HOLDING MULTINATIONAL CORPORATIONS IN AFRICA'S EXTRACTIVE INDUSTRIES ACCOUNTABLE FOR HUMAN RIGHTS VIOLATIONS

BY

PAMELA FRANCISCA CHENGETAI CHOGA

689506

SUPERVISOR:

PROFESSOR LILIAN CHENWI

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DECLARATION

I, PAMELA FRANCISCA CHENGETAI CHOGA,

declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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ABSTRACT

Corporate accountability has been a contentious issue for decades. This research report therefore considers the question: what are the means through which multinational corporations (MNCs) in Africa's extractive industries are and can be held accountable for human rights violations? This consideration is achieved by looking at oil corporations and their operations in Nigeria and Sudan as examples. Principles on corporate accountability are discussed and, to in order to determine how MNC are held accountable, this report examines legal mechanisms that exist, as well as how these have applied principles of corporate accountability. It is argued that indirect accountability through states is not always adequate and is undermined by lack of political will of host states to regulate corporate activities in national laws, especially where there is a fear of losing government revenue from oil extraction. Also, home states do not always comply with their extraterritorial obligations, with the United States (US) and The Netherlands being used in the context of this research report as exceptions. Ultimately, this is an area of law that is seeing gradual improvement with individual African states such as South Africa practising horizontal application of human rights, aimed at ensuring corporations uphold human rights in the same way states do. Initiatives have been made by the African Commission on Human and Peoples' Rights' Working Group on Extractive Industries towards regional framework on MNC accountability; and the establishment of the African Court of Justice and Human Rights comes with the extension of criminal jurisdiction that covers corporate entities. For the purposes of this research report, both multinational and transnational corporations will be referred to as MNCs.

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples’ Rights
ATCA	United States Alien Tort Claims Act
AU	African Union
CIL	Customary International Law
CNPC	China National Petroleum Corporation
HRC	United Nations Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHRL	International Human Rights Law
ILC	International Law Commission
MNC	Multinational Corporation
NGO	Non-Governmental Organisation
NNPC	Nigerian National Petroleum Corporation
OECD	Organisation for Economic Co-operation and Development
TRC	Truth and Reconciliation Commission
UN	United Nations
UNEP	United Nations Environment Programme

UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

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I. INTRODUCTION

International borders which distinguish states and characterise state relations today have no bearing on modern-day corporate activities. Coined multinational corporations (MNCs) and transnational corporations (TNCs),[1] they have crossed territorial boundaries in search of global markets, untapped resources and cost-effective production facilities. Their economic muscle has taken over different sectors of the economy such as resource extraction. Africa is well known for its resource wealth – oil being one of them. Oil has been discovered in various parts of the continent and because of this, many oil corporations find African countries attractive hosts for oil extraction and have come to dominate the oil extraction industry in Africa. Oil is a very lucrative commodity in consistently high demand since mid-nineteenth century, fuelling the automobile industry, one of the biggest industries in the world.[2]

It is envisioned that these oil corporations should use their expertise and vast revenue to develop lucrative oil industries in oil-rich African countries.[3] However, their boundless pursuit for profit maximisation has led to destructive and exploitative practices. Oil corporations set up plant in host countries, where the oil is located, to extract it and operate their business on site. In some instances, their operations in the host state have left a trail of human rights abuses such as environmental degradation, supporting invasive property rights violations and financing repressive military operations against civilians.

This research report seeks to examine how MNCs in Africa's oil extractive industries are and can be held accountable for human rights violations. Also examined is whether legal mechanisms used to apply the law are indeed effective in ensuring accountability for

[1] For purposes of this research report, the term Multinational Corporations (MNCs) will be used to describe Multinational Corporations and Transnational Corporations as these are interchangeable terms, without one fixed definition. See M Karavias 'Shared Responsibility and Multinational Enterprises' (2015) 1 *Netherlands Int LR* 2, 5.

[2] R Rapier 'Peak Oil Demand is Millions of Barrels Away' *Forbes* (19 June 2017) <https://www.forbes.com/sites/rrapier/2017/06/19/peak-oil-demand-is-millions-of-barrels-away/2/>.

[3] A Diouf, J Kibugu, N Mncwabe, J Mello Neiva & G Regaignon 'Africa Oil Week 2013: Oil and Gas Industry Must Improve its Respect for Human Rights' (2013) *Business & Human Rights Resource Centre Briefing Note* 1.

misconduct. This is achieved by setting out, in section II of this research report, the legal principles under international human rights law (IHRL) that have been developed to establish direct and indirect accountability of corporations. It is important to understand what is meant by MNCs; hence, section II begins with a definition of MNCs. Next the impact of oil corporations on the environment and livelihood of communities in Nigeria and on internal conflict and livelihood of people in Sudan are considered under section III.[4] These two examples are considered against the background of the IHRL principles outlined in section II. Section IV highlights initiatives taken by the African continent through a special mechanism to ensure corporate accountability as well as steps being taken towards legally binding direct corporate liability through a judicial mechanism.

II. DEFINING MNCS AND PRINCIPLES ON CORPORATE ACCOUNTABILITY UNDER INTERNATIONAL HUMAN RIGHTS LAW

a) General definition of MNCs

MNCs have a sheer magnitude and presence that extends across territorial boundaries and they operate in several different countries, accumulating revenue and profit.[5] A common definition that acknowledges their features is that which describes MNCs as consisting of a parent corporation with subsidiaries as members of a group of companies.[6] The parent company is registered in a home state, is a citizen juristic person of and is domiciled in that state.[7] Its subsidiaries are based in several other states – host states – where they invest and operate as separate entities from the parent company.[8] Each are considered

[4] UN Environment Programme (UNEP) 'Environmental Assessment of Ogoniland' (2011) <www.unep.org/nigeria>.

[5] F Cherunilam *International Economics* 5 ed (2008) 528.

[6] P Blumberg 'Accountability of Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity' (2001) 24 *Hastings Int & Comparative LR* 297, 301 and 303.

[7] H O Yusuf 'Oil on Troubled Waters: Multinational Corporations and Realising Human Rights in the Developing World, with Specific Reference to Nigeria' (2008) 8 *African HRLJ* 79, 105.

[8] Note 1 above, 5.

entities of the country in which they operate and subsidiaries are independent with separate duties and liabilities from the parent corporation.[9]

An example of a MNC is Royal-Dutch Shell, which is based in The Netherlands and registered in the United Kingdom (UK).[10] It operates in 100 countries with all its subsidiaries identified as stand-alone corporations.[11] It is recognised as one of the top six oil corporations in the world, earning $305 billion revenue in 2017.[12]

b) Principles on corporate accountability under international human rights law

Globalisation has allowed for corporate functions to cross national borders to amass tremendous global wealth and power, leaving international human rights lawyers challenged on how to respond to this phenomenon. Academics, engaged in heated debate over the years, have been divided between those advocating for binding obligations and those against this idea.[13] Binding obligations would mean regulating MNC conduct, just as state conduct is limited under IHRL. A brief discussion on how IHRL regulates state conduct gives some background regarding how it is structured and the reasons behind this.

International state relations have been centred on the notion of state sovereignty, which dictates that individual states have authority over everything that happens in their

[9] Ibid 9.

[10] Shell website 'Who we are' <https://www.shell.com/about-us/who-we-are.html>.

[11] Shell Is A Multinational Company Commerce Essay (2015) <https://www.ukessays.com/essays/commerce/shell-is-a-multinational-company-commerce-essay.php>. Also see 6 above, 303.

[12] Ibid; note 10 above.

[13] For example, see K Nowrot 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' (1993) *Journal of Global Legal Studies* 1 on recommending that MNCs be considered directly accountable unless they can prove otherwise. An opposing view is in a submission made on the horizontal application in *Certification of the Amended Text of the Constitution of The Republic of South Africa*, 1996 1997 (2) SA 97 'Supplementary written argument by the South African Institute of Race Relations in terms of the directions of the President of the Constitutional Court'.

boundaries.[14] Occurrence of internal conflict and international wars between states led to the realisation that states wield an unequal advantage of political power over individuals.[15] Therefore IHRL became a necessary measure in avoiding abuse of this power, protecting the individual and regulating state conduct.[16]

Accordingly, the preamble to the Universal Declaration of Human Rights notes that 'member states have pledged themselves to achieve, in cooperation with the UN [United Nations], the promotion of universal respect for and observance of human rights and fundamental freedoms'.[17] Therefore, states are the principal duty-bearers of human rights.[18]

The same does not apply to private entities such as MNCs. It is assumed that the private realm is self-regulating, and all parties always find a way to establish equality among themselves.[19] This could not be further from the truth as abuse of power by MNCs is of global concern.[20] MNCs are mostly indirectly regulated under IHRL, without binding direct corporate accountability under the IHRL framework.

i. *Indirect accountability of MNCs through states' obligation to protect*

As principal duty-bearers, states are considered the guardians of human rights and obligated to 'respect, protect, promote and fulfil' rights.[21] This is integral to the realisation of human rights enshrined in, for example, the International Covenant on Economic,

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[14] J Schechinger 'Global Health Issues and Shared Responsibility? The Case of Ebola' *Shared Project* (October 2014) < http://www.sharesproject.nl/global-health-issues-and-shared-state-responsibility-the-case-of-ebola/>.

[15] Ibid.

[16] Uganda Consortium on Corporate Accountability (UCCA) 'The State of Corporate Accountability in Uganda: A Baseline Study for the Uganda Consortium on Corporate Accountability' (2016) 1, 10.

[17] Universal Declaration of Human Rights (1948) preamble.

[18] Note 16 above, 10.

[19] Ibid.

[20] Ibid.

[21] See for example, *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* 2001 (60) AHRLR para 44.

Social and Cultural Rights (ICESCR),[22] the International Covenant on Civil and Political Rights (ICCPR),[23] and the African Charter on Human and Peoples' Rights.[24]

The obligation to protect is of particular importance because it has featured in cases involving MNCs. Simply put, it is a state's duty to prevent rights violations by third parties or respond to such violations through the provision of effective remedies.[25] It thus includes the duty to plan and put into place mechanisms at the disposal of right holders that they can use when their rights are threatened.[26] When violations do occur and are caused or perpetuated by corporations, this conduct is attributed to the state as it is obliged to investigate and prosecute those responsible.[27]

Even where conduct cannot be directly attributed to the state, the circumstances still attract state responsibility. As explained in the leading case on the obligation to protect – the Inter-American Court of Human Rights' decision *Velasquez Rodriguez v Honduras*[28] – the result is state responsibility 'not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it'.[29] Due diligence is when a state takes reasonable steps to prevent misconduct from occurring.[30] Before assessing what the violation was, the mere fact that it even happened means the state did not exercise diligence to prevent it.

Therefore, precedent has relied heavily on an indirect approach towards corporate accountability, with the host state taking responsibility for the protection of human rights of its people against third party violations, by regulating corporate conduct under their

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[22] International Covenant on Economic, Social and Cultural Rights (1966) Parts I and III. See also art 2(1) and (2) on state obligation.

[23] International Covenant on Civil and Political Rights (1966) Parts I and III. See also art 2(1) and (2) on state obligation.

[24] African Charter on Human and Peoples' Rights (1982) Part I Chapter I. See also art 1 on state obligation.

[25] Note 21 above, para 45; note 16 above, 13–14.

[26] Note 21 above, para 45.

[27] *Velasquez Rodriguez v Honduras* [1988] Inter-Am Court HR (Ser C) No 4, para 74

[28] Ibid.

[29] Ibid para 72.

[30] Note 16 above, 13.

national laws.[31] This means MNCs become directly accountable to the states in which they operate. This duty is expected from the host state because this is where corporations operate and is ideally more accessible for the host to supervise corporate conduct.[32] This principle is based entirely on an individual state's political will to 'regulate and exercise authority over foreign investment and supervise the activities of transnational corporations within their national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations'.[33]

States must address violations at a local level before international mechanisms are approached. In fact, the African Charter, for example, insists that complainants 'exhaust local remedies' first before approaching a regional body.[34] However, seeking a remedy in the host states is not possible at times because:

> States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment.[35]

This leads to the question of what may happen when host states are unable or unwilling to prevent third party violations. Where this is the case, it should be noted that home states also have the same obligation to protect because this is where corporations are incorporated.[36]

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[31] Charter of Economic Rights and Duties of States UN Doc A/RES/39/163 (1984) art 2.

[32] Note 16 above, 14.

[33] African Charter (note 24 above) art 56(5).

[34] Ibid. It should be noted that it is not strictly applied and exceptions exist to this rule, for example, where 'no adequate domestic remedies are existent', the rule does not apply (see note 21 above, para 41).

[35] UNHRC 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Promoting and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (2008) UN Doc A/HRC/8/5, para 14.

[36] Ibid para 19.

ii. Extraterritorial obligations of home state

Globalisation has limited the effect of home states' territorial jurisdiction over MNCs as these entities have transcended their borders. For example, corporate law dictates that a parent corporate entity is separate from its subsidiaries, meaning that a home state will have territorial jurisdiction over the parent entity and not its subsidiaries.

However, under IHRL, there has been debate regarding the extent to which home states' have personal jurisdiction over the entities themselves as they operate abroad.[37] Ruggie clarifies as follows:

> Experts disagree on whether international law requires home states to help prevent human rights abuses abroad by corporations based within their territory. There is greater consensus that those states are not prohibited from doing so where a recognised basis of jurisdiction exists, and the actions of the home state meet an overall reasonable test, which includes non-intervention in the internal affairs of other states. Indeed, there is increasing encouragement at the international level, including from the treaty bodies, for home states to take regulatory action to prevent abuse by their companies overseas.[38]

Some IHRL conventions state that home states must regulate entities within their territory and jurisdiction. Article 2(1) of ICCPR, for example, applies 'to anyone within the power and effective control of that state party, even if not situated within the territory of the state'.[39] This means international conventions have been interpreted to include extraterritoriality.[40]

Home states' obligation to protect extends beyond their borders as they are obliged to act where corporate subsidiaries are outside their territorial control but remain affiliated to them.[41] Hence the soft law provision, drawn from international law, stating that:

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[37] Ibid.

[38] Ibid.

[39] HRC General Comment No 31(80) Nature of the General Legal Obligation Imposed on States Parties to the Covenant UN Doc CCPR/C/21/Rev.1/Add.13 (2004) 3.

[40] R McCorquodale & P Simons 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 *Modern LR* 598, 603.

[41] Ibid 624; note 16 above, 16.

> All states must take necessary measures to ensure that non-state actors which they are in a position to regulate...such as private individuals and organisations and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other states have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.[42]

The extraterritorial effect of the obligation to protect ensures that MNCs are directly accountable to home states, to the extent that this does not interfere with the sovereignty of the host state.[43] However, this is a slippery slope for home states, as they are often accused of controversially using this jurisdiction over corporate subsidiaries to dictate power relations between states and is therefore rarely used.[44] There a few exceptions such as the Alien Tort Claims Act (ACTA),[45] which allows for the exercise of extraterritoriality by the US over corporations registered in it but operating abroad.

iii. Principles promoting direct corporate accountability

The notion that corporations are self-regulating entities is quickly losing ground under IHRL. Recognition that MNCs are equally likely to abuse their power like states has led to countless norms, codes of conduct and guidelines which encourage MNCs to respect human rights.[46]

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[42] Fian International *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2013), principle 24. See also principles 23 and 25-27 on extraterritorial obligation to protect, and preamble para 8 confirming that the principles are drawn from international law.

[43] Note 16 above, 14.

[44] Note 40 above, 621.

[45] Alien Tort Claims Act 28 USC section 1350 ATS.

[46] UNGA '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 Nations "Protect, Respect and Remedy" Framework (2011) UN Doc A/HRC/17/31 (Ruggie Principles).

The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines),[47] introduced the idea that MNCs must always be cognisant not to negatively impact on others' freedoms within their operations and to take positive action to address such impact should it occur.[48] This was consolidated by the UN framework was initiated by UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights,[49] which stated respect for human rights within one's 'sphere of influence' means not only respecting rights by being on the lookout and act diligently taking 'reasonable steps to avoid involvement with human rights abuse', but also refraining from misconduct that perpetuates abuse.[50] Other soft law instruments like the UN Global Compact,[51] does not have enforcement mechanisms but encourages corporations to desist from complicity to human rights violations.[52]

Standards outlined in all the above-mentioned instruments are already applicable to state conduct but are made in the context of corporate accountability to encourage human rights observance in MNC operations.[53] However, they are packaged in non-binding soft law instruments, meaning no sanctions apply for those that do not comply with their obligations:[54]

> A company is not obliged to honour commitments it makes in any voluntary mechanism. Voluntary tools therefore, are necessary but not sufficient to change a company's behaviour in a

[47] Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises* (2000).

[48] Ibid.

[49] UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[50] Ibid.

[51] UN Global Compact <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

[52] Ibid principle 2.

[53] P Macklem 'Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction' (2005) 7 *International Law Forum du Droit International* 281, 284–285.

[54] Ibid.

zone of conflict. This is equally applicable to the context of realising the economic, social and cultural rights of MNCs' host communities.[55]

Since these soft law instruments cannot be enforced, they mainly serve to consolidate states as primary duty-bearers which is in line with states' obligation to protect human rights.[56] The fact that MNCs have limited capacity as legal entities of international law, also makes it difficult to legally bind them to direct accountability. While there is no universally binding treaty (like the ICESCR or ICCPR) governing how MNCs should relate with other parties in their business ventures, 2014 saw the establishment of a working group by the Human Rights Council.[57] The Inter-Governmental Working Group on Transnational Corporations and other Business Enterprises with respect to human rights, with a mandate to 'elaborate an international legally binding instrument' on corporate operations' relationship with international human rights law.[58] This development shows that indirect accountability is no longer sufficient and soft law not effective enough.[59] It is hoped that legally binding measures at international level will provide guidance for national legal systems to adopt in the progress of time.

Corporate accountability is predominantly based on states fulfilling their obligation to protect which indirectly ensures that MNC conduct is regulated, therefore nipping possible misconduct in the bud. Where misconduct occurs, states must be seen to be taking action. MNCs do have obligations similar to states but these are not binding and enforceable as yet.

[55] S Tripathi 'International Regulation of Multinational Corporations' (2005) *33 Oxford Development Studies* 117,122.

[56] K Nowrot 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' (1993) *Journal of Global Legal Studies* 1, 5.

[57] UNHRC Resolution 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' UN Doc A/HRC/RES/26/9 (2014).

[58] Ibid para 1.

[59] Note 16 above, 19.

III. HOLDING MNCS IN THE OIL EXTRACTIVE INDUSTRY ACCOUNTABLE: MNC PRACTICES IN NIGERIA AND SUDAN OIL INDUSTRIES

This section illustrates the negative impact that oil corporations' operations have had on property, environmental and socio-economic rights in Nigeria and Sudan. It highlights why MNCs must be held accountable for their misconduct. It also questions whether the principles outlined in section II are sufficient when applying them in a real-life context. This will be done by discussing case law that has applied and interpreted the principles.

a) Royal Dutch Shell operations in the Niger Delta

Royal Dutch Shell oil company (Shell) is the most influential multinational corporation in Nigeria and is responsible for 50% of the country's daily oil production.[60] It attained its rights of exploration in 1938, discovered oil in 1956, whereby it started exporting commercially in 1958.[61] Between 2005 and 2009, Shell made profits worth $1,8 billion from Nigerian production, which is about 7% to 10% of its total annual profits.[62] Shell's oil production facilities were huge, building well-equipped operation plants spreading over 30 000 square kilometres of land, 90 oilfields and 6000 kilometres of pipelines.[63]

The corporation is part of a joint venture between the state and MNCs – the Nigerian National Petroleum Corporation (NNPC) – a state owned company with Nigeria's

[60] S Sawyer & E T Gomez *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (2012) Palgrave MacMillan 168.

[61] Ibid 171.

[62] A ten Kate 'Royal Dutch Shell and its Sustainability Troubles: Background Report to the Erratum of Shell's Annual Report 2010' (2011) *Milieudefensie (Friends of the Earth Netherlands)*. Also see Amnesty International 'Investor Warning: Shell Profits won't count true costs of Niger Delta oil spills' (30April 2015) <https://www.amnesty.org/en/latest/news/2015/04/shell-profits-wont-count-true-cost-of-niger-delta-oil-spills/>.

[63] Note 60 above, 171.

majority stake, (55%) and Shell with 30%.[64] Shell, however, controls all operations of the joint venture's oil extraction activities.[65]

While Shell's influence in Nigeria's oil production is evidently impressive, its set up has been at the expense of communities in the Delta region who lost the lucrative benefit from their ancestral land after the Land Use Act of 1978[66] permitted the government to expropriate without redress.[67] Oil extraction is of public interest because the industry accounts for over 90% of its national revenue.[68] Hence, forced displacement was done mostly without compensation and those who were compensated, were in the minority receiving reimbursement only for lost income of crops and livestock at the time of displacement.[69]

The consortium operated negligently by exposing those who live near it to oil contaminated land and water as pipelines running through villages leaked regularly.[70] Massive environmental deterioration increased risk of disease.[71] Saro-Wiwa, an activist against Shell's operations explained the impact as follows:[72]

> Oil exploration has turned Ogoni into a wasteland: lands, streams and creeks are totally and continually polluted; the atmosphere has been poisoned, charged as it is with hydrocarbon vapours, methane, carbon monoxide, carbon dioxide and soot emitted by gas which has been flared 24 hours a day for 33 years in very close proximity to human habitation. Acid rain, oil spillages and oil blowouts have

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[64] Ibid. Other members of the joint venture are Elf with 10% and Agip with 5%.

[65] Ibid. C Kaeb 'Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks' (2008) 6 *Northwestern J Int Human Rights* 327, 330.

[66] Land Use Act Decree 6 of 1978.

[67] Note 60 above, 171.

[68] Amnesty International Publications 'Claiming Rights and Resources: Injustice, Oil and Violence in Nigeria' (2005).

[69] Note 60 above, 171.

[70] Ibid.

[71] Note 4 above, 4.

[72] Ken Saro-Wiwa's Speech at Unrepresented Nations and Peoples Organisation, Geneva in 1992. This was extracted from Amnesty International (note 68 above) 2.

> devastated Ogoni territory. High-pressure oil pipelines criss-cross the surface of Ogoni farmlands and villages dangerously.[73]

Disgruntled communities protested against the damage and against Shell's unsafe practices.[74] Response from the government and corporation brought to light their common interest in wanting to protect oil facilities at all costs.[75] Oil extraction brought revenue to the government and Shell wanted to maximise profits at minimum cost.[76] Therefore, when the military used excessive force against protestors to protect oil facilities, there was complicity on the part of the corporation.[77] Oppression against protestors escalated to a point where human rights activists were prosecuted and executed in 1995.[78]

Ogoni protests raised awareness which initiated a global campaign involving UN and Amnesty International, leading to the suspension of Nigeria from the Commonwealth and having sanctions being imposed on it by the United States (US) and European Union.[79] Judicial accountability measures were employed by the Ogoni community, including filing a complaint with the African Commission on Human and Peoples' Rights (ACHPR), civil liability under ACTA in the US and in Shell's home states, the Netherlands and UK.

i. Indirect accountability in Nigeria's oil industry and limitations

Human rights are based on the notion that individuals must be protected against state power. This is done, as explained in section II above, by obligating states to take steps to ensure every individual realises their rights.[80] In the context of oil corporations, host states

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[73] Ibid.

[74] Note 65 above, 330.

[75] Ibid.

[76] Ibid 337.

[77] Ibid 330.

[78] Known as the Ogoni 9, see note 7 above, 84.

[79] Amnesty International Publications *A Criminal Enterprise?: Shell's Involvement in Human Rights Violations in Nigeria in the 1990s* (2017) 17.

[80] African Charter (note 24 above), art 1, ICESCR (note 22 above) art 2(1), ICCPR (note 23 above) art 2.

must protect citizens from corporate violations by taking reasonable measures to prevent and address violations. The ACHPR illustrates how this can be achieved.

The complaint filed with the ACHPR accused Shell and the Nigerian government of actively contravening international law and environmental norms.[81] It cited the oil consortium NNPC and Shell, stating that the host state was acting through the oil corporations (that is, they were its agents) and it was responsible for environmental damage, deterioration of the Ogoni people's health and livelihoods caused by the oil corporations.[82]

The ACHPR acknowledged, in its assessment of admissibility of the complaint, that despite Nigeria's ratification and incorporation of the African Charter in national law,[83] it was not in a position – at least at the time the complaint was filed – to provide effective remedies in its courts.[84] Nigeria was not fulfilling its obligations due to corrupt governance during military rule.[85]

The ACHPR found that the Nigeria failed to exercise its duty to protect:

> The [African] Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments.[86]

This is due to the fact that Nigeria failed to guarantee rights enshrined in the African Charter and international conventions, such as preventing environmental degradation and ensure a healthy environment for inhabitants as stated under article 24 of the African Charter and article 12 of the ICESCR.[87] It violated property rights under articles 14, 16

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[81] Note 21 above, para 2, 3 and 58.

[82] Ibid para 1.

[83] Nigeria ratified the African Charter in 1983.

[84] Note 21 above, para 41.

[85] Ibid para 57.

[86] Ibid para 58.

[87] Ibid para 52, 54, 65–69.

and 18(1) of the Charter,[88] and also failed to uphold the right to health, which involves refraining from any conduct which may threaten this right.[89] The Ogoni people were not involved in any decision-making processes and were therefore unaware of any developments made in their community.[90] This is a violation of article 21 of the Charter.[91] Given the history of colonialism on the continent, African host states must take special care to involve communities and address their concerns effectively and Nigeria failed to do so.[92]

The ACHPR held that Nigeria ought to address violations by conducting assessments on the environment, providing regulatory standards that must be followed as well as penalising acts of environmental degradation.[93] Nigeria ought to have exercised due diligence and taken active steps towards upholding all its obligations.[94]

The ACHPR only has jurisdiction over states parties to the African Charter, among other regional treaties. Hence, its holding in this case – although it mentioned the misconduct of private entities – was directed at the host state.[95] The ACHPR's interpretation of the law confirmed indirect accountability of corporations through host states. Its interpretation is consistent with other regional body decisions such as the *Velasquez* case and the European Court's decision in *López Ostra v Spain*,[96] where it was stated that the

[88] Ibid para 60.

[89] Ibid para 52, 69.

[90] Ibid para 52.

[91] Ibid para 55

[92] Ibid para 56.

[93] Ibid paras 65–69.

[94] J D'Aspremont, A Nollkaemper, I Plakokefalos & C Ryngaert 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 *Netherlands Int LR* 49, 54.

[95] O Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors and the Struggle for Peoples' Rights in Africa (2003) 18 *American University International Law Review* 851, 910.

[96] *López Ostra v Spain* (Merits) A/303-C (1995) 20 EHRR 277.

state must actively ensure protection of socio-economic rights especially where they are infringed by a third party.[97]

Indirect accountability however has limitations, as it does not mean the third party will materially be held to account at all. Although the *SERAC* case recommended that victims be compensated, this does not necessarily mean that Shell will be responsible for providing this remedy.[98] Action taken to implement the remedy may or may not involve the cooperation of the entity, meaning that it does not necessarily deter further violations by Shell. Deterrence occurs when Nigeria effectively complies with the holding by regulating Shell's conduct and prosecuting misconduct. Therefore, many opt for civil liability in home states.

ii. Extraterritoriality and direct corporate accountability of Shell in home states

Home states can take reasonable steps in ensuring corporate accountability of oil corporations operating in the host state. This obligation may include regulation of and adjudicating over corporate misconduct. The closest example to a tried-and-tested mechanism of extraterritorial MNC accountability is ATCA. It is a route used by many African plaintiffs from Nigeria for delictual claims.[99]

ACTA is almost 200 years old but only became popular recently with over 100 cases against corporations in US courts by 2013, providing a major source of relief - particularly against oil MNCs.[100] Due to the lack of judicial redress in the host state to hold MNCs

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[97] Ibid. Also see *Nachova and Ors, European Roma Rights Centre (intervening) and Ors (intervening) v Bulgaria* (Judgment) (Merits) 43577/98, 43579/98 (2006) 42 EHRR 43 para 35 where it was stated that the state must actively protect rights and ensure rights are protected, not only refrain acting in a certain way.

[98] Note 21 above, para 69.

[99] See cases *The Presbyterian Church of Sudan et al v Talisman Energy, Incorporated and Republic of the Sudan* (2003) 244 F. Supp. 2d 289; *Wiwa v Royal Dutch Petroleum, Wiwa v Anderson and Wiwa v Shell Petroleum Development Company* 532 US 941 (2001); *Kiobel* v *Royal Dutch Petroleum Co* 133 S Ct 1659, 1664 (2013); *Khulumani v Barclays National Bank* 1:03-CV-4524 (SD NY) (2014) which will all be discussed below.

[100] J L Cernic 'Corporate Accountability for Human Rights: From a Top-Down to Bottom-Up Approach' in J Martin and K E Bravo (eds) *The Business and Human Rights Landscape: Moving Forward, Looking Back* (2015) 193, 206.

directly accountable, and where the host state has no political will to do so, jurisdictions that are open to foreign nationals are popular.[101] It is becoming increasingly unachievable for corporations to argue dismissal of these cases.[102]

Normally, foreign courts have cited jurisdictional difficulties, when hearing claims from foreign plaintiffs.[103] When a claim was lodged against Royal Dutch Shell in the UK for conduct of its subsidiary in Nigeria, the court held that UK courts do not have jurisdiction over subsidiaries operating in a different jurisdiction.[104] It reasoned that:

> There is simply no connection whatsoever between this jurisdiction and the claims brought by the claimants, who are Nigerian citizens, for breaches of statutory duty and/or in common law for acts and omissions in Nigeria, by a Nigerian company.[105]

While home states need to be cautious as to the extent to which they exercise their jurisdiction over MNCs operating abroad, to avoid interfering with host state regulation, this decision by the UK court was incorrect in ruling that courts in the country do not have jurisdiction altogether. The extraterritorial reach of home states obligations over MNCs abroad have been outlined in binding treaties,[106] and soft law instruments[107] alike, clearly indicating that MNCs operating in host states are directly accountable to home states.

On the other hand, ACTA effectively gives US courts the right to interpret international customary law.[108] It has been stated that:

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[101] *The Presbyterian Church of Sudan et al v Talisman Energy, Incorporated and Republic of the Sudan* (2003) 244 F. Supp. 2d 289, 335 – 341. The court held that it did have jurisdiction to hear the case.

[102] Note 35 above, 23.

[103] M Kelly 'Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan' (2012) 90 *Oregon LR* 413, 436.

[104] A Vaughan 'Nigerian Oil Pollution Claims Against Shell cannot be heard in UK, Court Rules' *The Guardian* (26 January 2017) <https://www.theguardian.com/business/2017/jan/26/nigerian-oil-pollution-shell-uk-corporations>.

[105] W Wallis & A Raval 'Shell Proves Test Case for Oil Majors Environmental Records' *The Financial Times* (1 March 2016) <https://www.ft.com/content/90b2a612-dfc4-11e5-b072-006d8d362ba3>.

[106] Article 2(1) of ICCPR.

[107] Note 35 above.

[108] Note 103 above, 440.

> US federal courts have near universal jurisdiction. They hear any civil case: introduced by a foreigner, introduced by a victim of serious violation of the law of nations or CIL, in force in the US, regardless of where the crime was committed, regardless of the nationality of the perpetrator (US or foreign citizen), knowing that the defendant in the case must be on US soil when the suit is brought (this is the only connecting factor).[109]

As a result, the extraterritorial jurisdiction of US courts over MNCs is extensive. It includes corporations based in the US, their subsidiaries in other states where the subsidiary is formally associated, or has a 'significant' connection with a corporation within US jurisdiction.[110] In establishing the link, a number of elements are examined such as ownership, extent of authority over subsidiary, and the presence of corporate officials – even when it is for a short-term basis – on US territory.[111] In the strict sense, non-citizen plaintiffs can rely on the ATCA to claim against non-US corporations for violations committed in host states without having exhausted local remedies.[112]

Two prominent cases were brought by Nigerian plaintiffs before US courts.[113] In both cases, families and survivors of violations committed in Ogoni sought to prove that the corporation aided and abetted the military government in the unlawful detention and execution of the 'Ogoni 9'.[114] They alleged that the excessive violence used against protestors was in protection of Shell and the corporation helped the government commit atrocities.[115]

Plaintiffs in the *Wiwa* case received compensation, after the case was settled, of $15, 5 million.[116] However, upon appeal to the US Supreme Court, the claim (in the *Kiobel* case)

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[109] B Stephens, M Ratner *International Human Rights Litigation in US Courts* (1996) 9.

[110] Note 65 above, 338.

[111] Ibid.

[112] Note 35 above, para 26.

[113] *Wiwa v Royal Dutch Petroleum, Wiwa v Anderson and Wiwa v Shell Petroleum Development Company* 532 US 941 (2001). *Kiobel v Royal Dutch Petroleum* 456 F.Supp 2d 457 (SDNY 2006), appeal was heard *Kiobel* v *Royal Dutch Petroleum Co* 133 S Ct 1659, 1664 (2013).

[114] Ibid 92.

[115] Ibid. *Wiwa v Royal Dutch Petroleum,* 5; *Kiobel v Royal Dutch Petroleum* (2006), 2.

[116] W Kaleck & M Saage-Maaβ 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges' (2010) 8 *J Int Criminal Justice* 699, 710.

was dismissed.[117] It was stated that the court did not have jurisdiction because US courts cannot adjudicate over foreign corporations.[118] The effect has been stated as follows:

> the *Kiobel* decision will have the greatest impact on individuals from countries with inoperative and ineffective legal systems as they are left empty-handed with regard to a potential forum for their claims. Domestic legal systems of the countries where violations are committed should primarily be responsible for their legal redress. Proving the corporate liability for extraterritorial violations of human rights has thus far been a difficult task and thankless task.[119]

Evidently, this piece of legislation is becoming less of an option.[120] Cases brought to courts in the US under the ACTA have rarely been successful lately due to the higher standard of proof required by the US courts.[121] The outcome in *Kiobel* illustrates the widespread approach by home states to purposefully avoid exercising extraterritoriality over corporations operating abroad. Some courts hold that they have no jurisdiction and others limit the application of their laws to a point where it becomes impossible for claims to succeed.

However, few states continue to provide hope for victims with The Netherlands finding in favour of Nigerian farmers' claim for jurisdiction over Shell in relation to its contamination of farm land and water in Ogoni.[122] The court held that 'the Dutch court has international jurisdiction to hear the claims against both the parent company and the Nigerian subsidiary'.[123]

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[117] Ibid 710.

[118] *Kiobel v Royal Dutch Petroleum* (2013), 14.

[119] Note 100 above 215.

[120] M Jain & B Meyersfeld 'Lessons from Kiobel v Royal Dutch Petroleum Company: Developing Homegrown Lawyering Strategies Around Corporate Accountability' (2014) 30 *SAJHR* 430, 433.

[121] Note 103 above, 415. *Khulumani v Barclays National Bank* 1:03-CV-4524 (SD NY) (29 September 2014).

[122] *Eric Barizaa Dooh & the Association of Environmental Defence v Royal Dutch Shell Plc & others* (2015) ECLI:NL:GHDHA 3586 (Court of Appeal The Hague).

[123] Ibid para 8.

iii. Impact of accountability measures in Nigeria's oil industry

The above-mentioned soft law principles encourage MNCs to avoid negatively impacting those affected by their operations and to act reasonably to address impact when they do. International backlash of Shell's operations in Ogoni, pressurised the corporation to adopt voluntary codes of conduct to monitor operations.[124] This was not enough to ensure that the human rights of the vulnerable communities were upheld, as two major oil spills were reported in 2008.[125] Shell continues to deny its role and responsibility and blames pipeline sabotage for the environmental damage done in Ogoni, insisting it is the government's responsibility.[126]

An environmental assessment conducted by the UN Environmental Programme (UNEP) found that contaminated land and water and oil spills causing fires which destroy plants, impacted people's right to health, food and access to water.[127] As a result, Nigeria launched a billion-dollar environmental clean-up exercise to be funded by oil MNCs which will take up to thirty years to complete.[128] This will ensure that Shell fulfils its obligation in addressing the damage it has caused, as financial assistance from Shell is not voluntary.[129]

Learning from its past of corrupt and repressive governance and failure to uphold international standards of human rights protection, a clear example of how Nigeria is seeking to strengthen direct corporate accountability, is its inclusion of a derivation clause in the Constitution of the Federal Republic of Nigeria, 1999, which states that 13% of earnings from oil production must be given to federal states affected by oil extraction.[130] Consequently, between 2002 and 2005 Shell reserved $39 million for community

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[124] Note 68 above.

[125] J Vidal 'Shell Attacked Over Four-Year Delay in Niger Delta Oil Spill Clean-Up' *The Guardian* (23 September 2012) <https://www.theguardian.com/environment/2012/sep/23/shell-attacked-niger-oil-spill-clean-up-delay>.

[126] Note 65 above, 329.

[127] Note 4 above, 3.

[128] Ibid 5.

[129] Ibid 5.

[130] Constitution of the Federal Republic of Nigeria, 1999 s162(2).

outreach for approximately 31 million people in the affected states.[131] Due to corruption and lack of transparent supervision of allocated funds, communities have not benefitted yet,[132] but it remains a very practical tool to ensuring that people benefit from resource extraction. If done right, it can go a long way to ensuring development and consideration of the negative effects oil extraction has on the livelihoods of people.

Furthermore, there have been a few notable cases within the Nigerian judicial system that have raised confidence in the national legal system to defend communities against human rights violations by major oil corporations. One example is where the High Court ordered Shell to pay damages of $1.5billion to surrounding communities for polluting their environment.[133] Corporate accountability in Nigeria moving forward from *SERAC* has thus improved.

b) Operations of oil corporations in Sudan

Similar violations to those recorded in Nigeria have been occurring in Sudan. Corrupt military rule has characterised Sudanese governance for six decades.[134] A catastrophic civil war from 1983 until 2003 resulted in over two million deaths and four million people displaced.[135]

Despite internal conflict in the country, oil corporations have managed to operate in the country for many years. For example, China National Petroleum Company (CNPC) and Canadian based-US registered Talisman Energy, the former during the Darfur conflict and the latter during the north-south civil war.

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[131] Note 60 above 174.

[132] Ibid.

[133] *Chief (Dr) Pere Ajuwa & Anor (on behalf of the Ijaw Aborigines of Bayelsa State) v Shell Petroleum Development Company of Nigeria Limited (SPDC)* (2008) NWLR (Pt.1094).

[134] Z Zonkosi 'Caught Between Colonial Remnants and Oil Revenue' (2004) 1 *African Renaissance* 74.

[135] UN Secretary-General 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 (International Commission of Inquiry report) (2005) 19.

While oil corporations are fiercely protected by the Sudanese government, corporate infrastructure is used for military purposes.[136] The Sudanese government has had oilfield zones cleared for use by the oil corporations and has them guarded by the military.[137] Civilians were forcefully removed, a direct result of oil exploration and extraction in the region.[138] The military has established fortresses, 'buffer zones' around oil-fields and airstrips as assembly bases and civilians are targeted through airstrikes and ground military attacks.[139] Military aircraft is refuelled and based at oil exploration plants.[140] The 'buffer zones' around oilfields were established by forcefully displacing people through use of airstrikes and on-the-ground forces.[141] Those displaced sought refuge in refugee camps and were forced to survive on very little.[142]

This has occurred with the knowledge and tacit cooperation of the oil companies. This is evident from a publication in a Chinese newspaper that stated, 'a Chinese foreign official said that Beijing "cooperates with the Sudanese government" on security and has asked Khartoum "to send troops to areas in which Chinese companies operate"'.[143] The bigger the oil industry in Sudan gets, the more powerful the military becomes.

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[136] *The Presbyterian Church of Sudan et al v Talisman Energy, Incorporated and Republic of the Sudan* (2009) 583 F 3d 249 (Appeals Court Case).

[137] H Travis 'Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations' (2008) 25 *Arizona J Int & Comparative L* 1, 45.

[138] Ibid, 45.

[139] Note 137 above, 249, 250.

[140] Ibid.

[141] Note 101 above, 650.

[142] Note 135 above.

[143] Sudan Divestment Task Force 'Sudan Divestment Resource Guide' (2008) 9.

i. Indirect accountability in Sudan's oil industry and limitations

Mechanisms such as the UN Security Council resolutions,[144] the ACHPR,[145] the ICC[146] and US sanctions[147] have tried to address the blatant abuse of power of the government of Sudan on its people. However, specific measures are yet to be taken to invoke indirect accountability of MNCs, despite established research by academics indicating that a direct relationship exists between Sudan's oil exports and Sudan's military weapon imports.[148] In other words, the revenue from its oil exports directly finances its military exploits. As a result of massive military expenditure by the Sudanese government, it continues to engage in violent conflict in Darfur.[149] MNCs have over the years played a role of facilitating and aiding and abetting the Sudanese government's military warfare, highlighting limitations in holding MNCs accountable for the role they play in Sudan. Sudan has shown that gross misconduct of MNCs in aiding a repressive government can go unpunished for years.

ii. Extraterritoriality and direct corporate accountability of MNCs operating in Sudan's oil industry

In the same way that Nigerian plaintiffs approached foreign courts for relief, Sudan's Presbyterian Church, represented by an American based public interest organisation, approached US courts in a class action against Talisman Energy.[150] US courts confirmed jurisdiction over the matter because Talisman was registered in the US stock exchange at

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[144] UN Security Council, 'Security Council resolution 1564 (on Darfur, Sudan)', UN Doc S/RES/1564 (2004).

[145] See ACHPR's website on communications submitted against Sudan <http://www.achpr.org/communications/>.

[146] *The Prosecutor v Omar Hassan Ahmad Al Bashir* Warrant of Arrest for Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-1 (2009) | Pre-Trial Chamber I.

[147] S J Kobrin 'Oil and Politics: Talisman Energy and Sudan' (2004) 36 *NYU J Int L & Politics* 425, 454.

[148] Ibid 441.

[149] P Manyok 'Oil and Darfur's blood: China's thirst for Sudan's oil' (2016) 4:1 J Political Sciences and Public Affairs 1, 3.

[150] Note 101 above. This was confirmed in the appeal court case 247–248.

the time.[151] The complaint alleged that Talisman abused the right to religious freedom of non-Islamic minorities through its support of genocide to make way for oil exploration.[152]

The case ticked all the jurisdictional boxes but was dismissed on the basis that Talisman was not liable for aiding and abetting the Sudanese government's human rights violations.[153] Intention to do so was not established as the standard that has to be satisfied in order to apportion liability for aiding and abetting is intention or 'purpose'.[154] The court held that 'even if Talisman built roads or improved airstrips with the intention that the military would also be accommodated, the evidence of such coordination with the military supports no inference of a purpose to aid atrocities'.[155] The court went on to state that it is 'not enough for plaintiffs to establish Talisman's complicity in depopulating areas…plaintiffs must establish that Talisman acted with the purpose (of assisting) the government's violations of customary international law'.[156]

The case failed on a substantive issue − the interpretation of customary international law (CIL) done by the court differed substantially from that of International Court of Justice (ICJ) previous decisions stating that the standard under CIL for complicity is knowledge of what the assistance given is intended for by the other party.[157] The court in *Talisman* unilaterally imposed a higher burden of proof which effectively limited the chances of success of this case and similar cases in US federal courts. This is unfortunate given the cost of litigation for a foreign citizen in US courts discourages and blocks many from approaching the courts in the first place.[158]

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[151] Note 137 above, 44.

[152] Note 101 above, 296, 299.

[153] Ibid.

[154] Ibid.

[155] Ibid 262.

[156] Ibid 263.

[157] Commentaries to Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/10, 66. *Bosnia v Serbia Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 218. Also see UN Global Compact (note 49 above).

[158] Note 120 above, 452.

Ruggie speculated that a possible reason for home state courts to refuse claims brought against subsidiaries is 'out of concern that those firms might lose investment opportunities or relocate their headquarters'.[159] In contrast, it is also argued that strict regulation increases investor confidence to stay as it ensures stability. This highlights the challenge in ensuring corporate accountability and providing effective remedies for victims of violations because there is a lack of consensus on which approach to take.

While stakeholders are aware of the nature of their investment and make final decisions on how to conduct their business in foreign territories,[160] the state of Canada – one of Talisman's home states – used its extraterritorial muscle to facilitate the corporation's exit from Sudan.[161] It started by investigating the oil corporation conduct in Sudan and found that 'the testimony of those directly involved directs us to conclude that oil is exacerbating the conflict in Sudan'.[162]

Internal pressure mounted for Canada to act, with public interest groups rallying against Talisman operations in Sudan.[163] It was essentially the Sudan Peace Act[164] in the US that placed sanctions on corporations invested in Sudan which made Talisman's operations in Sudan end due to financial constraints.[165]

Talisman only left Sudan reluctantly insisting that it could use its influence and resource to advance human rights in the country yet was complicit in human rights violations:[166]

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[159] Note 35 above, para 14.

[160] A Clapham 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *J Int Criminal Justice* 899, 902.

[161] Note 137 above, 45. In 2003 Talisman left Sudan's oil industry.

[162] Ibid, 45 quoting J Harker *Human Security in Sudan: The Report of a Canadian Assessment Mission* Canada Department of Foreign Affairs and International Trade (2000) 12.

[163] Note 147 above, 440.

[164] The Sudan Peace Act Pub.L. 107–245.

[165] Amnesty International Publications 'Sudan: The Human Price of Oil' (2000).

[166] Note 160 above, 902.

> [M]any people we speak to believe that the appropriate moral response is to stay and use our corporate resources in a broad and responsible manner to encourage peace, provide economic opportunities and support the communities in which we operate. We share this view.[167]

Disinvestment in Sudan initiated by Canada was a positive incentive to uphold human rights and directly implicated Talisman's involvement in human rights, but it then opened the host's industry up to more aggressive investors.

With no incentive of binding obligations to enforce against MNCs, corporations such as CNPC continuously disregard respect for human rights in pursuit of business interests and are found on the wrong side of the law, despite public outcry. Chinese MNCs involvement in Sudan is with the knowledge that Sudan's military feeds from oil revenue. China's need for oil[168] has seen CNPC help Sudan construct military factories,[169] and provision of training by its home state of military pilots who then use these expertise on 'Mi-8 helicopters, Mi-24 helicopters and Antonov aircraft' designed by Chinese engineers on villagers in Darfur.[170] In other words, without the political will, not all home states will hold MNCs accountable for human rights violations committed in host states.

iii. The need for Sudan to adopt accountability measures

A UN Commission of Inquiry on Sudan concluded that internal conflict in Sudan has effectively eroded local judicial systems.[171] Sudanese domestic courts could not and are not prepared to prosecute wrongdoers because they fear persecution by the government.[172] In fact, Sudan's laws are not in line with international human rights standards.[173] The legitimacy of the legal system is questionable, where immunity is

[167] Talisman Energy Incorporated 'Corporate Social Responsibility' (2001) 5 < http://www.talisman-energy.com/pdfs/csr2001_report.pdf>.

[168] Note 160 above, 902. Through CNPC, China gets 5% of its oil from Sudan.

[169] Note 137 above, 51.

[170] Note 135 above, 64; note 103 above, 423.

[171] Note 40 above, 622.

[172] Note 135 above, 144.

[173] Ibid.

granted to public officials for human rights violations that amount to international crimes making it difficult to rely on it for an effective remedy.[174]

Although it may take a long time before judicial legitimacy is restored in Sudan, this is necessary as law reform regulating corporate activity in oil extraction can be done substantially at local level which makes it difficult for the state to be corruptible. This is illustrated by South African example.

Lessons learnt from South Africa's apartheid era led to one of the most progressive national constitutions in the world today – the Constitution of the Republic of South Africa, 1996. The apartheid era was a time characterised by blatant human rights abuses by the government, supported by corporations. However, its Constitution has defied traditional notions of human rights being only applicable to public entities and private entities being self-regulating. It not only requires the state to uphold the Bill of Rights, but that it be applied horizontally to other legal entities.[175] This provision has facilitated enactment of legislation that encourages human rights considerations in business dealings, such as section 7 of Companies Act,[176] regulation 28 of the Pensions Act and Part II of the Mineral and the Petroleum Resources Development Act.[177]

The concept of horizontal application of human rights is a recent development and is a good example of a positive step towards legally binding direct accountability which will hopefully be adopted eventually by African host states such as Sudan.

IV. PROMOTING AND ENSURING ACCOUNTABILITY THROUGH AFRICAN REGIONAL SPECIAL AND JUDICIAL MECHANISMS

In situations such as Sudan, the host state is extremely reliant on foreign direct investment for its military expenditure, with 70% to 80% of its oil revenue being utilised to purchase weapons of mass destruction and advanced technology in military equipment.[178] This

[174] National Security Force Act of 1999 art 33.

[175] Constitution of the Republic of South Africa, 1996 s8.

[176] Companies Act 71 of 2008.

[177] Mineral and Petroleum Resources Development Act 28 of 2002.

[178] Ibid; note 137 above, 4.

makes regional mechanisms directed at reducing the negative effects of oil corporations essential.

a) The Working Group on Extractive Industries, Environment and Human Rights Violations in Africa

The ACHPR adopted a resolution establishing a special mechanism, the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa (Working Group), based on, inter alia, its conviction of 'the necessity of an improved protection of human rights through development of jurisprudence on holding non-state actors accountable for human rights violations in Africa'.[179] The resolution stated its concern over the prevalence of human rights abuses by corporations, mentioning the oil industry as one of the main culprits.[180]

The backdrop of Africa's extensive resource wealth has come to be considered by many to be a curse because African communities are not benefiting at all from this.[181] The Working Group was therefore established to analyse the effect that the extractive industry has had on the environment and local communities and the extent to which they have violated guaranteed rights in the African Charter.[182] As mentioned in the *SERAC* case, community involvement in decision-making is essential to prevent corporate misconduct and the Working Group acknowledges this.[183] The Working Group aims to compile a report on how liability can be determined under the ACHPR with a plan on how to prevent and compensate violations.[184]

It has come up with a toolkit which requires that local communities be informed about and have a say in the extraction of their resources.[185] This was a measure put in place to

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[179] ACHPR Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations ACHPR/Res.148 (XLVI) 09.

[180] Ibid.

[181] Ibid.

[182] Ibid.

[183] Note 21 above, para 57.

[184] Note 179 above.

[185] M Azu 'A Review of the Work of the African Commission's Working Group on Extractive Industries, Environment and Human Rights Violations in Africa' <https://africlaw.com/2016/04/26/a-review-of-

prevent what happened in Ogoni from occurring elsewhere.[186] The Working Group was tasked mainly to promote transparency especially in the security sector by initiating a human rights code of conduct for private security companies that guard MNCs' businesses, so that they are directly accountable for incidents where the use excessive force against civilians.[187] The Working Group is in the perfect position to investigate incidents of violations and bring them to the ACHPR's attention.

There have been concerns about the Working Group, some of which were summarised by Azu as follows:

> [I]t is not clear whether the Working Group has completed several projects, including a mapping of the extractive industries in Africa, a code of conduct for private security companies on respect of human rights and a regional policy guide on labour rights. Also, the African Commission tasked the Working Group to conduct an in-depth research on the impact of illicit capital flight from the extractive industries on human rights in Africa. But, beyond a note in its inter-session report that it has organised a roundtable discussion on the subject, there is no further information on any progress that the Working Group has made on this project.[188]

Limitations faced by the Working Group include the lack of cooperation by many African states, be it financial cooperation or physical access to sites exposed to human rights violations by private entities.[189] However, there have been times when access is granted but due to other commitments made by working group members to other programmes, the Working Group has had to cancel.[190] Consequently, the Working Group has yet to visit Nigeria and Sudan.[191]

Particularly, in relation to the concern relating to lack of cooperation by states, the ACHPR urged states:

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the-work-of-the-african-commissions-working-group-on-extractive-industries-environment-and-human-rights-violations-in-africa/amp/>.

[186] Ibid.

[187] Ibid.

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] Ibid.

> to establish regional mechanisms for [c]ooperation and the exchange of good practices between States Parties to strengthen capacities and develop the necessary institutional and legal framework to ensure that mining contracts are negotiated to the benefit of and in consultation with affected individuals, local communities and indigenous populations/communities.[192]

It is hoped that collective cooperation to ensure both direct and indirect accountability under regional mechanisms through a regional agreement may help states such as Sudan move away from abuse of power and MNCs activity realises progressive development for all citizens. This initiative is cognisant of the African situation where many victims of human rights abuses do not have access to national judicial systems.

b) An African court applying direct corporate accountability

MNCs have more resources and economic authority than many emerging economies.[193] When corporations enter into contracts for oil extraction with states called concession agreements, they are regarded as equal parties (sometimes with even more bargaining power) to the state. If there is a contractual dispute, the corporation can take the state to international tribunals such as International Centre for the Settlement of Investment Disputes (ICSID).[194] MNCs exercise so much authority that when they commit human rights violations it 'makes penalising states and not the corporations themselves unjust'.[195] It is therefore questioned how they can be held directly accountable in a manner that balances this power to avoid further human rights violations.

The opportunity for direct corporate accountability through a African regional court comes in the form of the reform of the African Court of Justice and Human Rights into three sections.[196] The International Criminal Law Section of the future three-sectioned

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[192] ACHPR Resolution 'Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector' ACHPR/Res.367(LX) 2017.

[193] Note 1 above, 2.

[194] J Dugard *International Law: A South African Perspective* 4 ed (2011) 306. See cases *Texaco v Libya* (1977) 53 ILR 389; (1978) 17 ILM 1 para 44 and *The Government of the State of Kuwait v The American Independent Oil Company (AMINOIL)* (1982) 21 ILM 976 para 88.

[195] Note 16 above, 10.

[196] Protocol on Amendments to the Protocol on the African Court of Justice and Human Rights (2014) art 2. 15 states must ratify the Protocol for it to come into force (currently, 11 states have signed with no

court vies for specific jurisdiction over corporate accountability which is separate from both state responsibility and individual criminal accountability.[197] This criminal jurisdiction can be triggered through state party referral, Assembly of the Heads of State and Government of the AU or Peace and Security Council of the AU referral, or the prosecutor acting 'proprio motu'.[198]

Pending the three-sectioned court's coming into being as a functional court, the African Court on Human and Peoples' Rights (African Human Rights Court), remains the regional judicial avenue for indirect accountability through states, with legally binding decisions.[199] However, a likely setback of the yet-to-be-functional court which will undermine its legitimacy is the immunity it gives to government official whilst in office.[200] This is may apply to private actions of officials and is the case despite the fact that crimes prescribed in the Protocol are mostly committed by those in power.[201]

It remains to be seen how the court will interpret article 46A bis and whether it will defeat the purpose of the court altogether.[202] The International Criminal Law Section, however represents a stride taken by African states towards legally binding direct corporate accountability. If the relevant Protocol comes into force, African states would have accepted that indirect corporate accountability through state responsibility is no longer a sufficient measure to hold MNCs accountable especially where, for example, oil corporations cross borders in search of more oil at minimum cost.

ratifications); then the three-chambered court needs to become operational for the possibility of direct accountability through an African regional court to come to life.

[197] Ibid.

[198] Note 196 above, art 46F.

[199] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (2008) OAU Doc OUA/LEG/MIN/ACHPR/PROT III art 2.

[200] Note 196 above, art 46 A bis.

[201] J Kyriakakis 'Corporate Criminal Liability at the African Criminal Court' (2016) *Briefing Paper ACRI Meeting* para 9.

[202] Ibid.

V. CONCLUSION AND RECOMMENDATIONS

In determining how MNCs in Africa's extractive industry can be held accountable for human rights violations, principles of direct and indirect accountability under IHRL have been discussed. It was found that currently MNCs are held accountable mainly through states, since IHRL has been and still is aimed at regulating state power over individuals and not that of private entities such as MNCs. It is the state's obligation to protect its nationals from violations committed by MNCs. Therefore, it is no surprise that MNCs have been described as having 'no soul to damn and no body to kick' due to their privileged position within the international law sphere where they are not primarily responsible for protecting human rights under IHRL. A perfect IHRL system has both parent and subsidiaries accountable to the states in which they reside and operate.[203]

However, this has its limitations as one must rely on political will of a state to regulate, investigate and prosecute MNCs in order to prevent misconduct. This is currently lacking from both host and home states. In Nigeria, although the host state is taking reasonable steps to regulate MNCs, Shell's home states refuse to do the same, resulting in the corporation's failure to fully own up to the damage it has caused in Ogoni. In Sudan, on the other hand, where some home states investigate and regulate corporate conduct, the host state itself has failed to protect its citizens, meaning MNC conduct goes unpunished.

At the national level, direct accountability of corporate entities in African countries is becoming more of a reality, moving away from a human rights framework that solely regulates state conduct, with South Africa as an example. It illustrates that building national capacity of individual states is important but so is providing accessible universal remedies to avoid forum shopping by complainants.

Voluntary soft law mechanisms under the UN framework are slowly adopting internationally binding instruments of accountability, because the status quo is no longer sufficient due to globalisation.[204] Pursuit by victims of avenues such as ACHPR and

[203] J Coffee, 'No Soul to Damn: No Body to Kick": An Unscandalised Inquiry into the Problem of Corporate Punishment' (1981) 79 *Michigan LR* 386.

[204] Note 46 above, para 13.

foreign courts does not guarantee substantive change on the ground, illustrating that it is clearly an area of law that needs urgent development.[205]

Through the Working Group on Extractive Industries, oil corporate activities can be monitored and investigated at regional level with rights violations being brought to the attention of the ACHPR. Moving forward, a binding agreement among African states is desirable to set out obligations of MNCs. African countries must show greater political will to establish a regional code of conduct, one that universally applies to foreign corporations operating in Africa, including those in the oil industry. This regional code of conduct would be useful in regional advocacy for regulation of national law by providing guidelines on how to achieve human rights free oil extraction.[206] Countries such as South Africa and Nigeria, that have already taken initiatives to pursue a human rights conscious investment model ought to take the lead.

Scattered and piecemeal efforts to ensure accountability undermine the legitimacy of IHRL.[207] Therefore, it is hoped that the yet-to-be functional African Court will ensure direct corporate accountability becomes a reality for those suffering atrocities in Sudan and Nigeria.

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[205] Note 56 above, 8.

[206] Note 192 above.

[207] Note 56 above, 11.

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