accessed 5 October 2020).

[209] See para 2(ii) and (iv) of the Terms of Reference attached to the Guidelines on the conduct of investigations by the African Committee of Experts on the Rights and Welfare of the Child above.

[210] African Children's Committee 'Missions/country visits' <https://www.acerwc.africa/missions-country-visits/> (accessed 5 October 2020).

[211] African Children's Charter 42(a)(ii).

[212] African Children's Committee's General Comment 5 (n 89 above) para 11; African Children's Committee's General Comment on article 22 (n 90 above) para 76.

development of standards of corporate accountability for children's rights violations in the extractive sector.

6.3.3 The African Court on Human and Peoples' Rights

The African Court was established to complement the protective mandate of the African Commission.[213] It is invested with jurisdiction to hear all cases pertaining to the interpretation and application of the African Charter, its supplementary protocols and any other human rights instrument(s) ratified by the state involved. It also has the competence to determine whether it has jurisdiction.[214] The Court has the power to make binding decisions involving state parties to the African Court Protocol.[215] This point is germane in the light of the criticisms that have often characterised the quasi-judicial nature of the African Commission and the African Children's Committee.[216] The Court can deliver mandatory provisional and judicial orders in cases filed against state parties, which the latter are bound to carry out in their territories. Additionally, AU member states, the AU or any of its organs, or any African organisation recognised by the AU may request the advisory opinion of the Court 'on any matter relating to the Charter or any other relevant human rights instruments', if such matter is not already pending before the African Commission.[217]

In the context of abuses occurring in the extractive industries of state parties, the African Court offers a unique institutional proposition for providing remedies and driving accountability in two ways – by providing complementary protection and guaranteeing access to justice.

(a) The Court's complementary protection of victims

By virtue of the concurrent protective mandate of the African Commission and the Court, both institutions agree to harmonise their rules and meet at least once a year or as often as necessary in order to eschew conflict and ensure coherence in the execution of their protective mandates.[218] The revised Rules of Procedure of the African Commission 2020 allows the Commission to submit communications pending before it to the Court for adjudication with the consent of the applicant(s), where it is in the interest of justice to do so or where a state fails or is unwilling to comply

[213] African Court Protocol art 2.
[214] African Court Protocol art 3.
[215] African Court Protocol arts 28(2) & 30.
[216] ST Ebobrah 'Towards a positive application of complementarity in the African human rights system: Issues of functions and relations' (2011) 22 *The European Journal of International Law* 663 672.
[217] African Court Protocol art 4(1).
[218] Rules of Court 2020 rule 38.

with provisional measures or recommendations issued by the Commission.[219] Similarly, under the revised Rules of Court 2020, the Court can of its own volition transfer cases over which it is seized to the Commission where it considers that it is appropriate to do so.[220]

This complementary relationship is fundamentally relevant to the victims' quest for accountability and justice for abuses in extractive industries. This is especially so because it allows for the transformation of seemingly 'unenforceable' legal principles into enforceable ones. I will explain. The African Commission is generally considered a toothless bulldog due to its quasi-judicial character and non-binding decision-making powers.[221] Whether this is correct is a matter of debate. However, while the Commission's quasi-judicial character does not affect its normative and institutional authority to formulate binding legal principles and rules for state parties, the weak implementation of such rules has been largely due to the widespread perception among state parties and scholars that it lacks any binding authority to compel state action.

Here, I argue that the Court is well positioned to correct this perceptive anomaly by giving binding judicial toga to standards, legal principles and jurisprudence formulated by the Commission, which were otherwise perceived as non-binding. In essence, principles of law formulated in the Commission's declarations, resolutions, general comments, and decisions on communications with respect to the obligations of public and private actors for human rights violations in the extractive industries will ultimately find their way to the decisions of the Court in a way that compels state action.

Already, in a number of decisions, the African Court has consistently relied on principles of law enunciated in over three decades of Commission jurisprudence in its interpretation of the African Charter.[222] In the *Ogiek* case, the Court relied on the African Commission's formulated criteria for identifying indigenous populations espoused in the latter's Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples.[223] The Court also relied on the African Commission's

[219] Rules of Procedure of the African Commission 2020 rule 128(1)(2).
[220] Rules of Court 2020 rule 34.
[221] Okoloise (n 139 above) 29; Udombana (n 9 above) 63; F Viljoen 'A human rights court for Africa and Africans' (2005) 30 *Brook Journal of International Law* 1 13.
[222] *Ogiek* case (n 157 above) para 153; App No 003/2015 *Kennedy Owino Onyachi and Others v Tanzania* 28 September 2017 paras 131, 134.
[223] *Ogiek* (n 157 above) para 105.

decision in the *Endorois* case to the effect that largescale developmental programmes and the economic activities of other dominate groups even more necessitate the protection of indigenous peoples from being extinct as a distinct group.[224]

This synergy and cross-pollination of ideas between both institutions hold a lot of promise for the development of African human rights jurisprudence and the protection of individuals and communities affected by extractive industries.

(b) Access to the Court

'Access' is defined as the competence to approach the African Court to seek redress or an advisory opinion, be represented personally or by a legal representative as a victim or respondent before the Court or contribute to court proceedings as *amicus curiae*.[225] Under the African Court Protocol, there are three different modes of gaining access to the court. These are: access as of right, access upon a formal request to be joined in a case as a party, and access subject to a declaration by a state party. Litigants or victims generally have no access to the Court through the third mode where a state party has not made the necessary declaration.[226]

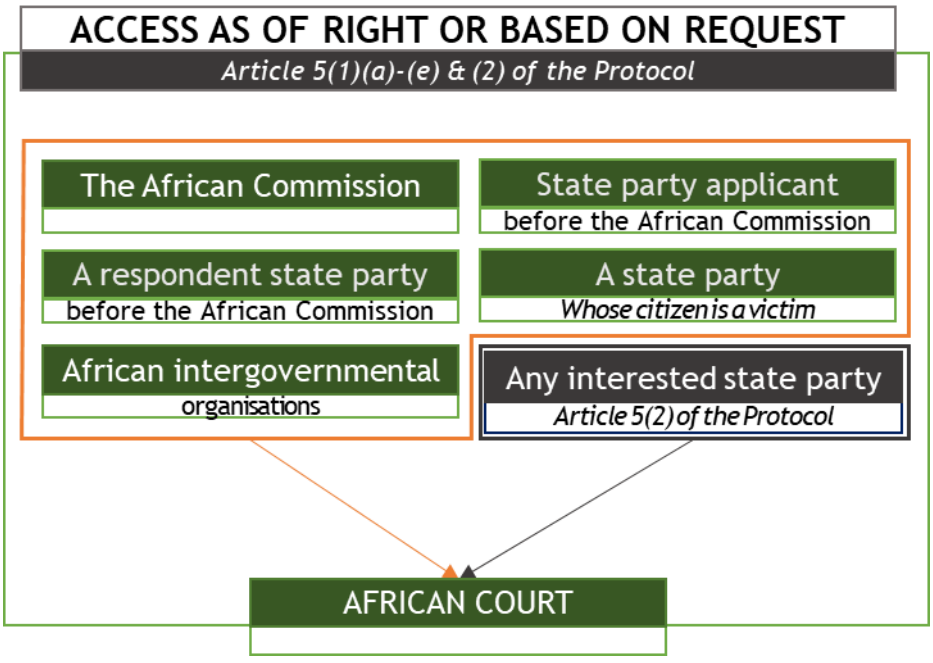

Figure 6-1: Access to the African Court as of rights or based on request.

[224] As above, para 180.
[225] F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International & Comparative Law Quarterly* 63 64.
[226] TF Yerima 'Comparative evaluation of the challenges of African Regional Human Rights Courts' (2011) 4 *Journal of Politics and Law* 120 123-124.

With respect to the first mode, only five categories of litigants can submit cases to the Court as of right. These are the African Commission, the state party which has submitted a communication to the African Commission, the state party against which a communication has been submitted at the African Commission, the State Party whose national is a victim of human rights violation, and African intergovernmental organisations.[227] Where a case is already pending before the Court, any interested state party may seek access using the second mode by applying to the Court for the purpose of being joined as a party (see Figure 6-1 above illustrating how this works).[228]

The third mode of access applies to NGOs with observer status and individuals, who are victims or representative of victims of human rights abuses. Under this mode, NGOs and individual litigants have two types of access to the Court – indirect and direct access.

i Indirect access

Generally, victims have no direct access to the Court against a state party that has only ratified the Court's Protocol. This includes victims of corporate human rights and environmental abuses arising from the territory of a state party. However, such victims may gain indirect access to the Court by first submitting a communication to the African Commission that has satisfied the requirement of local remedies and other conditions for admissibility under the African Charter. Thereafter, the Commission can (of its own volition or upon request by the applicants) submit a case before the Court under article 5(1)(a) of the African Court Protocol.[229] The legal consequence of such a submission is that the victims would be able to pursue binding provisional measures or final orders of the Court to prevent or remedy violations by private third parties in the state party concerned. The protective essence of this indirect access in the prevention of violations in the extractive industries cannot be over emphasised.

In the *Ogiek* case, the African Commission lodged the complaint against Kenya pursuant to article 5(1)(a) of the African Court Protocol. The case was brought in order to obtain provisional measures to halt the arbitrary eviction of the Ogiek

[227] African Court Protocol art 5(1)(a)-(e).
[228] African Court Protocol art 5(2).
[229] Rules of Procedure of the African Commission Rules 130 & 132; Centre for Human Rights *A guide to the African human rights system* (2016) 45-46.

community from the Mau forest in Kenya. Kenya objected to the case on the ground that it had not made an article 34(6) declaration authorising individuals and NGOs to bring direct claims before the court. And that, even though the instant case was instituted by the Commission, it originated from individuals and NGOs from Kenya. The African Court disagreed, holding that:

> pursuant to article 5(1)(a) of the Protocol, the African Commission is the legal entity recognised before this Court as an Applicant and is entitled to bring this Application. Since the Commission, rather than the original complainants before the Commission, is the Applicant before this Court, the latter need not concern itself with the identity of the original complainants before the Commission in determining the admissibility of the communication.[230]

It is pertinent to note that although the African Commission can institute claims on behalf of victims to grant indirect access to the Court, the African Children's Committee cannot do the same on behalf of child victims. In an advisory opinion delivered by the Court in 2014 on whether the African Children's Committee is an 'African intergovernmental organisation' within the meaning of the African Court Protocol, the Court held that 'the Committee cannot bring cases to the Court alleging violations of human or children's rights under article 5(1)(e) of the African Court Protocol in the capacity of an "intergovernmental" organisation.'[231] This suggests that until the Protocol on the Statute of the African Court of Justice and Human Rights 2008 (which grants the Committee access) comes in force, the Committee will have no right of direct access before the Court. However, it is suggested that the Committee may proceed indirectly to the Court to pursue a claim against a state party through the African Commission like any other victim or interested party.[232] See Figure 6-2 below illustrating how victim access works.

ii Direct access

Individuals and NGOs with observer status before the African Commission may approach the African Court directly where two conditions are met. First, the state against which they intend to proceed must have ratified the African Charter, the African Court Protocol and any other relevant human rights instruments upon which an allegation is based. Second, the state party concerned must have made an express declaration under article 34(6) of the African Court Protocol accepting the

[230] *Ogiek* case (n 157 above) para 88.
[231] Request 002/2013 *Requests for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights* (5 December 2014) para 74.
[232] Viljoen (n 225 above) 84-86.

competence of the Court to receive petitions from NGOs and individuals under article 5(3) of the Protocol.[233] Where a state party has made the declaration, victims have direct access to the Court to institute and maintain claims of human rights violations and seek judicial reliefs that are targeted at states and abusive corporations domestically.

As of 15 September 2020, there were 30 state party ratifications and only ten countries had made a declaration under article 34(6).[234] However, it is noteworthy that since 2016 when Rwanda unfortunately withdrew its article 34(6) declaration, Tanzania, Benin and Côte d'Ivoire have followed suit; thereby preventing individuals and NGOs from directly accessing the Court in relation to these countries.[235]

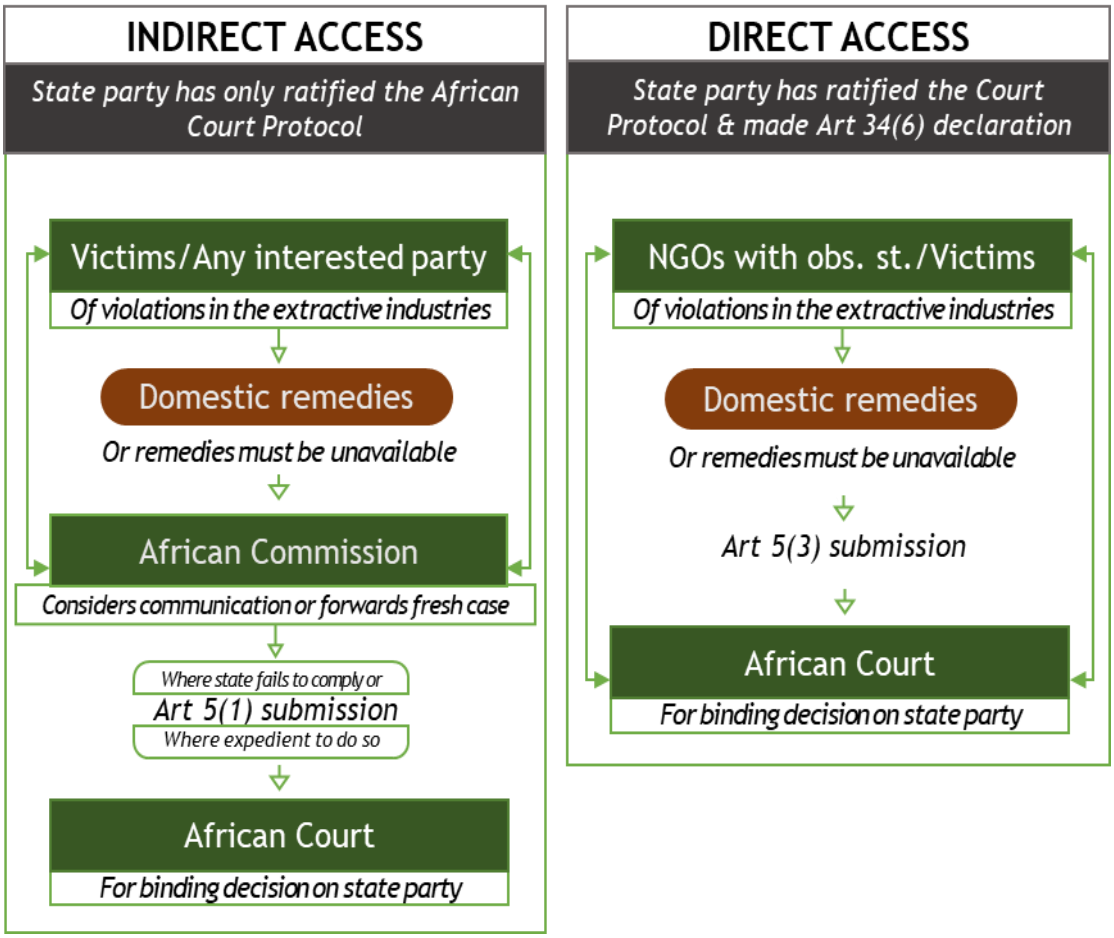

Figure 6-2: Indirect and direct access to the African Court.

6.3.4 The future African Court and direct corporate liability

The African human rights system will be incomplete unless its procedural rules are unrestrictedly applied to all categories of violators. Corporate entities, as legally

[233] As above, 67-71.
[234] The countries that have made a declaration are - Benin, Burkina Faso, Cote D'Ivoire, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania, Tunisia.
[235] African Court 'Declarations entered by member states' <https://en.african-court.org/index.php/basic-documents/declaration-featured-articles-2> (accessed 15 October 2020).

recognized persons at law, should be reasonably subject to the same normative stipulations and penal consequences of law as individuals. While the African Commission, the African Children's Committee and the African Court offer a measure of accountability in the extractive sector at the regional level, they remain constrained in their ability to directly hold businesses procedurally responsible for human rights abuses. Several scholars have decried that the propensity for TNCs to do just about anything to access Africa's natural resource wealth fuels conflicts and gross human rights violations in ways that are not adequately captured and addressed by the prevailing trends in international criminal law.[236] This highlights the weakness of the Westphalian system of international law that unduly places reliance on state structures (even where structurally weak), and necessitates a reformation of the state-centric system and procedure of liability for violations of international law.

To forge a regional system with a comprehensive jurisdictional outlook is often not without its controversies. Yet, the AU has dared to bring such a system into being – albeit in a somewhat choppy manner. In 2000, the AU's creation of a Court of Justice barely two years after the OAU's establishment of the African Court [on Human and Peoples' Rights] saw a needless and untidy duplication of judicial organs for the continent.[237] These spurred calls for the amalgamation of both courts into a single continental judicial body for Union affairs and human rights. To fuse both courts, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights 2008 (Protocol on the AU Court), and its annexure, the Statute of the African Court of Justice and Human Rights 2008 (Statute of the AU Court). However, with subpar consultations and weak oversight marking these initial drafts coupled with the outrage against the International Criminal Court's singular focus on

[236] KM Clarke, CC Jalloh, & VO Nmehielle 'Introduction: Origins and issues of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and People's Rights in context: Development and Challenges* (2019) 1 26-27; T Michalakea 'Article 46C of the Malabo Protocol: A contextually tailored approach to corporate criminal liability and its contours' (2018) 7 *International Human Rights Law Review* 225-248; M Sirleaf 'The African Justice cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 71 76; P Ambach 'International criminal responsibility of transnational corporate actors doing business in zones of armed conflict' in F Baetens (ed) *Investment law within international law: Integrationist perspectives* (2013) 51 65-66.

[237] Constitutive Act art 5(1)(d); AU Protocol of the Court of Justice of the African Union 2003 art 2 [with just 45 signatures and 19 ratifications as of 20 October 2020].

Africa, the AU resolved to make further amendments to the Protocol of the AU Court and its annexed Statute.[238]

The result was the adoption in 2014 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) and its annexure, the amended Statute of the African Court of Justice and Human Rights and Peoples' (Amended Statute). The events that chronicled that major normative reach has been controversial, despite its underlying desirability. However, by December 2020, neither the Protocol to the AU Court and its annexed Statute nor the Malabo Protocol and its annexed amended Statute have come into force as neither instrument has garnered the minimum required ratifications to bring it into operation.[239]

(a) Corporations as subjects of direct criminal liability in AU law

By far the most transformative strides of the Malabo Protocol and its annexed amended Statute is not merely the fusion of the African Court. It is the addition of the International Criminal Law Section to adjudicate over international and transnational organised crimes, and the formal recognition in regional law that corporations can procedurally be subject of international criminal liability before an international tribunal.[240] While still gaining traction in domestic systems and largely a subject of intense debate at the global level,[241] the adoption of corporate criminal responsibility in the African regional corpus is explained by the devastating impacts of corporate misbehaviour often with no accountability.

The recognition of corporate criminal liability makes a significant advancement and marks a dramatic shift in its conceptualisation in international criminal law.[242] It, in a tremendous way, overcomes the hurdles of desirability and compromise, that defeated its inclusion in the Rome Statute of the International

[238] AU Assembly 'Decision on the implementation of the Assembly Decision on the abuse of the principle of universal jurisdiction Doc. Assembly/AU/3(XII)' Assembly/AU/Dec.213(XII) para 9 12th Ordinary Session 1-3 February 2009 Addis Ababa, Ethiopia.

[239] African Union 'Human rights treaties' <https://au.int/en/treaties/1164> (accessed 21 October 2020). Not a single state has ratified the Malabo Protocol.

[240] H Van der Wilt 'Expanding criminal responsibility in transnational and international organised crime' (2016) 4 *Groningen Journal of International Law* 1 8; CB Murungu 'Towards a criminal chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1067 1085-1088.

[241] AO Nwafor 'Corporate criminal responsibility: A comparative analysis' (2013) 57 *Journal of African Law* 81-107; H van der Wilt 'Corporate criminal responsibility for international crimes: exploring the possibilities' (2013) 12 *Chinese Journal of International Law* 43-77.

[242] Sirleaf (n 236 above) 77; Ambach (n 236 above) 66.

Criminal Court 1998, in the UN Code of Conduct for Transnational Corporations 1987 and the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to Human Rights 2003, respectively.[243] Its entrenchment in regional law - a segment of the international law hierarchy - torches any potential ideological disagreements at the regional level on the procedural accountability of corporations before an international tribunal.[244] Stamping out such conflations, its normative prescription in treaty form sets the tone for developing objective scholarly thought on the direct *enforcement* of international criminal rules against corporations.

When operational, corporations will be amenable to the jurisdiction of the fused Court as defendants or, more appropriately, accused parties in charges alleging international crimes and egregious human rights violations. The rationale for attributing direct liability to corporate entities is based on the notion that it is illogical to confer rights on legal entities under international law while equally permitting them to 'circumvent responsibility for the most egregious abuses of that same body of law.'[245] In the past, military, political leaders and business officials have been successfully prosecuted in their personal capacity under international criminal law, while their business accomplices have remained unjustifiably exempt from prosecution and punishment.[246]

The Malabo Protocol and its annexed amended Statute confers original and appellate jurisdiction on the fused Court over legal persons involved in international and transnational organised crimes.[247] Notably, article 28A of the amended Statute empowers the Court to try 'persons', among other things, for crimes against humanity, war crimes, *corruption, money laundering, trafficking in hazardous wastes,* and *illicit exploitation of natural resources*. In the interpretation clause, the amended Statute defines 'person' as 'a natural or legal person'.[248] The Court's

[243] N Bernaz 'Corporate criminal liability under international law: The New TV SAL and Akhubar Bierut SAL cases in the Special Tribunal for Lebanon' (2015) 13 *Oxford Journal of International Criminal Justice* 313 318.
[244] Ambach (n 236 above) 66-67.
[245] R Slye 'Corporations, veils, and international criminal liability' (2008) 33 *Brook Journal of International Law* 955 959.
[246] C Meloni 'Modes of responsibility (article 28N), individual criminal responsibility (article 46B) and corporate criminal liability (article 46C)' in G Werle & M Vormbaum (eds) *The African Court: A commentary on the Malabo Protocol* (2017) 139 152; V Nerlich 'Core crimes and transnational business corporations' (2010) *8 Journal of International Criminal Justice* 895 896.
[247] Amended Statute arts 28B-28D, 28E-28L*Bis*; Van der Wilt (n 240 above) 8.
[248] Amended Statute art 1.

jurisdiction over legal persons completely resolves the question of whether corporations are subjects of accountability before a regional tribunal.

However, it needs to be acknowledged that the Court's exercise of jurisdiction will be based on the principle of subsidiarity, which suggests that any prosecution of a corporation for an international crime must ordinarily differ to national or sub-regional courts as forums of first instance.[249]

(b) Legal implication of direct corporate liability for international crimes

Should the Court come into fruition, the implication of directly holding corporations criminally accountable may be far-reaching. In instances of corporate complicity in state-sponsored crimes committed against resource-rich communities as was the case with Shell in the Niger Delta region, Talisman Energy in Sudan and Anvil Mining in the DRC, the future Court will offer a procedural pathway for victims to bring proceedings directly against both the individual(s) responsible for the international criminal conduct and the corporate entity itself. Considering that the Court will have jurisdiction over state parties in Africa, procedural hurdles such as *forum non-conveniens* and jurisdictional challenges that are often prevalent in home-country litigations would be significantly reduced.[250]

Overall, the impact of the Malabo Protocol and its amended Statute on the operations of the Court remains largely unclear for a number of reasons.[251] First, there is a risk that the lack of continent-wide national recognition of corporate criminal liability may complicate its application and enforcement.[252] Even in countries where corporate criminal liability does exist, differences in legal approaches and systems across Africa including in the proof of guilt make

[249] Amended Statute art 46H. See also the African Commission's decision on the limits of the principle of subsidiarity in *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) paras 50, 51, 53; S Nimigan 'The Malabo Protocol, the ICC, and the idea of "regional complementarity"' (2019) 17 *Journal of International Criminal Justice* 1005-1029.

[250] F Jeßberger 'Corporate involvement in slavery and criminal responsibility under international law' (2016) 14 *Journal of International Criminal Justice* 327 338.

[251] O Abe & A Ordor 'Addressing human rights concerns in the extractive resource industry in Sub-Saharan Africa using the lens of article 46 (C) of the Malabo Protocol' (2018) 11 *Law and Development Review* 843-878.

[252] J Kyriakakis 'Article 46C: Corporate criminal liability at the African Criminal Court' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and People's Rights in context: Development and Challenges* (2019) 793. See also the number of countries in which the corporate criminal responsibility concept may be found: Botswana (Penal Code 1964 sec 24); Ethiopia (Criminal Code 2004 art 34); Ghana (Criminal Procedure Code 1960 sec 192); Kenya (Penal Code 1930 sec 23); Nigeria (Companies and Allied Matters Act 2020 sec 79); South Africa (Criminal Procedure Act 1977 sec 332); Zambia (Penal Code Act 1950 sec 26(3)); Zimbabwe (Criminal Law (Codification and Reform) Act 2004 sec 277).

convergences an importantly concerning issue. Second, the breadth of crimes over which the International Criminal Law Section of the future Court has jurisdiction expands over and above the traditional *international* and *transnational* organised crimes that international tribunals are known to be seized. Kyriakakis argues that the fundamentally distinct ways in which states have traditionally collaborated to address such crimes and their differential approaches to corporate criminal responsibility 'complicate matters of legitimacy and enforcement as they relate to Article 46C [of the amended Statute].'[253]

Furthermore, with reference to parent company liability, it is uncertain how the Court will effectively exercise jurisdiction over parent TNCs that are not domiciled in Africa, but which make sufficient intervention in the operations of their African subsidiaries as to suggest control over the subsidiaries' affairs. Added to that, concerns that the threat of international criminal prosecution of TNCs could scare off foreign direct investments may remain a pressure point against widespread acceptance. This makes it even harder to speculate currently about the practical application of the Malabo Protocol and the amended Statute to TNCs operating in Africa or of direct corporate liability at the regional level. Yet, despite this difficulty, there is no doubt that this newest procedural guarantee of access to justice offers victims an added supplementary grievance remedial avenue, where domestic systems fail to address egregious human rights violations.[254]

When taken as a whole, the advances made by the African human rights system through the extension of criminal liability to corporate entities highlight the comprehensive outlook of African regional procedures in seeking to protect human rights and ensure justice and accountability. Therefore, the opportunities these present include appreciating the potential obstacles against the realisation of corporate criminal accountability, and channelling legal, political and scholarly efforts towards unravelling how to overcome them in the process of deepening access to justice for individuals and communities victimized by corporations.

6.3.5 The judicial organs of regional economic communities

Regional economic communities (RECs) are sub-regional intergovernmental groupings in Africa. They prominently comprise the Arab Maghreb Union (UMA), the East African

[253] Kyriakakis (n 252 above) 795-796. Also see C Meloni (n 246 above) 152-153.
[254] Van der Wilt (n 240 above) 8.

Community (EAC), the Economic Community of Central African States (ECCAS), the ECOWAS, and the Southern African Development Community (SADC), amongst others.[255] RECs form part of the building blocks of the AU and are often described as critical pillars of the AU's integration agenda and the broader African Economic Community.[256] Like national governments, RECs have a three-arm inter-governmental structure comprising legislative, executive and judicial bodies. While these organs of RECs exercise clearly defined responsibilities and functions, I am principally concerned with their judicial arms which, as Ebobrah rightly states, have been vested 'with original competence over the interpretation and application of founding treaties that have had the most obvious and far-reaching impact in the field of human rights.'[257]

The competence of the judicial organs of RECs over human rights and environmental claims often draws from their founding treaties or supplementary instruments. For example, in the ECOWAS sub-region, the recognition, promotion and protection of human and peoples' rights in line with the African Charter form part of the fundamental principles of the sub-regional body.[258] Under the ECOWAS Revised Treaty, member states commit to adhere to the principles of economic and social justice, accountability, and popular participation in development, and to recognise and observe the principles and rules of ECOWAS.[259] Member states which are signatories to the African Charter and relevant instruments also 'agree to cooperate for the purpose of realising the objectives of these instruments.'[260] The combined effect of these iterations of the African Charter or human rights in the ECOWAS Revised Treaty places human and peoples' rights adjudication within the scope of the ECOWAS' integration agenda.[261]

The ECOWAS Directives C/DIR.3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector (ECOWAS Mining Directives), adopted in

[255] Other RECs include: Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD). See African Union 'Regional economic communities (RECs)' <https://au.int/en/organs/recs> (accessed 23 October 2020).
[256] Treaty Establishing the African Economic Community 1991.
[257] S Ebobrah 'Human rights developments in subregional courts in Africa during 2008' (2009) 9 *African Human Rights Law Journal* 312 313; ST Ebobrah 'Critical issues in the human rights mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* 1 1-2.
[258] ECOWAS Revised Treaty art 4(g).
[259] ECOWAS Revised Treaty art 4(h)&(i).
[260] ECOWAS Revised Treaty art 56(2).
[261] ST Ebobrah 'A rights-protection goldmine or a waiting volcanic eruption? Competence of, and access to, the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307 314.

2009, affirms the obligation of companies to respect internationally recognised human rights, including the rights of women, children and employees.[262] The ECOWAS Mining Directives declare that:

> Companies shall obtain free, prior and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations; maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle.[263]

As such, the judicial organs of RECs in Africa play a pivotal role in the realisation of accountability within the African human rights system.[264] From the ECOWAS to the EAC and previously the SADC, the judicial organs of these sub-regional bodies have offered alternative channels of justice to victims where domestic judicial systems and grievance mechanisms failed either because local remedies were unavailable, ineffective or inadequate.[265] In the context of victims' access to justice for human rights and environmental violations in member states, the courts of RECs can play a complementary role in offsetting the deficits of national judicial systems with respect to redressing grievances by acting as parallel dispute resolution avenues to local remedies.

For instance, the ECOWAS Community Court of Justice (ECCJ) is the principal judicial organ for the West Africa sub-region.[266] By virtue of the Protocol A/P.l/7/91 on the Community Court of Justice 1991 (ECOWAS Court Protocol), the ECCJ's jurisdiction was originally intended for 'the interpretation and application of the provisions of the Treaty' in relation to any dispute between or among member states.[267] However, that jurisdiction was subsequently expanded to include claims alleging violations of human rights in a member state.[268] Under the Supplementary Protocol A/SP.1/01/05 amending the Preamble and articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice 2005 (ECOWAS Court Supplementary Protocol), 'individuals and corporate bodies' have access to the ECCJ to determine whether an act or omission of a community official infringes on the

[262] ECOWAS Mining Directives art 15; C Nwapi 'Mineral resource policy Harmonisation in West Africa' (2018) 7 *Global Journal of Comparative Law* 134-168.
[263] ECOWAS Mining Directives art 16.
[264] LN Murungi & J Gallinetti 'The role of sub-regional courts in the African Human Rights System' (2010) 118 *Sur - International Journal on Human Rights* 119.
[265] Ebobrah (n 257 above) 312-313; F Viljoen 'Human rights in Africa: Normative, institutional and functional complementarity and distinctiveness' (2011) 18 *South African Journal of International Affairs* 191-216.
[266] ECOWAS Revised Treaty arts 6(1)(e) & 15(1); ECOWAS Treaty 1975 art 4(1)(d).
[267] ECOWAS Court Protocol art 9.
[268] ECOWAS Court Supplementary Protocol art 3; ECOWAS Court Protocol (as amended) art 9(4).

rights of the individuals or corporate bodies, or to seek relief for violation of their human rights.[269]

Given this elaborate judicial power over member states, individuals and corporations, the ECCJ has an important role to play in minimising the remedial deficits that affected communities face in West African countries. In the case of *Social and Economic Rights Action Project (SERAP) v President of the Federal Republic of Nigeria and Others* (*SERAP* case),[270] the applicants instituted an action against the Nigerian President and six oil companies before the ECCJ alleging environmental and human rights abuses in the Niger Delta region of Nigeria. The six companies challenged the jurisdiction of the ECCJ over corporate entities, on the ground that they were not party to the ECOWAS Treaty. In declining jurisdiction over companies and permitting the case to proceed only against Nigeria, the ECCJ observed in its judgment that while the issue of corporate accountability remains a hot topic, it was not poised to depart from the widespread understanding that companies are not subjects of international law. The Court held that 'the process of codification of international law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts.'[271]

The ECCJ's line of reasoning raises important points of law. Firstly, it is questionable whether the Court's failure to properly identify its primary legal source of personal and subject matter jurisdiction negatively impacted its decision. Article 9(4) of the amended ECOWAS Court Protocol provides that '[t]he Court shall have any powers conferred upon it, specifically by the provisions of this Protocol.' Based on this provision, it is clear that the ECCJ's jurisdiction over member states, individuals and corporate corporations can only be determined based on its protocols. By virtue of the ECOWAS Court Supplementary Protocol and amended ECOWAS Court Protocol, the ECCJ has express personal jurisdiction over corporate bodies. Article 4 of the ECOWAS Court Supplementary Protocol and article 10(c) of the amended ECOWAS Court Protocol grants direct access to the Court to '[i]ndividuals and corporate bodies in proceedings [arising] from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies.' Although this provision pertains to the acts of an

[269] ECOWAS Court Supplementary Protocol art 4; ECOWAS Court Protocol (as amended) art 10(c)&(d).
[270] ECCJ General List No ECW/CCJ/APP/08/09, ECCJ Rul No ECW/CCJ/APP/07/10 (10 December 2010).
[271] As above, para 69.

ECOWAS official, the Court will in essence exercise jurisdiction over corporate bodies in the process. The ECOWAS Court Protocol in no way suggests that the exercise of jurisdiction in that way is strictly restricted to corporate bodies only coming before the Court as applicants nor is it preconditioned on such companies being party to the ECOWAS Revised Treaty or any other treaty for that matter as the Court has erroneously held.

Furthermore, article 10(d) grants subject matter jurisdiction to the Court over claims brought by individuals seeking relief for violations of their human rights. This provision does not prescribe that such claims are only maintainable against a member state where the violation occurred, when in truth the actual violation was committed by a corporate defendant. If these preconditions did not exist, then there was no basis for Court to go against the Protocol in declining jurisdiction. Besides, it is arguable that if *corporate bodies* can lawfully maintain a claim before the ECCJ and are considered to have human rights obligations under the African Charter, then the ECCJ may have been wrong to have declined jurisdiction purely on the basis of international practice. Entities which have obligations to which they must answer cannot only come as applicants before the Court. The ECOWAS Revised Treaty, the ECOWAS Court Protocol and the ECOWAS Court Supplementary Protocol are the primary sources of law for the ECCJ's jurisdiction, not international practice. Hence, the ECCJ should have thoroughly considered the unique nature of its own Protocols and the African Charter in order to determine whether corporate bodies are subjects of ECOWAS laws and amenable to its jurisdiction.

The ECCJ therefore lost a crucial opportunity to hand down a landmark decision that would have greatly impacted the accountability of corporate actors before international forums of adjudication. In hindsight, it is not surprising that the ECCJ opted for political correctness rather than narrow down the issue to its jurisdictional competence over corporate entities. In fact, the decision was delivered at about the same time as the SADC Tribunal was under political assault from Zimbabwe's President Robert Mugabe and subsequently striped of its jurisdiction over human rights cases.

The ordeal of the SADC Tribunal started, following several orders it made against the Zimbabwean government's forceful expropriation of privately-owned land belonging to Caucasian farmers in Zimbabwe.[272]

Offended by the decisions, the Zimbabwean government saw to it that the Tribunal was suspended *de facto* in 2010, the mandate of the Tribunal renegotiated in order to confine it to only interpreting the SADC Treaty and protocols, and more importantly that individual access to the Tribunal was removed.[273] The ECCJ may have cleverly averted this compromising situation by avoiding a situation that could potentially have opened the floodgates to a multiplicity of suits against corporations. Whatever the rationale might have been, it was a missed opportunity to judiciously utilise the jurisdiction of the court in the advancement of corporate human rights accountability in Africa. Notwithstanding this temporary setback, there is room for some optimism that in the future the ECCJ will have another chance to revisit its position on the procedural accountability of corporate entities.

Furthermore, in East Africa, the Treaty for the establishment of the East African Community 1999 (EAC Treaty) also typifies the trend of human rights protection by sub-regional courts.[274] Under its conditions of membership and fundamental principles, the Treaty requires that for a foreign country to be admitted to, permitted to participate in or be associated with the EAC, it must adhere to universally acceptable principles of human rights and social justice, the rule of law, democracy and good governance.[275] As part of the fundamental and operational principles, partner states of the EAC agree to collectively pursue the objective of recognising, promoting and protecting human and peoples' rights in line with the African Charter.[276] Added to this, partner states of the EAC agree to cooperate on common foreign and security policies that are geared towards the development and consolidation of democracy, the rule of law and respect for fundamental freedoms and human rights.[277] The implication of these provisions is that human rights form a fundamental core of the EAC's objectives.

[272] *Mike Campbell (Pvt) Limited v Zimbabwe* SADC (T) Case No. 2/2007 [2008] SADCT 2 (28 November 2008) (*Campbell* case).
[273] L Nathan 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35 *Human Rights Quarterly* 870-892.
[274] J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2013) 24 *Duke Journal of Comparative & International Law* 249 250.
[275] EAC Treaty arts 3(3)(b), 7(2).
[276] EAC Treaty art 6(d).
[277] EAC Treaty art 123(3)(c).

The EAC Treaty confers on the East African Court of Justice (EACJ) jurisdiction over natural and legal persons – although only as applicants – and anticipates that the Court's jurisdiction may be subsequently extended to include human rights issues. Under its provisions, any person, whether natural or juristic, who is resident in a partner state, may institute for the Court's determination, a matter challenging the validity of any law, regulation, decision, directive or action of a community institution or partner state on the ground of its legality or inconsistency with the EAC Treaty.[278] While the Treaty does not expressly grant the Court jurisdiction over human rights claims, it declares that, where the Council of Ministers so determines, the Court 'shall have such other original, appellate, human rights and other jurisdiction'.[279]

To date, no formal determination has been made by the EAC Council of Ministers to expressly extend the jurisdiction of the EACJ to human rights claims. However, the Court may have taken the liberty to adjudicate *de facto* over allegations of human rights abuses. As Gathi argues, the human rights case law of the EACJ 'goes far beyond the scope that the Treaty explicitly contemplated.'[280] In the case of *James Katabazi and Others v Secretary-General, EAC and Attorney-General, Republic of Uganda* (*Katabazi* case),[281] a claim alleging Uganda's infringement of the provisions of articles 6, 7(2) and 8(1) of the EAC Treaty was brought before the Court by victims of arbitrary detentions by the Ugandan government. The victims alleged that the Ugandan government failed to abide by a decision of the Ugandan Constitutional Court which declared the detentions unconstitutional and ordered their release. The EAC Secretary-General and the Attorney-General of Uganda challenged the jurisdiction of the Court over the claims on the ground that no human rights jurisdiction had been extended to it by the Council of Ministers.

The EACJ held that even though it did not have jurisdiction to adjudicate over human rights claims, the Court 'will not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes [an]

[278] EAC Treaty arts 1, 30.
[279] EAC Treaty art 27(2); HR Nsekela 'Overview of the East African Court of Justice' (2011) 5-6 <http://repository.eac.int:8080/bitstream/handle/11671/329/Overview-of-the-EACJ%5B1%5D.pdf?sequence=1&isAllowed=y> (accessed 2 December 2020).
[280] Gathii (n 274 above) 253.
[281] Ref No 1 of 2007 (*Katabazi* case).

allegation of human rights violation.'[282] That is to say, it could interpret the provisions of the EAC Treaty, including those aspects pertaining to human rights, good government, the rule of law and good democratic governance. By the tenor of this decision, not only does the EACJ join the ECCJ and the suspended SADC Tribunal in the list of sub-regional courts with a human rights mandate, it importantly fills in the gap in the development of human rights jurisprudence on the continent 'in sharp contrast to the general reluctance of national courts in EAC member states' to provide adequate human rights protection.[283]

In the context of violations emanating from the extractive industries, the *Katabazi* case suggests that the EACJ may provide an important remedial buffer for the protection of human and peoples' rights, where allegations of human rights violations in the sector also impinge the obligation of an EAC partner state under the EAC Treaty.

6.4 Empowering victims, CSOs, NHRIs and states to *#TakeAction!*

It is not enough to merely adopt regional rules on the obligations of duty-bearers and create monitoring as well as adjudicatory bodies if the basic knowledge of how best to utilise these channels of regulation and grievance remediation is divorced from those most impacted by extractive companies. For corporations to be accountable in Africa, victims, affected communities, human rights defenders and state actors responsible for human rights protection must be adequately empowered to take action at the grassroot level.[284] In this section, I look at the ways by which the African human rights system should engage critical stakeholders in the practical pursuit of corporate human rights accountability and environmental justice in Africa.

6.4.1 Victims or 'affected' communities

Affected communities or victims of abuses in the extractive industries, whether in the workplace or a nearby community, are often overwhelmed by the inordinate lack of legal protection and effective enforcement actions by state actors. They are frequently at the receiving end of procedural hurdles and costly legal battles against powerful TNCs and their subsidiaries that may offer only a narrow path to victory. If adequately equipped right from the onset of extractive projects with adequate

[282] *Katabazi* case (n 281 above) 16.
[283] Gathii (n 274 above) 250-251.
[284] SE Merry 'Transnational human rights and local activism: Mapping the middle' (2006) 108 *American Anthropologist* 38 39.

knowledge to understand the nature of the environmental, social and human rights impacts of such projects, perhaps violations could be avoided or greatly diminished.

In the context of natural resource exploitation, many affected individuals and often marginalised communities are particularly disadvantaged in three key areas.

First is *access to information*. Many individuals and communities are often neither aware of the nature of the resource extraction project to be undertaken on their land nor their right to demand comprehensive information about such projects.[285] This lack of knowledge leaves communities innocently ignorant and vulnerable to the real costs of the project on their lives and communities. Although states have a responsibility to promote human rights education in such communities and ensure that their right to meaningful access to information guaranteed,[286] businesses too have an obligation to fully disclose and afford, whenever asked, full information on the nature and extent of projected and guaranteed risks and possible damage to the environment (land, water, air and plants), the social fabric and physical health of the community.

Second is *effective consultation, representative participation and the free, prior and informed consent of affected communities*. Individuals and communities that are likely to be impacted by resource extraction projects need to be effectively consulted by both the government and the corporations involved.[287] They need to be adequately involved in the decision-making processes affecting them both substantively and in a manner that is representative of the various segments of the community's population, including of vulnerable and often marginalised groups such as women, children, the elderly and persons with disabilities.[288] Company employees, farmers, fishermen, fisherwomen, grazers, local traders and the youth should be actively involved in and carried along throughout the consultative

[285] WRN Compaoré 'Towards understanding South Africa's differing attitudes to the Extractive Industries Transparency Initiative and Open Governance Partnership' (2013) 9 <https://media.africaportal.org/documents/OP_146_GARP_Compaore_20130521.pdf> (accessed 2 December 2020); A Standing 'Corruption and the extractive industries in Africa: Can combatting corruption cure the resource curse?' (2007) 11 <https://media.africaportal.org/documents/PAPER153.pdf> (accessed 2 December 2020).

[286] African Convention on the Conservation of Nature and Natural Resources 2003 art 16(1)(a)(b)(c).

[287] African Convention on the Conservation of Nature and Natural Resources 2003 art 17; SRGPs paras 20-21.

[288] As above.

processes to obtain broad community support and the free, prior and informed consent of such community.[289]

Third, and most importantly, is *access to remedies and fair hearing*. Affected individuals and communities need to have unfettered access to judicial and non-judicial grievance mechanisms in accordance with their international human rights. The African Charter guarantees the right of everyone to have their cause heard and 'be equal before the courts and tribunals in the determination of their rights and obligations'.[290] This right entitles everyone whose rights or freedoms have been violated to effective remedy.[291] In the case of *Bissangou v Republic of Congo* (*Bissangou* case),[292] the African Commission held that the right to have one's cause heard entails not just the right to pursue one's cause to finality at an appellate level, but also the right to execute the judgment as an integral part of the proceedings.[293] State parties in which violations have occurred or likely to occur in the extractive sector have an obligation to ensure respect by companies of rights and guarantee the independence of the judicial or other human rights protecting bodies.[294]

In *Sudan Human Rights Organisation and another v Sudan*,[295] the African Commission considered that the burning of houses, bombing, forced evictions, and violence executed against the victims not only made access to national judicial

[289] As above; *SERAC* case (n 45 above) paras 52-54.

[290] African Charter art 7; African Commission 'Resolution 4(XI)1992: Resolution on the right to recourse and fair trial' (1992) para 2(a) 11th Ordinary Session 2-9 March 1992 Tunis Tunisia.

[291] African Commission 'Resolution 224(LI)2012: Resolution on a human-rights based approach to natural resources governance' (2012) para iv 51st Ordinary Session 18 April-2 May 2012 Banjul, The Gambia; African Commission 'Resolution 231(LII)2012: Resolution on the right to adequate housing and protection from forced evictions' (2012) para 6(iii) 52nd Ordinary Session 9-22 October 2012 Yamoussoukro, Côte d'Ivoire; African Commission Resolution 4(XI)1992 (n 290 above) para 1; Pretoria Declaration on Economic, Social and Cultural Rights in Africa para 6; African Commission 'Resolution 87(XXXVIII)2005: Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the International Criminal Court' (2005) Preamble 38th Ordinary Session 21 November-5 December 2005 Banjul, The Gambia; African Commission 'Resolution 97(XXXX)2006: Resolution on the importance of the implementation of the recommendations of the African Commission on Human and Peoples' Rights by states parties' (2006) Preamble 40th Ordinary Session 15-29 November 2006 Banjul, The Gambia; African Commission 'Resolution 111(XXXXII)2007: Resolution on the right to a remedy and reparation for women and girls victims of sexual violence' (2007) Preamble, paras 13-14 42nd Ordinary Session 15-28 November 2007 Brazzaville, Congo.

[292] (2006) AHRLR 80 (ACHPR 2006).

[293] As above, paras 73-75; *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 45; *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 58; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 62, 82, 87-88; *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 70, 72; Communication 409/12 (2013) *Tembani and Freeth v Angola and Thirteen Others* (2014) paras 138-139 54th Ordinary Session 22 October-5 November 2013 Banjul, The Gambia; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005) para 213.

[294] African Charter arts 25 & 26.

[295] (2009) AHRLR 153 (ACHPR 2009) para 185.

authorities impractical and illusory, it utterly violated the victims' right to have their cause heard under article 7 of the African Charter.

To ensure greater protection of affected communities, African human rights bodies need to do more to educate individuals and communities on the above rights. They should endeavour to make the state reporting process more participatory by ensuring the reporting guidelines require states to directly engage affected communities in the report preparation process. More so, African human rights bodies need to simplify the complaint submission and adjudicatory processes to enable easy accessibility from the remotest parts of Africa. As Viljoen argues, the empowerment of victims and their representatives in the procedures of African human rights bodies will 'ensure more intimate knowledge of the cases, and better access to witnesses and documentation.'[296] Nothing less will be sufficiently empowering.

African human rights bodies also need to educate the public on the various compliant submission processes by deploying multimedia platforms and user-friendly infographic, audio and braille guides that convey, in the simplest possible way, the steps for submitting communications before them. Finally, the monitoring bodies such as the African Commission and the African Children's Committee need to utilise their respective special procedures to directly engage businesses through workshops and conference to promote business respect for human and people' rights in Africa. Merely issuing recommendations, formulating principles or speaking to the converted – a category in which African states fall – is not enough to give corporate human rights accountability in Africa a living face.[297]

6.4.2 Civil society actors and human rights defenders

Human rights defenders and civil society actors have a very crucial role to play in the pursuit of corporate human rights accountability in Africa. They draw the attention of human rights bodies to violations, lodge complaints on behalf of affected individuals and communities, independently monitor state party compliance, and provide tremendous support in raising awareness of the activities of the various human rights bodies.[298] Over the past three decades, organisations such as SERAC,

[296] Viljoen (n 225 above) 86-87.

[297] African Commission 'Resolution 65(XXXIV)2003: Resolution on the adoption of the "Report of the African Commission's Working Group on Indigenous Populations/Communities"' (2003) TOR4 34th Ordinary Session 6th-20th November 2003 Banjul, The Gambia.

[298] African Commission 'Network: Non-governmental organizations' <https://www.achpr.org/ngos> (accessed 3 November 2020).

SERAP, IHRDA, Amnesty International, Human Rights Watch, Oilwatch International, to mention a few, have been at the forefront of fighting for individuals and communities adversely impacted by the extractive industries. In some cases, they have achieved landmark successes through strategic litigation and public campaigns.[299] In other cases, they have been faced with hostility from states and powerful corporate interests in the form of oppression, threats, denial of access to vital information, and strategic lawsuits against public participation (SLAPPs).[300]

However, what is clear is the fundamental essence of organised civil society actors and human rights defenders in promoting and safeguarding the rights of affected individuals and communities. Human rights defenders often lead the way in challenging the harmful impacts of extractive corporations and calling out states on the soft-ball approach to natural resource governance and environmental protection. Due to this important role that they play in championing accountability for abuses and environmental justice, they need to be protected and empowered in four material respects.

First is *the exercise of the rights to freedom of expression, association, and assembly*. Under the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 1998* (UN Declaration on Human Rights Defenders), human rights defenders have the rights to: form associations and NGOs; meet and assemble without hindrance; lawfully exercise their mission as human rights defenders; criticise official policy or public authorities and proposes ways of improving their activities with regard to the realisation of their human rights mandate; and request, receive and use resources targeted towards human rights protection.[301] African states have an obligation to guarantee these rights and ensure that they are exercised without fear or favour.[302]

[299] See the *SERAC* case (n 45 above); *Endorois* case (n 47 above).

[300] International Service for Human Rights 'human rights defenders & corporate accountability human rights monitor - November 2015' (2015) 5 <http://www.ishr.ch/sites/default/files/documents/business_and_human_rights_monitor_-_english_november_2015-final_last_version-2.pdf> (accessed 2 November 2020); International Centre for Non-Profit Law 'Protecting activists from abusive litigation: SLAPPs in the Global South and how to respond' (July 2020) 1, 12-13 <https://mk0rofifiqa2w3u89nud.kinstacdn.com/wp-content/uploads/SLAPPs-in-the-Global-South-vf.pdf> (accessed 2 November 2020).

[301] UN Declaration on Human Rights Defenders art 2(a); Declaration of Principles on Freedom of Expression in Africa 2019 principles I(1), II(2), XI(1)& (2)

[302] African Commission 'Resolution 104(XXXXI)2007: Resolution on the situation of human rights defenders in Africa' (2007) 41st Ordinary Session 16-30 May 2007 Accra, Ghana.

Second is *the right of access to information*. Access to information ensures transparency and accountability. It also aids civil society actors in better engaging corporations and the state on the potential adverse impacts of extractive projects. Like affected individuals and communities, human rights defenders and CSOs need access to information on development projects in the extractive sector that could potentially impact public health and the environment of host communities. They have a right to complete information on the parties' involved in a project, the nature of the project, the risk projection and impact-assessment reports on the environmental, social and human rights of the public or locality where the project is intended to be situated.[303] They also need information on the financiers of projects and the due diligence processes undertaken by all the parties involved. The importance of this cannot be overemphasised.

In recent years, development finance institutions such as the International Finance Corporation (IFC) and the African Development Bank (AfDB) have been cited for their poor environmental and social review procedures involving Shell's operations in Nigeria and Anvil Mining's operations in the DRC.[304] Several companies have had to be debarred from accessing international finance from the IFC and other World Bank Group (WBG) institutions due to poor and sometime dubious business practices.[305] Human rights defenders need access to information on the dealings and blacklist status of companies in their quest for accountability and social justice. They also need information on how to access the internal complaint and dispute resolution mechanisms of such financiers such as the Independent Review Mechanism of the AfDB, the Independent Evaluation Group of the World Bank, the Compliance Advisor

[303] African Convention on the Conservation of Nature and Natural Resources 2003 art 17; SRGPs paras 20-21.

[304] Environmental Justice Atlas 'Massacre in Kilwa facilitated by Anvil Mining, operating Dikulushi open pit, Katanga province, DR Congo' 18 August 2018 <https://ejatlas.org/conflict/kilwa-mine> (accessed 12 November 2020); A McBeth 'Crushed by an Anvil: A case study on responsibility for human rights in the extractive sector' (2008) 11 *Yale Human Rights and Development Law Journal* 127 159-162; Compliance Advisor Ombudsman '2005-06 annual report' (2006) <http://www.cao-ombudsman.org/publications/documents/CAOAR2006English.pdf> (accessed 28 October 2020).

[305] A Sobják 'Corruption risks in infrastructure investments in Sub-Saharan Africa' (2018) <https://www.oecd.org/corruption/integrity-forum/academic-papers/Sobjak.pdf> (accessed 25 October 2020); World Bank Group 'Annual update: Integrity Vice Presidency' (2017) 24 <http://pubdocs.worldbank.org/en/703921507910218164/2017-INT-Annual-Update-FINAL-spreads.pdf> (accessed 26 October 2020); M Barton 'Understanding the World Bank Group's anti-corruption measures in project financing' (2011) 3 <https://www.lw.com/thoughtLeadership/world-bank-group-anti-corruption-measures-in-pf> (accessed 26 October 2020); RAID 'The World Bank in the Democratic Republic of Congo' (2006) <http://www.raid-uk.org/sites/default/files/briefing-worldbank-drc.pdf> (accessed 26 October 2020).

Ombudsman for the IFC and the Multilateral Investment Guarantee Agency, and the Integrity Vice Presidency which is the WBG's anti-corruption arm.[306]

Third is *the protection of human rights defenders from intimidation, threats and acts of violence, reprisals and SLAPPs, discrimination, and oppressive as well as arbitrary acts from state officials and private companies*. Human rights defenders are entitled to a safe working environment to freely carry out their human rights activities. They should be protected by the state from infringements, 'pressure and any arbitrary acts by State or non-State actors as a result of their human rights activities.'[307] In particular, they should be allowed to support both employees of extractives corporations who are vulnerable to harsh, abusive or hazardous working environments, and host or nearby communities who are susceptible to the adverse environmental, social and human rights impacts of extractive activities. It is their right to be allowed to participate in consultative meetings with affected communities and the environmental, social and human rights impact assessment processes.

Fourth is *the education and capacity building of civil society actors, human rights defenders and grassroot activists on the obligation of business and the state for human rights and the environment*. Without the requisite capacity and knowledge, the ability of human rights defenders to build solidarity and support resistance to poor risk management practices or promote good and sustainable business conduct will be greatly limited. African human rights monitoring bodies, NHRIs and states need to strategically empower NGOs and human rights defenders with effective knowledge management systems and capacity-building programmes that strengthen the ability of civil society actors to act.

A crucial task for African human rights monitoring bodies will be to closely supervise the extent to which human rights defenders and civil society actors can lawfully exercise the rights to freedom of expression, association, assembly and access to information. They also must insist on greater domestic protection of human rights defenders from harassment and arbitrary state actions, and actively collaborate with civil society groups on capacity-building initiatives that support

[306] Independent Evaluation Group 'Review of MIGA's experience with Safeguards and Sustainability Policies (1999–2008)' (2011) 15 [Andres Liebenthal] <http://documents.worldbank.org/curated/en/315621468152971744/pdf/653570NWP0Box30GAWorkingpaper201102.pdf> (accessed 28 October 2020).

[307] African Commission Resolution 104(XXXXI)2007 (n 302 above) para 2.

accountability and social justice. At the moment, both the African Commission and the African Children's Committee have adopted a number of guidelines on CSO engagements, including encouraging NGOs with observer status to submit complementary reports to afford these bodies a balanced perspective during the consideration of state reports.[308] In other cases, they have worked with CSOs to sensitise stakeholders on, for example, the SRGPs.[309] In the future, these bodies will need to do more to ensure that states report under the SRGPs through capacity building and an effective knowledge management system on the human rights responsibilities of business in Africa.

6.4.3 National human rights institutions (NHRIs)

NHRIs are domestic bodies established by states and charged with the responsibility to promote and protect human rights. The Principles relating to the Status of National Institutions 1993 (The Paris Principles) prescribes the basic composition, guarantees and responsibilities of NHRIs. For instance, they must be independent, composed of highly qualified experts, adequately resourced and able to conduct inquiries into allegations of violations. NHRIs function within the Africa human rights system and are required to assist human rights monitoring mechanisms in the promotion and protection of human rights at the country level.[310] They enhance the work of the African regional mechanisms and play a significant advisory role in getting their respective countries to ratify international human rights instruments, remedy violations, and educate the public on human rights issues.[311]

[308] African Children's Committee 'Civil society organizations (CSOs), complementary report, conduct and participation of CSOs in ACERWC pre-session guidelines' (2018) <https://acerwc.africa/wp-content/uploads/2018/08/Guidelines_for_Civil_Societies_Organisations_Complementary_Report_Eng.pdf> (accessed 6 November 2020); African Children's Committee 'Criteria for granting observer status to non-governmental organisations (NGOs) and associations' (2018) <https://acerwc.africa/wp-content/uploads/2018/08/ACERW_Criteria_for_Observer_Status_English-1.pdf> (accessed 6 November 2020); African Children's Committee 'Guidelines for reporting by non-governmental organisations (NGOs) and association with observer status' (2015) <https://acerwc.africa/wp-content/uploads/2018/08/ACERWC_Reporting_Guidelines_NGO_with_Observer_Status.pdf> (accessed 6 November 2020);

[309] African Commission 'Newsletter of the Working Group on Extractive Industries, Environment and Human Rights' (2019) 3 <https://www.achpr.org/public/Document/file/English/WGEI%20Newsletter%20Issue%202_October_2019_ENG.pdf> (accessed 6 November 2020).

[310] African Commission 'National Human Rights Institutions' <https://www.achpr.org/nhris> (accessed 6 November 2020).

[311] A Smith 'The unique position of national human rights institutions: A mixed blessing?' (2006) 28 *Human Rights Quarterly* 904 905; WM Cole & FO Ramirez 'Conditional decoupling: Assessing the impact of national human rights institutions, 1981-2004' (2013) 78 *American Sociological Review* 702 705.

In the context of the extractive sector, NHRIs can conduct independent investigations, carry out sensitisation and awareness-raising campaigns, organise academic seminars and implement effective domestic programmes that promote responsible business conduct and advance environmental accountability.[312] They can act as an alternative non-judicial grievance mechanism and, in some countries, can make orders that are equivalent to that of a high court.[313] This implies that NHRIs may be the gordian knot tying the promotional and protective mandate of the African human rights system to victims on the ground. Although they function like NGOs, they are state-created and work with African human rights bodies and NGOs in a way that connects all categories of actors together. With this important linkage, NHRIs have enormous leverage that can be used to actively engage extractive companies on their human rights responsibilities. They can also properly propose standards adopted by African regional bodies for incorporation in domestic law and policies.

6.5 Conclusion

The failure, refusal or neglect by domestic systems to address abuses by extractive corporations justifies the rationale of this chapter for strengthening the African human rights system as a complementary avenue for corporate human rights accountability in Africa. The normative and institutional authority of the African regional system puts its mechanisms in good stead to regulate the adverse impacts of corporations and adjudicate disputes arising from corporate abuses in the extractive and other industries. More importantly, the normative recognition of the corporation obligation to respect human and peoples' rights in various African human rights instruments, the prescriptive role of African human rights monitoring mechanisms and the jurisprudential progress made under their respective complaint procedures have laid the groundwork for directly and indirectly advancing accountability in the extractive industries.

By taking a deep evaluative dive into the promotional and protective mandates of the various African human rights mechanisms, including the

[312] AJ Beredugo & F Viljoen 'Towards a greater role and enhanced effectiveness of national human rights commissions in advancing the domestic implementation of socio-economic rights: Nigeria, South Africa and Uganda as case studies' (2015) 48 *The Comparative and International Law Journal of South Africa* 401 410; South African Human Rights Commission 'Marikana Commission of Inquiry: Report on matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province' (2015) <https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf> (accessed 4 November 2020).

[313] Nigeria's National Human Rights Commission (Amendment) Act 2010 secs 5(b)(c), 6.

supplementary roles of the future African Court and the judicial bodies of RECs, this chapter critically assessed the opportunities presented by the various mechanisms to regulate in a coherent way the activities of extractive corporate entities in Africa. It also highlighted the legal essence and challenges of the AU's recognition of the concept of corporate criminal responsibility and emphasised the need to empower victims and civil society actors for effective grassroot action through greater collaboration among African regional mechanisms, states, NHRIs, CSOs and affected populations. This analysis and the normative as well as jurisprudential propositions that it has methodically advanced clearly identify the promising role of the African human rights system in protecting resource-rich communities, regulating corporations, and remedying victims' grievances in the extractive sector.

Conclusion

7.1 Introduction

This research has achieved five clear objectives. First, it interrogated and established the legal framework for framing the idea of corporate human rights accountability in the extractive industries in Africa.[1] Second, amidst the crises of terminology associated with the corporate responsibility to respect human rights, it infused an African approach to the discourse which have been totally neglected by the dominant western narrative driving the debate.[2] Third, it demonstrated through case studies of Nigeria and other resource-rich African countries that due to the structural deficits of the post-colonial state, the regulation of corporations cannot be left alone to the incapacities and vagaries of host countries in Africa.[3] Fourth, the research validated through cases arising from Africa that home countries are equally inadequate forums for the pursuit of corporate regulation and accountability in the extractive industries.[4] Finally, the research articulated the increasing role of African regional human rights mechanisms in regulating abusive corporate conduct and advancing victims' right of access to remedies in the extractive industries.[5]

Therefore, this chapter will endeavour to highlight the critical reflections and conclusions from the preceding chapters that address the central research question and sub-questions of this thesis. Thereafter, it will propose a pragmatic path forward for strengthening corporate human rights accountability in the extractive industries in Africa.

1 Section 1.3.2. Also see Chapter Two above.
2 Section 1.3.2. Also see Chapter Three above.
3 Section 1.3.2. Also see Chapter Four above.
4 Section 1.3.2. Also see Chapter Five above.
5 Section 1.3.2. Also see Chapter Six above.

7.2 Conclusion and critical reflections

From the outset, the introductory chapter of this research set the scene for critically appraising the normative and institutional complexities associated with holding corporations accountable for various environmental, labour and human rights abuses in the extractive industries.[6] It illustrated the travails that victims face in redressing grievances in the problem statement, clearly identified the central research question, and sought to explore the opportunities for regulating corporate misconduct and addressing injuries through the mechanisms available in the African regional human rights system. Utilising a doctrinal methodology, the research evaluates, from an African approach, the noticeable governance gaps in the domestic and international regulation of corporations in Africa.

The second chapter evaluated the historical account of corporate human rights violations in the extractive industries against the backdrop of the normative evolution of international human rights rules applicable to business.[7] It problematised the conflations associated with the corporate 'responsibility' to respect human rights by dissociating it from the idea that it is only defined by social expectation.[8] By critically evaluating various human rights and environmental instruments adopted under the auspices of the UN, ILO and other international bodies, the chapter established that there is absolutely no distinction under international human rights law between 'obligation' and 'responsibility'. And that the UNGPs' attempt to create a distinction without a difference lacked any legal or theoretical foundation.[9] More importantly, the chapter established that even though the corporate responsibility to respect human rights may have been shaped by social expectation, it is grounded on international legal standards on human rights, labour and the environment.

The third chapter considered that the neglect of perspectives from the global South in the business and human rights discourse is a basis for developing an African approach to corporate accountability for human rights and environmental abuses committed in the extractive industries.[10] It established that the differential cultural appreciation of the place of individual – including business - in society informed the

6 Chapter One, sections 1.1-1.2 above.
7 Chapter Two, sections 2.2-2.3 above
8 Chapter Two, section 2.4 above.
9 As above.
10 Chapter Three, section 3.1 above.

conceptual misalignment between the West and Africa on the corporate 'obligation' to respect human rights.[11] By critically assessing African regional conceptions on the obligations of business for human and peoples' rights in Africa, the chapter established that unlike in the West, domestic law and African human rights instruments expressly recognised the horizontal relationship between individuals and corporations.[12] This assessment, therefore, not only confirmed that corporations have human rights obligations in Africa, but also provided an ample basis for conceptually clarifying 'corporate accountability' in the extractive industries.

The fourth chapter critically evaluated the relevance of relying entirely on domestic systems of regulation and redress to ensure the accountability of extractive corporations in light of the structural weaknesses and corporate capture of many resource-dependent African countries. While recognising the dilemma that host countries legitimately face between promoting socio-economic development and protecting human rights in the respective territories, the chapter demonstrated through case studies that the 'romantic' collaboration between host countries and extractive corporations was precarious for the effective regulation of the sector.[13] More importantly, it demonstrated that due to the alliance between host African countries and corporations, local remedies for corporate human rights abuses were often unavailable, ineffective or inadequate.

The fifth chapter assessed the extent to which extraterritorial regulations and home country litigation could practicably offset the regulatory and remedial deficits of host countries in Africa. The chapter established that, although extraterritorial regulations and home state remedies play a critical role in narrowing the global governance gaps in TNC regulation, their impact remain grossly limited. Firstly, the chapter identified the trends in state practice on extraterritorial rules from the United States to the United Kingdom, Australia and Canada, Europe, China and South Africa, which are predominantly home to the parent companies of the world's biggest extractive corporations.[14] Secondly, it demonstrated through nationalistic policy reversals in Trump's America, a robust amount of case law and a retinue of

[11] Chapter Three, sections 3.2-3.3 above.
[12] As above
[13] Chapter Four, section 4.5 above
[14] Chapter Five, sections 5.2.2, 5.4.2-5.4.3 above.

backstopping judicial procedures, the limits of home state litigation in victims' quest for justice and accountability in foreign countries.[15]

The foundation laid by the scholarly conclusions in the above chapters provided a pathway for exploring the normative and institutional role of the African regional human rights system in regulating corporations and redressing grievances in the extractive industries. Hence, in the sixth chapter, the research established the normative and institutional authority of the African human rights system as a basis for not only initiating the regional governance of corporations in Africa, but for supplementarily remedying violations in the sector.[16] Specifically, it (i) vocalised the recognition of the corporate obligation to respect human rights in African human rights instruments, (ii) emphasized the opportunities for indirectly regulating and remedying harm in the sector through the state reporting processes and individual access to the complaints procedures of the respective African regional mechanisms, and (iii) considered the increasing formulation of principles on the corporate responsibility for human rights in the general comments and declarations adopted by the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).[17] Thereafter, it demonstrated that principles and rules formulated by these quasi-judicial bodies can be transformed into binding legal standards through decisions of the African Court.

These considerations not only demonstrate the critical role of the African human rights system in regulating corporations but also in advancing corporate human rights accountability in the extractive industries.

Based on the foregoing, it is crystal clear that while states retain primary responsibility for regulating the conduct of corporations and protecting rights in the extractive industries, they are often unable to effectively address alone the complexities of economic globalisation and the structural gaps that make the transnational governance of corporations nearly impossible. This research has shown that corporations have obligations for human and peoples' rights in Africa. As global consensus on the human rights obligations of business remains lacking at the UN level, the African regional human rights system provides a pragmatic pathway for

[15] Chapter Five, section 5.4 above.
[16] Chapter Six, section 6.2 above.
[17] Chapter Six, sections 6.2.2-6.3.4 above

supplementarily addressing the deficit of domestic and global regulation by spurring action through regional monitoring and remediation. The main task therefore is to strengthen the African regional system to afford affected communities and victims of abuses in the extractive industries practical regulatory and remedial results.

7.3 Recommendations

In the light of the core findings of this research, I propose four broad recommendations for concretely advancing the accountability of corporations in the extractive industries through the normative and institutional framework of the African human rights system.

7.3.1 Strengthen existing monitoring systems that work

First and foremost, it is necessary to strengthen the various African human rights mechanisms in bolstering accountability in the extractive industries by consolidating on those aspects of their mandates that work. Here, I identify three important areas where the monitoring bodies should deepen action.

(a) Promote corporate accountability through state reporting

The state reporting process is a critical aspect of the mandates of the African Commission and the African Children's Committee. As an avenue for engagement between state parties and these human rights monitoring mechanisms, the reporting process is perhaps the most immediately viable path for prompting states to do more to regulate corporations.[18] The adoption of the *State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to the Extractive Industries, Human Rights and the Environment 2018* (SRGPs) now requires state parties to specifically report on compliance with articles 21 and 24 of the African Charter. This includes reporting on the extent to which (i) the rights of communities to adequate consultation, effective participation, free, prior and informed consent and access to information are protected in domestic law, (ii) the responsibilities of extractive companies for human rights, environmental health, financial transparency and fiscal responsibility are enshrined in local law, and (iii) the legislative, regulatory, administrative and policy measures adopted by the state to avoid or mitigate corporate abuses in the sector.[19]

[18] Chapter Six, section 6.2.2(b) above.
[19] Chapter Six, sections 6.2.1(a), 6.3.1(a) above.

Going forward, what this means is that over time, states may find themselves in the uncomfortable position of having to adopt local laws and regulations and ensure – to a greater extent - the protection of marginalised and vulnerable resource-rich communities and individuals in line with African human rights instruments. It will also see state parties gradually enact laws and adopt policy measures that promote responsible business practices in the sector and institute effective grievance remedial mechanisms at the operational and judicial levels.

(b) Make the complaints procedures more user-friendly

The complaints procedures of the various regional human rights mechanisms offer victims and civil society actors with observer status an important channel of redress, where domestic remedies are illusory. In the context of abuses in the extractive sector, the complaints procedure affords victims a path to indirectly hold corporations accountable by suing the state concerned for failure to exercise due diligence in its role as regulator and protector. At the moment, these channels operate from a distance for ordinary Africans and are often difficult to access. To make the complaint procedures more readily accessible to all, especially to victims of corporate violations, the various mechanisms need to invest in technologies and procedural services that make filing and pursuing of complaints intuitive, user-friendly and convenient. I propose that filings and hearing of complaints should be such that can be done from the remotest parts of Africa or any part of the world over the internet.[20] The various bodies can start by dispensing with the physical appearance of the authors or their representatives in proceedings and the manual filing of processes and replacing them with easy-to-use technologies.

(c) Animate the special procedures to directly engage business

The special procedures of the African Commission and the African Children's Committee play a key role in not only conducting research on the impact of the extractive industries on human rights and the environment, but also in formulating principles of law that could be directly applicable to business.[21] Special procedures are a mobile operational sub-mechanism within African human rights bodies that can be animated to directly engage with corporations on their human rights responsibilities.[22] In the lone instance where such an engagement between the African Commission and Anvil Mining occurred, it was manifestly reactive. The

[20] Chapter 6, section 6.4.1 above.
[21] Chapter 6, sections 6.3.1(c)(d)(e), 6.3.2(c)(e) above.
[22] Chapter Six, section 6.3.1(c)(i), 6.4.1 above.

Commission and Children's Committee need to be more purposefully proactive in terms of taking businesses to task on their human rights obligations.

7.3.2 Curb corporate impunity through innovative rulemaking

The impunity with which local and transnational conglomerates conduct their affairs in Africa present long-term concerns for individuals and communities in Africa. This cannot be addressed by off-the-shelve approaches with a reactive outlook often long after the facts of environmental pollution have occurred, and human rights have been violated. The AU and the African human rights system must proactively develop unique and innovate rules that nip in the bud the challenges of unethical business practices and their devastating consequences on human beings and the environment once and for all.[23] Existing initiatives in Europe targeted at regulating the unethical activities of corporations on a regional scale offer best practices and make a regional concerted effort in Africa far from being radical in its purport and means.

The EU's GDPR, the EU Conflict Minerals Regulation 2017/821, the European Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment 1993 and the International Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources 1977 (1977 London Convention) that directly target corporations at an international or regional level are especially apt to guide the AU and African human rights mechanisms in developing African-specific solutions to African problems.[24] In this section, I propose a gradual but coherent approach to pragmatically regulating corporations in Africa on a regional scale through soft and hard laws by three means: an African policy framework on business and human rights, a protocol to the African Charter on business and human rights, and a model law on business and human rights. I will explain the purpose of each in some detail.

(a) Develop an African Policy on Business and Human Rights

As the foremost regional body on the continent, the AU needs a continental policy framework on business and human rights to define the contours within which it may engage on the impact of business on human rights and the environment. In the recent past, it has adopted quite a number of regional policy frameworks on security sector reforms, sexual and reproductive health, fisheries, land, bioenergy, migration, social

[23] C Jochnick 'Confronting the impunity of non-state actors: New fields for the promotion of human rights' (1999) 21 *Human Rights Quarterly* 56 66; J Madeley 'The UN and TNCs' (2014) 41 *Appropriate Technology* 33 34.

[24] The Convention was adopted in London on 1 May 1977.

protection, transitional justice, amongst others.[25] What is conspicuously missing is a policy framework articulating its strategic understanding of the relationship between business and human rights in the context of historic violations by TNCs and their subsidiaries. Such a policy must be anchored on the African Charter, other relevant African and international instruments on human rights, labour and the environment, and principles and jurisprudence relevant to the business and human rights discourse, enunciated by African human rights monitoring mechanisms.

Any policy framework intended to deal with the impact of corporations on human rights must avoid the same pitfalls of the UNGPs that have stripped it off its appeal in many countries in the global South.[26] For example, the weak language of the UNGPs and conceptual conflations between obligations and responsibility present the UNGPs in weaker light to existing notions of rights and obligations under African human rights instruments.[27]

There is currently an attempt by the AU to develop a continental framework on business and human rights, having participated myself at one of the consultative meetings in 2017 in which the framework was discussed.[28] An unofficial copy of the draft African Union Policy on Business and Human Rights received from the AU states that '[t]his policy is inspired by the UN Guiding Principles on Business and Human Rights (UNGPs)' and 'draws on the UNGPs to guide AU Member States and businesses in their respective efforts to protect and respect human and peoples' rights in the context of business activities in Africa.'[29] While seeking to improve on the lack of an accountability language in the UNGPs, the draft Policy sadly falls in the very limbo for which the UNGPs have been thoroughly criticised. For one, it is anchored on the same three pillars as the UNGPs and ascribes without a clear legal basis a conceptual distinction between 'duty' and 'responsibility' in utter inconsistency with the African

[25] African Union 'Policies' <https://au.int/en/search/node/AU%20policy%20Framework> (accessed 7 November 2020).

[26] For instance, in the 10-year history of the UNGPs, no African country has formally adopted a National Actional Plan based on the UNGPs. See GlobalNAPs 'National action plans on business and human rights' <https://globalnaps.org/> (accessed 8 November 2020); European Parliament 'Study: Implementation of the UN Guiding Principles on Business and Human Rights' (2017) 46 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf> (accessed 8 November 2020).

[27] Draft African Union Policy on Business and Human Rights (2018) 2.

[28] African Union 'The African Union organises Stakeholders Validation Workshop on the Draft AU Policy Framework on Human Rights and Business' 21-22 March 2017 <https://au.int/en/node/32242> (accessed 9 November 2020).

[29] Draft African Union Policy on Business and Human Rights (2018) 3.

Commission's SRGPs which affirms that corporations have 'a legal obligation'.[30] Otherwise, the draft Policy sufficiently addresses the rights of communities affected by business projects to effective participation, consultation and free, prior and informed consent.[31]

Considering that the policy was being undertaken at the instance of the EU rather than AU member states, it is not surprising that after nearly five years since the process began not much progress has been made on its adoption. Having been initiated at a time when the EU had temporarily walked out on the UN negotiation process for a legally binding instrument on TNCs and other businesses enterprises, it does appear that the EU may have banked on the AU adopting an EU-dictated policy in order to delegitimise the UN treaty-negotiation process in favour of implementing the UNGPs.[32] This may have turned out to be a miscalculation as the AU has neither gone forward with the Policy nor have AU member states withdrawn their support for the UN treaty process. The EU's subversive approach has drawn wide condemnation from international NGOs. In 2019, Friends of the Earth wondered how the EU could claim 'it is committed to protecting human rights and those that defend them, when it is attempting to shut down this historical [treaty] process'.[33]

While the draft Policy does address the basic concerns of affected communities, it is manifestly misaligned with the legal philosophy of the African human rights system that corporations have legal obligations under the African Charter and other relevant regional human rights instruments in a significant way. Until this misalignment is revised, it is hard to see the draft Policy scaling through the scrutiny of the AU's Specialised Technical Committee on Justice and Legal Affairs. Even if it does scale through without significant revisions, such a policy stands to fundamentally conflict with existing standards enunciated by African human rights mechanisms on the subject of the human rights obligations of corporations in Africa. Given the normative character of such a policy, it is my view

30 SRGPs para 56.

31 Draft African Union Policy on Business and Human Rights (2018) 32, 39(i)(II), 44(d).

32 Friends of the Earth International 'Leak: EU to back out of UN treaty on business and human rights' 13 March 2019 <https://www.foeeurope.org/leak-eu-un-treaty-human-rights-130319> (accessed 4 November 2020); M Bordignon 'A winding road towards a binding treaty on business & human rights: A focus on Italy' 23 October 2017 <https://www.business-humanrights.org/en/blog/a-winding-road-towards-a-binding-treaty-on-business-human-rights-a-focus-on-italy/> (accessed 4 November 2020).

33 Friends of the Earth International 'Why does the European Union fear a binding human rights treaty on transnational corporations?' 11 July 2018 <https://www.foei.org/news/why-does-the-european-union-fear-a-binding-human-rights-treaty-on-transnational-corporations> (accessed 4 November 2020).

that it should have at the outset been developed by the African Commission or, at the very least, under its superintendence in order to keep the framework within the purview of African human rights jurisprudence.

(b) Adopt a Protocol on Business and Human Rights

A more pragmatic approach to regulating corporate impunity on a continental scale is to adopt a *Protocol to the African Charter on Human and Peoples' Rights on Business and Human Rights in Africa* (*Business and Human Rights Protocol*). Over the past three decades, the African Charter has been rightly supplemented by protocols on various issues to guarantee a regime of rights protection in Africa that is relatively comprehensive. However, that comprehensiveness is slackened by the Charter's apparent lack of precise language on business impacts on human rights: from the extractive industries to information technology. For a system that prides itself on having the unique attribute of incorporating all categories of rights in a single instrument and recognising that rights are correlative of duties, the absence of an express business and human rights language is a blind spot in the regulation of corporate abuses in Africa.

Conversely, this proposition raises the question of what the essence of such a Protocol will be if businesses are not going to be directly or procedurally accountable before African human rights mechanisms. This is a valid question. The essence of such a protocol is not much more about direct accountability than it is about providing a continental legal framework on business and human rights. I argue that to remove the notion of corporate human rights obligations from the vicinity of conjecture and guesswork, a Business and Human Rights Protocol is imperative. Such a protocol will operate to amplify in a focused way the rights of affected communities, the obligation of business for human rights, labour and the environment, and the duties of states with respect to the enforcement of that obligation. Hence, the essence of a protocol in these respects cannot be over-emphasised for several reasons.

Firstly, the recognition of the corporate legal obligation for human rights in the SRGPs and its enunciation in several general comments by both the African Commission and the African Children's Committee make it ripe for consolidation in treaty form. Unlike at the UN level, the existing consensus on the human rights obligations of corporations in Africa makes the negotiation process for a regional protocol a lot less prone to ideological differences. Such a Protocol could

institutionalise indirect corporate accountability by requiring state reports in line with the current practice under African human rights instruments.

Secondly, the Protocol will provide the skeleton on which the details of a model law on business and human rights and, subsequently, national legislation can be fleshed out. At the moment, the enunciations of principles on business and human rights by the respective African human rights bodies remain fragmented, segregated and incoherent. This is bad for articulating Africa's position on business and human rights at a policy-making level. The lack of coherence may also impact the extent to which the complaint procedures of the various African human rights mechanisms can integrate business and human rights principles in their decisions.

Third, the absence of a properly coordinated and institutionalised framework on the issue of business and human rights in Africa makes it nearly impossible for African CSOs to critically engage in the UN treaty negotiation process. The result of such a fragmented and disaggregated approach would be that Africa has no clear policy position on business and human rights issues or laser-focused precision guidelines on which the position of African CSOs can be hinged.

Last, and most importantly, the rights of individuals and communities who are at risk of being victimised by business development projects need to be adequately protected, whether in the realm of the extractive sector, or in capital-intensive national, public-private or purely private infrastructure development, agribusiness, the blue economy or information communication technology. In particular, the rights of affected communities and marginalised populations to effective participation, broad consultation, FPIC, land rights, and their cultural heritage must be protected. Like other supplementary protocols, a Business and Human Rights Protocol will provide thematic protection to resource-rich communities and marginalised groups.

The African human rights system has been left far behind the trail of the EU's normative advances in reining in corporate abuses. It now must play catch-up with Europe's advances on conflict minerals, data protection, environmental population, and climate change. Having been adopted in 1981, it is obvious that the African Charter did not foresee many of the technological and economic transformations of our time or their human rights and environmental implications on our lives. Consequently, the protocol will operate to adapt the African Charter more broadly to the unforeseen impacts of business on human and peoples' rights in Africa.

(c) Adopt a Model Law on Business and Human Rights

A model law serves as a template for state parties to adopt domestic legislation dealing with a particular assemblage of issues.[34] It is a set of legal provisions substantiating international, regional or sub-regional standards on a given subject matter, with the intention that it will serve as a guide for national legislation.[35] A key challenge for many African countries desirous of balancing between promoting foreign investments and protecting human rights is often how to adopt legislation that guarantee strong environmental, labour and human right standards that are yet to gain traction globally. This is very difficult to do because unilaterally adopting such standards de-markets the state as an investment destination and potentially makes it less attractive to investors.

A regional model law on business and human rights – either standing on its own or drawing from a regional Business and Human Rights Protocol - will identify the basic practical content of the human rights obligation of business upon which national legislation is expected to be based.[36] It will have the effect of signalling to investors that there is a common regional consensus on the human rights obligations of business within the existing framework of African human rights instruments. Such a law will help characterise future international trade and investment negotiations, define the contours for domestic concessions to private actors, and significantly increase the standard of conduct for businesses operating in Africa. What is most fascinating about the potential of such a model law is that it needs not be adopted hook, line and sinker. States will be at reasonable liberty to adapt the law to the domestic realities of their respective countries, while sticking to the bare minimum standards for businesses across sectors.

When adopted, the model law will go a long way in entrenching a culture of responsible business conduct for current and future investors in the extractive industries and define the basic responsibilities of states and businesses for labour, the environment, human rights and corporate ethics.

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[34] MY Mattar 'Harmonization of national legislation through Model Laws: From the United Nations Commission on International Trade Law to the League of Arab States and the Gulf Cooperation Council' (2017) 22, 26 <http://www.uncitral.org/pdf/english/congress/17-06783_ebook.pdf> (accessed 8 November 2020).

[35] African Commission 'Model Law on Access to Information for Africa' (2013) 7 <https://www.achpr.org/legalinstruments/detail?id=32> (accessed 6 November 2020); Model Law for the Implementation of the African Union Convention for the Protection of and Assistance to Internally Displaced Persons in Africa 2018.

[36] As above.

7.3.3 Mobilise for change

For corporate human rights accountability to take root in Africa, the establishment of normative prescription and institutional monitoring at the African regional level will not be enough. There is the risk of the African human rights system being disconnected altogether from the corporate culture of impunity and the goings-on on the ground. Hence, its theory of change must adopt a proactive rather than a reactive approach to prevent violations before they occur and, where they are likely to occur, mitigate their potential impacts on communities. To draw abusive businesses away from the path of perdition, monitoring bodies such as the African Commission and the African Children's Committee must apply not just a top-down but also a bottom-up approach to awareness raising and abuse prevention in the extractive sector.

To do this, the inextricable link between the African human rights system, NHRIs, NGOs, victims and violators must be utilised as a valuable symbiotically reinforcing channel for effective grassroot action. As Okafor notes, the interaction between African human rights bodies and civil society should not be entirely defined by 'what these [human rights] institutions can do for the disadvantaged or oppressed' CSOs.[37] Rather, it should be a two-way relationship that harnesses the advantageous position and knowledge management systems that civil society actors on the ground can equally use to reinforce and advance the human rights agenda of the African regional bodies. With this symbiotic relationship in mind, African human rights monitoring bodies should take a key part in mobilising for grassroot action by supporting civil society causes in five important areas.

(a) Popularise the corporate accountability lexicon

The role of the African Commission and the African Children's Committee as the primary promoters and protectors of human and peoples' rights in Africa does not stop at the consideration of state party reports, the determination of complaints and formulation of human rights principles. They must take key part together with civil society actors in the popularisation of the corporate accountability lexicon. This means that they are expected to work directly with extractive companies and

[37] OC Okafor *The African human rights system, activist forces and international institutions* (2007) 39.

support NGO initiatives and NHRI programmes at the domestic level to institutionalise the corporate accountability language in business.[38]

(b) Support grassroot campaigns on corporate accountability

African human rights monitoring bodies also need to actively support grassroot-based CSOs that seek to educate communities and workers on their rights as stakeholders and the responsibilities of states and corporations as duty-bearers in extractive projects. This is particularly important because when continental agendas of such nature are pushed by continental institutions, they are likely to gain credibility and legitimacy than they would normally have with foreign-donor projects. Hence, the monitoring bodies need to work with domestic civil society actors to help entrench a culture of responsible corporate conduct and environmentally sustainable initiatives at the grassroot level as articulated in the African Mining Vision 2009 and other AU instruments on natural resource governance.[39] This could entail convening multi-stakeholder initiatives comprising regulatory bodies, extractive corporations, chambers of commerce, captains of industries and industrial associations, NGOs and the African human rights monitoring bodies themselves.

(c) Democratise the state reporting and compliance process

The African Commission and the African Children's Committee need to democratise and expand the focus of the state reporting and compliance process to include the extractive industries. Considering that the reporting process is intended to afford these bodies a comprehensive understanding of the situation of children, human and peoples' rights in African states, it should be such that allows for public participation and self-reflection by affected stakeholders and the state concerned. Commendably, the reporting guidelines of both monitoring bodies already encourage state parties to 'facilitate popular participation, national introspection and public scrutiny of government policies and programmes, private sector practices and generally the

[38] R Gawaya & RS Mukasa 'The African Women's Protocol: A new dimension for women's rights in Africa' (2005) 13 *Gender and Development* 42.

[39] African Union 'Africa Mining Vision: African Minerals Governance Framework' (2017) <https://www.uneca.org/sites/default/files/PublicationFiles/african_mining_vision_african_mineral_governance_framework.pdf> (accessed 26 August 2020); African Union & UN Economic Commission for Africa 'African Mining Vision – Looking beyond the vision: An AMV Compact with private sector leaders' (2017) 8-10 <https://www.uneca.org/sites/default/files/PublicationFiles/africa_mining_vision_compact_full_report.pdf> (accessed 27 August 2020).

practices of all sectors of society'.[40] However, there are no clear indications on the modalities or composition of such 'participatory' processes to determine whether affected and vulnerable segments of the population such as women, children, the elderly and persons with disabilities were involved in the process. The opportunity of NGOs to participate or submit alternative reports does not make the process any more democratic.[41]

More so, it does seem that it is only the African Commission that is focused on the environmental, social and human rights abuses in the extractive industries.[42] It not only has three working groups looking into the adverse human rights impact of extractive industries on communities, it has also adopted the SRGPs to enable it assess the situation in states through the state reporting process. Although worthy of commendation, it is equally worrisome that since the adoption of the SRGPs in 2018 no state party has given any report focusing on the extractive industries to date. On its part, the African Children's Committee appears to be slacking on the equally important issues of child labour, child prostitution and child exploitation that are rampant in the extractive industries.[43] This is especially evident in the Committee's reporting guidelines, which have no specific aspect of its special procedures dealing with child rights abuses in the extractive industries. It is hoped that the establishment of the African Children's Committee's Working Group on Children's Rights and Business will provide a clear framework for developing norms and standards on children's rights and business in Africa.

[40] African Children's Committee Guidelines for Initial Reports of States Parties para 3; African Children's Committee Guidelines on the Form and Content of Periodic State Party Reports to be submitted pursuant to article 43(1)(b) of the African Charter on the Rights and Welfare of the Child 2020; BD Mezmur & J Sloth-Nielsen 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 596 601-602.

[41] African Children's Committee 'Reporting Guidelines' sec 1(3) <https://www.acerwc.africa/initial-reports-guidelines/> (accessed 30 September 2020); F Viljoen *International human rights in Africa* 2nd ed (2012) 360-362.

[42] The African Children's Committee does not have any guidelines similar to the African Commission's SRGPs.

[43] International Labour Organisation 'Child labour in Africa' <https://www.ilo.org/ipec/Regionsandcountries/Africa/WCMS_618949/lang--en/index.htm> (accessed 6 November 2020); A Kelly 'Apple and Google named in US lawsuit over Congolese child cobalt mining deaths' *The Guardian* 16 December 2019 <https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths> (accessed 6 November 2020); Z Neff 'Africa's child mining shame' *CNN* 11 September 2013 <https://www.hrw.org/news/2013/09/11/africas-child-mining-shame> (accessed 6 November 2020); United Nations Children's Fund 'Children's rights and the mining sector: UNICEF extractive pilot' (2015) 9, 11, 16 <https://www.unicef.org/csr/files/UNICEF_REPORT_ON_CHILD_RIGHTS_AND_THE_MINING_SECTOR_APRIL_27.pdf> (accessed 6 November 2020).

(d) Strategic litigation before regional complaint mechanisms

Strategic litigation is a potent tool for developing the law, mobilising grassroot action and raising awareness about a particular issue in society. It has been used in several cases before domestic and international tribunals to develop judicial precedents, enunciate new legal principles and clarify existing law on issues not explicitly addressed in the literal text of statutes and human rights instruments. For example, the *SERAC* case led to the enunciation of the right to housing as an implicit right enshrined in the African Charter through the combined reading of the rights to property, the best attainable state of mental and physical health, and family life under articles 14, 16 and 18(1) of the African Charter. African human rights mechanisms need to recognise the importance of strategic litigation when they arise and be prepared to give such complaints the seriousness that they deserve.

(e) Continuous education

The need to continuously educate the African populace, private and public actors, CSOs, NHRIs and regulatory institutions on the nature, scope and legal consequences of the human and environmental obligations of corporations cannot be overemphasised. For responsible corporate conduct to take root, constant effort must be made to educate the public on the obligation of business to do no harm and the duty of institutional regulators to monitor and enforce laws. African human rights bodies should collaborate frequently with relevant academic institutions, CSOs and NHRIs to educate affected communities, extractive corporations and state regulators on the relationship between business and human rights and the various roles that each has to play to avoid harm and remediate injuries.

7.3.4 Create a Corporate Accountability Monitoring System (CAMS)

One other thing that both the African Commission and the African Children Committee can do to promote responsible business conduct in the extractive industries and generally track human rights compliance in the business sector is to establish a corporate accountability monitoring system (CAMS). The CAMS will be a focal sub-mechanism either operating through the existing working group system or created afresh as a collaborative initiative between the monitoring bodies and companies to address business and human rights issues in Africa. The CAMS will be responsible for tracking corporate compliance with African human rights and environmental standards. And it may also incentivise responsible corporate conduct and corporate compliance with human rights by periodically recognising companies

that make significant strides in meeting their corporate human rights obligations. This could be done through a formal award or an honorary recognition, displayed in the website of the relevant monitoring mechanism. The likely implication of this is a race to the top by companies to receive such prized award or recognition from the foremost human rights monitoring bodies in Africa.

7.4 Final thoughts

On the whole, it should be emphasised that in articulating the role of African regional mechanisms in advancing corporate accountability in the extractive industries, I do not in the slightest way misrepresent that Africa will magically address all the problems in the sector or will do so instantaneously. Not in the least. Real progress requires the necessary leadership, takes time and demands purposeful effort. Therefore, whether the various regional mechanisms will rise up to the challenge of addressing the human rights and environmental abuses in the extractive sector in a supplementary and pragmatic way will depend on the leadership of the various bodies, and cooperation with states, NHRIs, civil society actors and ordinary people in Africa who are interested in seeing a dramatic shift from the regime of state and corporate impunity to one of responsible conduct and accountability. All-in-all, only time will tell.

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EXCERPTS FROM THE THESIS EXAMINERS' COMMENTS

"The thesis is organized around a clear research question that seeks to address a major human rights concern. The organization and presentation of the analysis and discussions of the various chapters is crafted around the sub-set of questions and geared towards answering these questions, thereby responding to the central question. The thesis is accordingly logically organized and coherently presented….

The major contribution of the thesis is in the pertinent and strong case that it makes for the discourse on business and human rights to be informed by and draw on the specificities of the nature of human rights challenges in Africa resulting from the operation of extractive industries. The thesis also makes an important contribution to the field by identifying the many ways by which the current normative and institutional approach to the regulation of corporate responsibility, with its self-regulation and voluntary and legally non-binding approach, for human rights at the UN level fails to address the major human rights issues associated with the role in particular of TNCs.

The thesis is also excellent in setting the stage and providing useful materials for engaging in further research and analysis on corporate accountability within the African human rights system."

- Dr Solomon Dersso, Addis Ababa University [Also, *Chairperson of the African Commission on Human and Peoples' Rights/Special Rapporteur of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa*]

"The thesis by Mr. Okoloise is the first of its kind. To the best of my knowledge, it is the first comprehensive academic research on this particular subject, from an African perspective. It provides a detailed account of the regime of corporate regulation and human rights accountability, a topic on which discussions for a proper regulation are still ongoing both at the international and regional levels. The research is then timely, relevant and original. It will certainly make a great contribution not only to the ongoing above-mentioned conversation but also to the advancement, not only of knowledge and a better rights protection.

The problematic and research questions are well presented and the reader is eager to discover.

The study adopted relevant theoretical or analytical frameworks (human rights-based approach and Third World or African Approaches on international human rights law). The issues are dealt with using the perspectives from the South, with the particular aim of unearthing the potential of the African human rights system to ensure a better rights protection and access to justice for the victims of atrocities committed by or in complicity with TNCs."

- Prof Pacifique Manirakiza, *Faculty of Law/Common Law Section, University of Ottawa [Previously, Member of the African Commission on Human and Peoples' Rights & Special Rapporteur of the African Commission Working Group on Extractive Industries, Environment and Human Right Violations in Africa*

"My overall impression is that the thesis is well written and well-researched. It covers a particularly important and topical subject and makes a number of interesting recommendations. It makes a valuable contribution, making new recommendations, on a very topical issue."

- Prof Dire Tladi, *Faculty of Law, University of Pretoria* [Also, *Vice-Chair of the International Law Commission; Special Rapporteur of Peremptory Norms of General International Law (Jus Cogens); Member of the Institut de Droit International.*

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Publications and papers

Publications

- 'The role of the African Union in advancing corporate human rights accountability in Africa' (2022) *Journal of African Law* [Forthcoming]
- 'Engaging the "Obligations" of international financial institutions towards resource-rich communities in Africa' in S Dersso (ed) *Pushing the boundaries of the natural resource governance regime in Africa: The African*

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- *Humanizing investments in the extractive industries in Africa through the IFC's sustainability policies,* Social Protection of Human Rights Conference, University of Dayton, Dayton, Ohio, 1-4 October 2019
- (1) *African Mining Vision and the State Reporting Guidelines: Synergies and linkages*, AND (2) *How NGOs can use the Guidelines – A tool for advocacy*, African Commission on Human and Peoples' Rights Promotional and Sensitisation Workshop for the Southern African Development Commission on the State Reporting Guidelines, Johannesburg, South Africa, 30 August 2019
- *Open source intelligence as a tool for advancing accountability in Africa,* Amnesty International's Digital Verification Corps Summit 2019, The University of Hong Kong, 2-5 June 2019
- *Sustainability as a proactive internal and external risk-reduction strategy for extractive corporations in Africa,* Innovate Rights: New Thinking on Business and Human Rights Conference, University of New South Wales, Australia, 14-16 May 2019
- *Access to justice by victims of corporate abuses in the extractive industries in Africa: Beyond a state-focal accountability system*, 3rd Law and Development Research Network conference, Leiden University, The Netherlands, 19-21 September 2018
- *Digital Verification of the conflict environment in the DR Congo*, Digital Verification Summit (DVC), Cambridge University, Cambridgeshire, United Kingdom, 26-30 June 2018
- *The role of the African Union in advancing corporate human rights accountability in Africa,* 3rd Business and Human Rights Young Researchers Summit, New York University, United States, 19-21 April 2018
- *Diminishing corporate human rights violations in the extractive industries in African through African accountability standards*, Centre for Development Research (ZEF), University of Bonn, Germany, 2-7 September 2017
- *Impact of foreign debts and global financial crises in West Africa,* Global Classroom, European Inter-University Centre for Human Rights and Democratisation, Lido-Venice, Italy, May 2015

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