Multi-National Corporations in Human Rights Protection and the Role of the African Union*

*By Mugambi Laibuta

Mlaibuta@gmail.com
mlaibuta@es-ea.com
www.laibuta.com

Table of Contents

1 Introduction 3

2 Soft law dilemma 8

2.1 Corporate accountability origins 8

2.2 Corporate Social Responsibility 11

2.3 International principles, norms and regulations 18

3 Role of the African Union 27

3.1 Preliminary considerations 27

3.2 African Commission of Human and Peoples Rights 31

3.3 African Court of Human And Peoples Rights 33

3.4 Litigation in Individual African States 33

4 Extra-territorial jurisdiction 35

4.1 Home States 38

4.1.1 United States 38

4.1.2 United Kingdom 42

4.1.3 France 43

4.2 Host state 44

5 Conclusion 45

Bibliography 48

1 Introduction

Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework as proposed by the United Nations Special Representative on business and human rights were endorsed by the UN Human Rights Council on 16th June, 2011.[1] They heralded new thinking and practice on the role of businesses in human rights. The guiding principles are formulated into three broad categories, states' duty and corporate responsibility in protection of human rights and access to remedies. Culminating from lengthy negotiations and consultative processes, the principles on business and human rights may be traced to the 'industrialists trials' by the Allied powers after World War II.[2] The principles are the most recent international standards. This paper highlights the negative impact multi-national corporations have on African states and the flaws soft-law regulations that seek to control corporate operations have. Further the paper examines the role the African Union can play in filling policy and legislative gaps in African states with weak institutions plus ineffective legal systems.

Since colonial domination, multi-national corporations have operated in Africa; some were used to administer a number of territories. Corporations' impact on Africa's development has been varied. Arguably, multi-national corporations have provided vital foreign direct investment, boosting economic, political and social gains. In the last decade or so, Africa has realized an influx of investors from the European Union, the Americas and the Far East. Between the years 2000-2006, Africa received foreign direct investment inflows of $145 billion.[3] African owned multi-national companies

[1] 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 A/HRC/17/31

[2] United States v. Friedrich Flick (The Flick Case), 6 T.W.C (1952); United States v. Krauch (The Farben Case), 7 T.W.C; United States v. Krupp (The Krupp Case)

[3] UNCTAD *World Investment Directory* Volume X Africa [2008] 2

also made investments around the continent realizing an outflow of around $60 billion.[4] Multi-nationals corporations are involved in the key sectors of infrastructure development, agricultural schemes, energy and financial sectors and the extractive industries.

Multi-national corporations as well have been involved in some of the continent's worst atrocities including apartheid, civil wars, environmental degradation, financial crimes and offering support to repressive regimes. The Niger Delta oil conflict situation,[5] conflict diamonds in Sierra Leone, Liberia and Angola, illegal logging in Liberia,[6] blood diamonds in Zimbabwe,[7] illegal mining in the Democratic Republic of the Congo and the Central African Republic,[8] conflict oil in Chad[9] explicate some of the atrocities committed. Hedge funds' land acquisition to boost profits in the food and bio-fuels sector plus use of illegal child labour in diverse business activities around the continent are some examples of the negative impact of international business in Africa.[10]

Attracting and maintaining foreign direct investment while protecting individual and communal fundamental rights and freedoms is a challenge to African states. Weak and corrupt political and administrative institutions[11] coupled with inadequate legal

[4] ibid 13; table 11 p. 20 highlights African multi-nationals and their host states

[5] United States Institute of Peace, *Blood Oil in the Niger Delta*, Special Report 229 (August 2009)

[6] Global Witness, *Taylor Made - The Pivotal Role of Liberia's Forests and Flag of Convenience in Regional Conflict* (September 2001)

[7] Global Witness, *Return of the Blood Diamond the Deadly Race to Control Zimbabwe's New-Found Diamond Wealth* (2011)

[8] International Crisis Group, *Dangerous Little Stones: Diamonds in the Central African Republic* Africa Report N°167 – 16 (December 2010)

[9] Bonn International Centre for Conversion, "*We were promised development and all we got is misery"—The Influence of Petroleum on Conflict Dynamics in Chad,* brief *41* (2009)

[10] Global Witness, *How the UN and Member States must do more to end natural resource-fuelled conflicts*, (January 2010)

[11] Ilias Bantekas, 'Corporate Social Responsibility In International Law', Boston University International Law Journal, (Vol. 22:309) 310

systems continually facilitate corporate impunity even where countries are state party to international human rights instruments.[12] Multi-nationals often compromise the political and administrative classes through bribery and financial support for political activities; in effect multi-nationals largely dictate regulatory policies in many African states or render such policies ineffective. African states are at crossroads, having to decide between legislating stringent corporate regulatory mechanisms and providing an investor friendly environment. With many African states bidding for direct foreign investment, multi-national corporations have leverage in bargaining for greater regulatory concessions in investment contracts.[13] Creating a loosely regulated investment environment impacts on the accountability of multi-national corporations. With most multi-national corporations opting to shield themselves from national regulations through investor treaty agreements, disputes arising from negative corporate action or state regulatory action are settled through arbitration. Arbitration arising from bilateral investment treaties rarely considers protection of communities' fundamental rights and freedoms as core factors in assessing state or corporate liability arising therein. [14]

Corporate regulation in Africa is weak. State legislation and regional agreements contain no express provisions for corporate responsibility in protecting, respecting and enhancing human rights.[15] International law principles on human rights violations lean on state responsibility or individual responsibility in the case of international criminal law; multi-national corporations are not deemed to be international actors in human rights protection. Bilateral Investment Treaties concluded by African states on

[12] see, Oona A. Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) Journal of Conflict Resolution Volume 51 Number 4, 588-621

[13] Ronen Shamir, 'The De-Radicalization of Corporate Social Responsibility Critical Sociology' (2004) Volume 30, issue 3, 672

[14] Luke Eric Peterson and Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, (April 2003) Institute for Sustainable Development (IISD), <http://ctl.scu.edu.tw/scutwebpub/website/DocUpload/CourseTeaching/68000003200943014 2441_3.pdf> accessed 6 July 2011

[15] Ilias Bantekas (n 11)

the other hand often include provisions that suspend and or freeze for a time national laws and investment regulations to encourage greater foreign direct investment.

In Africa, apart from the 'Harmonization of Guiding Principles and Policies in the Mining Sector'[16] adopted by the Economic Community of West African States in 2009, regional bodies have not initiated concrete efforts to deal with the negative impact of corporate activities within the continent through a uniform regulatory mechanism. However, with the advent of the Kimberly Process as certification for rough diamond, diamond trade within the continent has come under strict scrutiny and supervision. Further, with the United Nations Human Rights Council endorsing the Guiding Principles for Business and Human Rights,[17] the general perception is that these will ensure greater corporate accountability in the protection of human rights. While a positive step, the Guiding Principles represent a shaky non-committal soft-law approach to corporate regulation. Bearing in mind Africa's lowly rule of law reputation, the soft-law approach adopted by multi-national corporations and international institutions offer no definitive solutions. Chapter two of this paper examines this predicament at length.

The role that the African Union can take up in corporate regulation in Africa is explored in chapter three. Over the backdrop of the fact that most African states have feeble legal systems, through their mandate under the Constitutive Act of the African Union,[18] the various organs of the Union ought to take conclusive steps towards the provision of legal regulations that enhance the responsibility of multi-national corporations operating in Africa while laying out judicial mechanisms to deal with human rights violations and modalities for reparation.

---

[16] <http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf> accessed 15 July 2011

[17] United Nations Human Rights Council A/HRC/17/31, GE.11-12190 <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf> accessed 15 July 2011

[18] <http://www.au2002.gov.za/docs/key_oau/au_act.htm> accessed 16 July 2011

International corporate personality is not expounded in this paper.[19] Multi-national corporations are considered to be organs of society having similar responsibilities and duties as states and individuals.[20] Corporate structures are taken not to be an impediment to the development of hard legal provisions, extraterritorial jurisdiction and a greater role for the African union.[21] The analysis posited below does recognise that save for states, no other actors can become parties to international treaties or conventions.[22] Protection of the corporate veil should not undermine human rights protection in Africa. General Comments on the right to water and the right to the highest attainable standard of health by the United Nations Committee on Economic, Social and Cultural Rights have given indication as the pivotal role played by non-state actors in protection and promotion of human rights.[23] Extraterritorial jurisdiction is examined in depth in chapter four as a means by which the current international law impasse may be addressed by home states of multi-national corporations through well defined legal processes. Nonetheless, host states bear greater responsibility in corporate regulation.[24]

---

[19] see generally, Jörg Kammerhofer, 'Non-state actors from the perspective of the Pure Theory of Law' Jean d'Aspremont (ed.), *Participants in the international legal system. Theoretical perspectives* (2010) <http://ssrn.com/abstract=15701079> accessed 13 August 201; Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP, Cambridge 2006) 72 - 76

[20] Premised on the preamble of the Universal Declaration of Human Rights, (G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)) that places the Declaration as the standard for every individual and every organ of society

[21] John Ruggie, 'Business and Human Rights: The Evolving International Agenda' (October 2007) The American Journal of International Law, Vol. 101, No. 4, 819-840

[22] See Manisuli Ssenyonjo, 'Non-State Actors and Economic, Social, and Cultural Rights' in Baderin, Mashood and McCorquodale, Robert (eds) *Economic, Social, and Cultural Rights in Action* (OUP, Oxford 2007); Andrew Clapham, *Human Rights Obligations of Non-State Actor*s (OUP, Oxford 2006) 199-201

[23] General Comment No. 15 on the Right to Water, U.N. ESCOR, 29th Sess., Agenda Item 3, para. 38, U.N. Doc. E/C.12/2002/11 (2003); General Comment No. 14 on the Right to the Highest Attainable Standard of Health, U.N. ESCOR, 22nd Sess., Agenda Item 3, para. 42, U.N. Doc. E/C.12/2000/4 (2000)

[24] Andrew Clapham (n 22) 241 - 252

2 Soft law dilemma

2.1 Corporate accountability origins

Businesses are fashioned to be profit-making organs of society. With a basic objective to maximise returns on investment, businesses will resist initiatives that stifle this primary objective.[25] As one of the earliest form of modern day constitutional documents in protecting human rights, the *Magna Carta* provided, state control of business activity was to be limited. In part, the *Magna Carta* stated:

> 'All merchants are to be safe and secure in leaving and entering England, and in staying and travelling in England . . . to buy and sell free from all maletotes by the ancient and rightful customs, except, in time of war, such as come from an enemy country [who] shall be detained without damage to their persons or goods, until we or our chief justiciar know how the merchants of our land are treated in the enemy country; and if ours are safe there, the others shall be safe in our land.'[26]

Provisions of the *Magna Carta* sought to protect commercial interests of merchants free from state control. Though taxes were paid for mercantile activities, the monarch's control over business enterprise was limited.[27] Business activities have nonetheless evolved over the centuries. There is now increased cross-border trade, foreign direct investment and globalisation have expanded the reach of business activity and heightened the role of states and international organisations in policing corporate activities.

[25] Jennifer A. Zerk, (n 19) 7 - 57

[26] Quoted in Holt, J. C., *Magna Carta*, (2nd edn) Cambridge University Press, Cambridge 1992) 448-73 and Timothy Sandefur, 'The Common Law Right to Earn a Living' (Summer 2002) The Independent Review, v. VII, n.1, 70

[27] Timothy Sandefur, ibid

With adoption of the Universal Declaration of Human Rights in 1948[28] there has been increased vigilance in the protection of fundamental rights and freedoms. Post World War II cases were pivotal in evolving the concept of corporate responsibility in international law. The cases indicated that businesses could be held responsible for complicity, aiding and abetting international crimes. One of the post WWII cases, *United States v. Friedrich Flick*[29] tried before the American criminal tribunals charged Nazi industrialists who were high ranking directors of the Flick Group of Companies with war crimes and crimes against humanity. The directors faced charges for forcible deportation of foreign nationals and the use of prisoners of war for forced labour at the Flick Group industries and mines. Second, they faced charges of forcible seizure of factories and property belonging to foreign nations within the Nazi occupied territories. Third, they were charged with crimes against humanity, mainly for persecuting Jews. Fourthly, they faced charges of financially supporting the Nazi Secret police (SS). One of the directors was convicted and sentenced for aiding and abetting criminal activities of the Nazi Secret Police (the SS).

In another post war case, the *United States v. Krauch* Case[30] the defendants were directors of I.G. Farbenindustrie A.G., a German Conglomerate Chemical firm. These directors were charged with planning, preparation and waging a war of aggression, plundering and spoliation of occupied territories, enslavement and being members of a criminal organisation. Thirteen of the defendants were convicted and sentenced for spoliation of occupied territories and use of slave labour.[31] The *United States v. Alfried Krupp Von Bohlen und Halbach* case,[32] tried former directors of the Krupp Industrial and Armaments Conglomerate. They were accused of arming the Nazi regime among other war crimes and crimes against humanity. Despite the fact that not all the defendants were convicted and sentenced for the various international crimes, the 'industrialists' trials' emphasized the emerging custom of sanctioning business

[28] G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

[29] (Case V), March 3, 1947-December 22, 1947

[30] Case VI Nuremberg Military Tribunals, iii-iv (1952)

[31] Niels Beisinghoff, *Corporations and Human Rights* (Internationaler Verlag der Wissenschaften Frankfut ,2009) 37-44

[32] US Military Tribunal Nuremberg, Judgment of 31 July 1948

entities that engaged in unlawful activities. This in effect conferred responsibility on persons who bore the greatest responsibility in shaping corporate operations.

Over the last two decades, multi-national corporations operating in Africa have been complicit or aided and abetted war crimes and crimes against humanity in various conflict zones. Claims have been made against multi-national corporations operating in Southern Sudan, the Darfur region of Sudan, the Democratic Republic of Congo, Liberia, Sierra Leone, Angola and Zimbabwe. Several military and political leaders have been prosecuted in international tribunals[33] over their alleged involvement in international crimes but criminal trials similar to the post WWII industrialists trials have never taken off to charge corporate leaders for their role in fuelling war crimes and crimes against humanity. While individual criminal responsibility has evolved into a legal concept in international criminal law, development of corporate criminal liability stalled after the Nuremberg trials.

Corporate accountability was aggravated by the failure to provide for corporate criminal responsibility in the Rome Statute of the International Criminal Court.[34] Article 25 of the Rome Statute only recognises criminal jurisdiction of natural persons.[35] The Office of the Prosecutor[36] of the International Criminal Court has made attempts to set in motion processes that would indict corporate heads involved in war crimes, the crime of genocide and crimes against humanity.[37]

[33] An example is the Charles Taylor trial (*Prosecutor v Charles Taylor* Case No. SCSL-03001-PT) at the Special Court for Sierra Leone charging Charles Taylor for waging a war in Sierra Leone and dealing with conflict diamonds.

[34] A/CONF.183/9 of 17 July 1998

[35] Article 25(1), Rome Statute, ibid: 'The Court shall have jurisdiction over natural persons pursuant to this Statute.'

[36] Reinhold Gallmetzer, 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas: The Strategy of the Office of the Prosecutor of the International Criminal Court' (2010) ICJ 8, 947- 956

[37] See Hans Vest, 'Business Leaders and the Modes of Individual Criminal Responsibility Under International Law' J Int Criminal Justice' (2010) 8 (3): 851-872

After adoption of the UDHR, a multiplicity of international and regional human rights instruments have been ratified to cater for fundamental rights and freedoms ranging from civil and political rights to socio-economic rights and minority rights. Human rights' principles lean towards compelling all organs of society to respect, protect and promote human rights. With this 20th century progression of international human rights laws, many corporations are moving towards ensuring they respect and promote human rights in their areas of operation. Multi-national corporations have also sought to refrain from wilful human rights violations; international debate is moving towards legal remedies for private sector human rights violations.[38] Corporate Social Responsibility and soft law initiatives are being adopted by businesses and international organisations to cover for state inefficiencies in the protection of human rights from negative business influences. The argument below inquires into the practice of CSR and soft laws as alternatives to strong state regulations or weak sates especially in Africa.[39] It bears in mind the fact that multi-national corporations operating in Africa may be either African owned or foreign in relation to the African region.

2.2 Corporate Social Responsibility

Prevailing corporate practice has been such that corporate responsibility relates to compliance with corporate regulations and duties owed to shareholders. Responsibility that extends to persons and communities directly affected by corporate activities is defined as corporate social responsibility.[40] Based on philanthropy, businesses carry out CSR initiatives to mitigate the negative effects of their operations. The fact that multi-national corporations are some of the primary beneficiaries, drivers of globalisation and champions of market deregulation and

38 Anita Ramasastry and Robert C. Thompson, Commerce, Crime and Conflict Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries (FAFO, Norway September 2006)

39 Ralf G. Steinhardt, 'Soft Law, Hard Markets: Competitive Self Interest and the Emergence of Human Rights Responsibilities for Multi-national Corporations' (2007-2008) 33 Brook. J. Int'l L. 933 - 953

40 Ilias Bantekas (n 11) 311

integration, they attract responsibility that goes beyond traditional corporate regulations and business practice. Such responsibility responds to the impact business operations have on societies.[41] Corporate response to societal needs has encompassed voluntary investment in socio-economic schemes that boost state funded projects.[42] Corporate social initiatives mainly revolve around the education, health, environment or sports sectors. Africa has greatly benefited from corporate investment into community, national and regional socio-economic initiatives. One United Nations in Trade and Development report[43] postulates that a social contract exists between societies and corporations. By society allowing and facilitating corporate operations, corporations owe the society a duty that exceeds mere compliance with express legal obligations. In effect the corporate social contract theory imposes a moral duty upon corporations that exceeds philanthropy.[44] The social contract theory in relation to multi-national corporations becomes relevant through an assessment of corporate investment into essential services.[45] Multi-nationals are engaged in provision of social amenities such as water, electricity, pharmaceutical products, transportation and agriculture. More and more states are getting into public-private partnerships effectively widening corporate impact on societies with weak political and administrative structures especially in Africa.

Traditionally, the social contract theory defines relationships between states and its citizens setting out rights, responsibilities and duties between the two. This was within the assumption that the state controlled tools of government and had to exercise this authority within reasonable confines. Enter the 21st century and multi-national corporations are wielding greater power in comparison to states, having the potential to control state machinery and provision of critical socio-economic amenities. In effect this translates to greater responsibilities and duties owed to the

[41] United Nations Conference On Trade And Development (UNCTAD), *The Social Responsibility Of Transnational Corporations United Nations* (New York and Geneva, 1999) UNCTAD/ITE/IIT/Misc. 21 p. 1

[42] ibid, 5

[43] ibid

[44] ibid

[45] Allen L. White, *Is It Time to Rewrite the Social Contract?* (April 2007) Business for Social Responsibility: New York, 2

citizenry by corporations.[46] The challenges facing multi-national corporations in this public-private predicament as a business model is how to reconcile business interests and societal expectations. The upshot of the matter is that CSR would be inadequate in addressing such issues.[47]

In weak states, multi-national corporations often have no impetus to engage in corporate social responsibility; weak and or corrupt political, institutional and monitoring structures create an environment where impunity thrives. Most CSR initiatives are visible in more stable and developed markets based on a public relations model aimed at improving corporate image while driving up sales.[48] Through external pressure from civil society, governments and communities, multi-national corporations resort to CSR to 'clean' their corporate images and encourage cooperation in their areas of operation. Rationale behind this emanates from emerging norms that apart from a duty owed to shareholders, businesses feel obligated towards communities within their chains of supply. Creation of job opportunities, increased investments and tax remittances are insufficient to pacifying discontent voices emerging from the negative effects of corporate activities.[49] Multi-national corporations in Africa have adopted diverse CSR frameworks that are hardly modelled on human rights protection and promotion. Further, CSR as corporate contribution to communities is hardly independently monitored and audited as opposed to a social contract theory that puts in place institutions to provide checks and balances against unmitigated use of power. CSR are nonetheless initiatives by which corporations have made their contribution to development in African communities.

[46] UNCTAD (n 41) 5

[47] Gates, J. *The ownership solution: Toward a shared capitalism for the 21st century.* (Perseus Book, New York 1998) quoted in Allen L White (n 45)

[48] Constantina Bichta, *Corporate Social Responsibility A Role In Government* Policy And Regulation Research Report 16 (2003) 7

[49] Ibid, 311

CSR as advanced by the UNCTAD report mentioned above[50] concerns the direct impact of corporate activity to the society far removed from corporate philanthropy. CSR in this sense relates to reaction to the negative effects of corporate operations on the environment, human rights, consumers, economic stability and state governance structures within areas of operation. This in essence relates to how corporations handle their chains of supplies to fit within international human rights norms. Even though CSR in this sense appears to lean towards societal needs, multi-national corporations reap huge value for their efforts as seen by promotion of products that are touted to be human rights, environmental protection or fair trade compliant. Product boycotts occasionally occur against companies that engage in child labour, environmental degradation or are in support of despotic governments.[51] Consequently it is within corporate interest to strike a balance between profit maximisation and minimising negative corporate effects while fostering constructive dialogues between communities and multi-nationals.

The corporate social contract theory extends to the concept of global corporate citizenship; business entities are recognised as organs of society in like manner as states and individuals.[52] All have roles in human rights protection and enhancement.[53] Global corporate citizenship requires that corporations critically assess political and socio-economic conditions of the states they operate in and go beyond legal expectations to remedy challenges facing societies. Global corporate citizenship is especially relevant to Africa. Due to the instability, corruption, poverty and bad governance plaguing many African states, multi-national corporations should rise to the occasion and be part of the solution to Africa's challenges.

[50] UNCTAD (n 41) 8

[51] Bryan W Husted and David B Allen, 'Corporate social responsibility in the multinational enterprise: strategic and institutional approaches' (2006) Journal of International Business Studies 37, 838 see also Ronen Shamir, 'The De-Radicalization of Corporate Social Responsibility' (2004) Critical Sociology, Volume 30, issue 3, 670; Ilias Bantekas (n 11) 310

[52] ibid

[53] Guido Palazzo and Andreas Georg Scherer, 'Corporate Social Responsibility, Democracy, and the Politicization of the Corporation' (2008) Academy of Management Review 33, 773-775

Common to African states, many governments negotiate to minimise control over multi-national corporations in an effort to attract and maximise foreign direct investment opportunities.[54] Legislative regulations on labour practices, environmental protection, foreign currency exchange, taxation and land usage are relaxed for the benefit of multi-national corporations. The economic leverage held by multi-national corporations empowers them to dictate legislative, social and economic policies in African states. Occasionally, multi-nationals will bargain with several African states for the same investment opening up a bidding war that relegates human rights protection to the periphery.[55] Though not within the scope of this paper, bilateral and multi-lateral investment treaties have in the literal sense tied the hands of African states in regulating corporate behaviour to protect fundamental rights and freedoms.[56] Hence, in addition to the fragility of governance structures in African states, negotiated agreements expose the continent to unscrupulous multi-national corporations. As posited in later chapters of this paper, a united front by African states can provide a stronger bargaining platform against any foreign direct investment into the continent. Alternatively, human rights obligations should be incorporated in investment treaties.

In Africa legislative regulation and monitoring of CSR has not been realised. In England for example, efforts to introduce a Corporate Responsibility Bill[57] failed. Of special note was that the Bill provided for the regulation of business registered and operating in the UK.[58] Companies would also have been required to publish reports on any significant environmental, social, economic and financial impacts of any of its operations in the preceding year; and an assessment of the significant environmental

[54] Ronen Shamir (n 51) 672

[55] Ronen Shamir (n 51) 672-674

[56] See Luke Eric Peterso, *Human Rights and Bilateral Investment Treaties Mapping the role of human rights law within investor-state arbitration Rights & Democracy*, (International Centre for Human Rights and Democratic Development 2009); Luke Eric Peterson and Kevin R. Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration* (International Institute for Sustainable Development (IISD) 2005)

[57] Bill 129 59/2 (House of Commons Sessions 2002-2003).

[58] Ibid, Clause 1

social, economic and financial impacts of any proposed activities.[59] The Corporate Responsibility Bill was never enacted but the Companies Act, 2006[60] introduced new regulations regarding the roles of company directors. Directors are now required to act towards the promotion of the success of a company while bearing in mind its effects the community and the environment.[61] The provisions have not received much judicial interpretation but may be touted as encompassing the spirit of the rejected Corporate Responsibility Bill. Section 417(5)(b) further requires a Company directors' report to include information about the business impact on the environment,[62] social and community interests.[63] Unequivocal regulation of CSR within the UK legislative framework is yet to be achieved.[64]

After the economic meltdown, the United States of America's Taxpayer Protection and Corporate Responsibility Bill[65] was proposed in relation to recipients of the Troubled Asset Relief Program.[66] The Bill targeted limitation of corporations from sponsoring, hosting, or paying for entertainment or holiday events during the calendar year in which asset relief had been received from taxpayers' monies. Noble in curbing corporate excesses at the expense of the US economic recovery plan, the Bill was never passed. In 2009, a Bill on corporate responsibility was introduced in the Philippine parliament.[67] The ensuing Act would institutionalise corporate social responsibility. Corporations would be required to institute effective initiatives in cooperation with relevant stakeholders to make certain corporate accountability in their operations. Section 3 specifically stated:

---

[59] Ibid, Clause 3

[60] 2006 Chapter 46

[61] Companies Act, 2006, s 172

[62] Companies Act, 2006, s 417(b)(i)

[63] Companies Act, 2006, s 417(b)(iii)

[64] An analysis the role of UK government in CSR regulation is expounded in Constantina Bichta, *Corporate Social Responsibility A Role In Government Policy And Regulation? (*2003) Centre for the Study of Regulated Industries, Research Report 16 (university of Bath)

65 S.463, 2009

[66] Public Law 110-343

[67] House Bill 6414, Corporate Social Responsibility Act of 2009 <http://www.congress.gov.ph/download/basic_15/HB01224.pdf> accessed 4 August 2011

> *'Any corporation, whether domestic or foreign, partnerships and other establishments performing business in the country are hereby mandated to observe its corporate social responsibility or the obligation to consider the interests of society by taking responsibility for the impact of their activities on customers, employees, shareholders, communities and the environment in all aspects of their operations.'*

The text approved by the Congress of the Philippines was more explicit in its terms.[68] Section 3 defined corporate social responsibility as the commitment of business to contribute on a voluntary basis to sustainable economic development by working with relevant stakeholders to improve their lives in ways that are good for business, sustainable development agenda and society at large.[69] The Philippine CSR Act provides an apt legislative template for African parliaments to work from. First, by making it mandatory for all business entities to engage in CSR, second by defining CSR and finally by linking CSR to development which in effect ensuring the protection of fundamental rights and freedoms.

African states do not have CSR legislation in place; corporate laws and regulations on the other hand have not been strong enough to reign over irresponsible corporate behaviour.[70] Increased reliance on CSR as multi-nationals contribution to the African society hides the fact that multi-nationals are opposed to strong corporate regulation that includes international human rights norms. While CSR has its positive dimension of corporate philanthropy, it does not address the challenges of corporate irresponsibility in weak African states with failed political and institutional structures. CSR has failed to deliver its promises in Africa.[71] In weak African states, concrete

[68] H. No. 457 <http://www.congress.gov.ph/download/billtext_15/hbt4575.pdf> accessed 4 August 2011

[69] Ibid

[70] Halina Ward, *Legal Issues in Corporate Citizenship* (February, 2003) Swedish Partnership for Global Responsibility: Stockholm

[71] Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility* (2004) London; Institute for Human Rights and Business, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries* (2011) IBHR, London

corporate regulation far from corporate philanthropy is required.[72] Further CSR does not tackle the emerging corporate control in the provision of essential social services. When states enter into public private partnerships for services such as water, health care, education, and infrastructure development, corporations act as state agents and take over the role of the state. Owing to the fact that states bear greatest responsibility in protecting and enhancing human rights, when business entities take up states' roles, they ought to bear similar responsibility.[73] The corporations and human rights situation in Africa would be different if multi-national corporations engaged in corporate citizenship as earlier espoused. Multi-nations should be part of the solution to human rights protection in Africa.

2.3 International principles, norms and regulations

Soft law embodies the main regulatory scheme for corporate responsibility in addressing negative effects of business operations. Numerous national and international norms are in operation for this purpose. These norms, regulations and principles fill gaps occasioned by slack political and administrative structures. Indications from discussions above are that multi-national corporations have evolved to be highly influential in economic and politically spheres.[74] Further, the fact that more and more corporations are getting involved in the provision of basic services that were the preserve of the state makes them key players in the protection and promotion of human rights standards. With basic services falling under basic social economic rights provisions, a rethink of corporate involvement in their provisions is paramount. This section examines some of the preeminent voluntary international business regulatory schemes. The main query against these is how multi-national

[72] Antonio Vives, 'Corporate Social Responsibility: The Role of Law and Markets and The Case of Developing Countries (2008) 3 Chi.-Kent L. Rev. 199 - 229

[73] See, Manisuli Ssenyonjo 'Non-State Actors and Economic, Social, and Cultural Rights' in Baderin, Mashood and McCorquodale, Robert (eds) *Economic, Social, and Cultural Rights in Action* (2007) (Oxford Scholarship Online: January 2009) 109 - 135

[74] See, Andreas Georg Scherer and Guido Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm' (June 2011) Governance, and Democracy Journal of Management Studies 48:4

corporations as powerful organs of the society may be effectively regulated by non-binding norms or principles in Africa and what this implies for states where internationally binding norms are hardly enforced.

With academic debate hesitant on theorising towards an indication of multi-national corporations having equal international responsibility as states, business practice has come up with soft law regimes to regulate corporate conduct. These have yielded much result; driving multi-national corporations to declare their intention to adhere to some of the voluntary regulatory schemes.[75] Voluntary/soft law legal regimes have proliferated international human rights practice on business regulation. One of the primary reasons for this is the fact that soft law regimes have proven to be easier to negotiate and offer greater flexibility in their implementation; parties may opt out at their pleasure or modify them to meet their specific needs. Resort to judicial redress seldom forms part of the voluntary schemes. States and multi-national corporations prefer non-binding norms in the regulation of the controversial challenges of corporate conduct. Primary incentive for international human rights theorists and practitioners to churn out soft law is that it provides basis for negotiations in developing hard international law that offers concrete legally binding norms and judicial mechanisms for recourse in case of breach.

Coupled with poor political leadership and weak legal systems, soft law proves to be a challenge in ensuring corporate compliance with international human rights norms in Africa.[76] Where states are involved in wanton human rights violations, corporations are not provided with any framework that checks their human rights compliance in such territories. Many African states are state party to a multiplicity of human rights conventions and treaties but this has not effectively translated to greater human rights protection and promotion in the continent. Various countries have been cited for

[75] Gregory C. Shaffer Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23 <http://ssrn.com/abstract=1426123> 717 accessed 20 July, 2011

[76] Carlos M. Vázquez, 'Direct Vs. Indirect Obligations Of Corporations Under International' Law 43 Colum. J. Transnat'l L. 927, 2

human rights violations while their transparency record is not as good.[77] Having failed in protecting definitive international human rights norms, African states are not legally equipped to enforce soft law regulations. However, there is a counter argument that supporting the ease with which states and multi-national corporations adhere to such regulations.[78]

Prospects for a concrete international legal framework were enhanced when in 2003, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* were approved by the Sub-Commission on the Promotion of Human Rights of the United Nations Commission on Human Rights.[79] The United Nations Commission on Human Rights however declined to approve the Norms.[80] The Norms contemplated change in finding obligations for corporations under international law. Couched in mandatory language,[81] the Norms sought obligate corporations to respect, protect and promote human rights but recognizing states as the primary human rights duty bearers. Transnational corporations were also to recognise already existing international human rights law,

---

[77] Transparency International, *Corruption Perception Index 2010*

[78] Anthony D'Amato, 'International Soft Law, Hard Law, and Coherence' Northwestern University School Of Law Public Law And Legal Theory Series NO. 08-01 < http://ssrn.com/abstract=1103915> accessed 10 August 2011

[79] 55th Sess., 22d mtg., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); for historical account on the norms, see Carolin F. Hillemanns 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) German Law Journal [Vol.04 No.10] 1065-1080

[80] Andrew Clapham (n 22) 225 - 237

[81] Ibid, Clause 1, - '*States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises 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, including the rights and interests of indigenous peoples and other vulnerable groups.'*

national laws and regulations.[82] Primarily, the Norms went beyond conventional international law practice by the recognition of transnational organisations as key duty bearers; a proposal that was unacceptable to many stakeholders hence the rejection of the Norms by the United Nations Commission on Human Rights.[83]

Rejection of the Norms resulted into a process led by Secretary-General's Special Representative for Business and Human Rights to come up with acceptable guidelines. The process resulted in the United Nations Human Rights Council endorsing the new Guiding Principles on Business and Human Rights.[84] The Principles are on implementation of the United Nations protect, respect and remedy framework. Protection rests on states to ensure that third parties and corporations do not engage in human rights abuses, responsibility is placed upon corporations to act with due diligence to avoid infringing on human rights while limiting adverse effects of their activities. Victims of human rights abuses by businesses should have greater access to remedies.[85] The Guiding Principles are a culmination of a lengthy negotiation process with states, multi-national corporations, civil society and trade unions among other international actors.

31 standards form the Guiding Principles. Principles 1 – 10, deal with the State's duty to protect human rights. States are to take steps that ensure full compliance of international human rights norms by all parties within their territories. Effective policies, regulations, legislation and adjudicatory mechanisms should be put in place to this end. The mechanisms would apply to private, public and international business enterprises in equal measure. States are also to ensure that businesses respect human rights in conflict zones and that states will not enter into any bilateral or multi-lateral agreements that undermine human rights protection. Principles 11 – 24 reflect on the need for business enterprises to avoid infringing human rights as protected by national and international legal instruments. Principle 13 indicates that corporate responsibility

[82] (n 79) Clause 10

[83] Carlos M. Vázquez 'Direct Vs. Indirect Obligations Of Corporations Under International Law' (2005) 43 Colum. J. Transnat'l L. 927, 2

[84] Guiding Principles, (n 17)

[85] Guiding Principles (n 17), paragraph 6

is two fold, corporations should avoid making adverse effects on human rights and seek to mitigate any adverse human rights impacts that their operations may have on human rights. Principle 22 requires corporations to avail remedial action for adverse effects caused. Principles 25 – 31 on the other hand highlight the need for states and corporations to ensure that there are effective remedies for human rights violations.

In their normative application, the Guiding Principles have no provision to indicate that they are binding upon states and corporations. Since they are only a few months in operation, with a nomination process set in motion to select members of the UN Working Group on Human Rights and Transnational Corporations and other Business Enterprises to spearhead the Principles' implementation, it is too soon to analyse their effectiveness. A restatement of existing human rights obligations, the Guiding Principles are an ambitious framework that if fully implemented would herald an end to corporate impunity. As for the present times, the discussion below analyses similar initiatives and their impact on human rights protection in Africa.

Human Rights watch in 2011[86] has reported serious human rights violations in a considerable number of African states. While human rights violations may be occurring in other parts of the world, cases from Africa are a manifestation of an already fragile human rights situation. Human Rights watch has reported existence of a hostile environment for human rights defenders and journalists in Angola,[87] Burundi,[88] Liberia[89] and the Democratic Republic of the Congo.[90] Democratic and electoral processes have almost collapsed in the Ivory Coast,[91] Burundi,[92] and Uganda. Equatorial Guinea despite having massive oil reserves has most of its population live in abject poverty while the president and his aides continue to enjoy lavish lives.[93] In Sudan, reports on the situation in Darfur and the Abyei region have

[86] Human Rights Watch, *World Report 2011 Events of 2010*

[87] Ibid, 76

[88] Ibid, 88

[89] Ibid, 198

[90] Ibid, 107

[91] Ibid, 97

[92]Ibid, 83

[93]Ibid, 111

uncovered human rights violations that go unaddressed by the state.[94] Bearing in mind that Sudan has mineral rich regions, it is hardly conceivable to expect human rights compliance in corporate operations under conditions of gross impunity.

The Kimberly Process Certification Scheme (KPCS)[95] relevant to the African conflict situation has sought to control diamond trade especially in Africa's conflict zones. Due to proliferation of conflict diamonds in the international market, the Kimberly process main objective is to ensure complete elimination of trade in diamond from conflict zones. Though facing criticism as to its adequacy, reports indicate a sharp decline in the conflict diamonds trade. Couched in rather obligatory language, the KPCS is largely enforced by diamond producing states. In its Annex, the KPCS encourages states to ensure that mining and prospecting companies put in place security measures to ensure that conflict diamonds do not contaminate legitimate production.[96] Recommendations also extend to diamond sellers, buyers and importers who are required to exercise due diligence in their trade of rough diamonds.

Almost similar to the KPCS, the Extractive Industries Transparency Initiative (EITI) has 12 principles to be applied in extractive projects throughout the world relating to oil, gas and mining. EITI recognises the benefit natural resources have on states in enhancing sustainable development and reducing poverty. Hence, the initiative seeks to mitigate the negative economic and social impacts of the extractive industries operations.[97] EITI emphasises on transparency in extractive industry activities and accountability of government in resource allocation and distribution.[98] The EITI rules lay down their implementation matrix to be followed by compliant states to the EITI.[99] Five African countries are already compliant with the EITI.[100] The EITI

[94] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004

[95] <http://www.kimberleyprocess.com/home/index_en.html> last accessed 1 August 2011

[96] Ibid, Recommendation 10, Annex II

[97] Ibid, Principle one

[98] Principles five to nine

[99] 2011 Edition <http://eiti.org/files/EITI_Rules_Validations_April2011.pdf> last accessed 11 August 2011

[100] Central African Republic, Ghana, Liberia, Niger and Nigeria

initiative may be instrumental in checking multi-national corporation involvement in Africa's extractive industry. Of special note is the manner in which the implementation matrix includes government, community and civil society stakeholders in ensuring compliance. As other voluntary schemes, non-compliance attracts no real sanction plus the EITI does not specifically delve into human rights that may be violated by operations in the oil, gas and minerals sectors.

Multi-national corporations from the 34 member states of the Organisation for Economic Co-operation and Development (OECD) have made considerable direct investment into African countries.[101] OECD seeks to harmonise and improve economic, social and environmental policies within member states.[102] To this end, OECD has formulated guidelines for multinational enterprises registered within the member states. OECD Guidelines for Multinational Enterprises[103] provide the basic yardstick for good practice principles recognised internationally by both corporations and states. These are however not legally binding. Wording used by the document states:

> 'The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. Observance of the Guidelines by enterprises is voluntary and not legally enforceable. Nevertheless, some matters covered by the Guidelines may also be regulated by national law or international commitments.'[104]

OECD guidelines may be employed to make an argument for extraterritorial jurisdiction by states against multi-national corporations registered within the OECD. It is key that one of Africa's major foreign direct investment partners has corporate regulation guidelines. Conspicuously missing in such regional regulations is an Asian

[101] by 2008 the OECD had foreign direct investments of $88 billion into Africa <http://blog.oecdfactblog.org/?p=269> last accessed 11 August 2011

[102] Andrew Clapham (n 22) 201 - 211

[103] OECD, *Recommendations for Responsible Business Conduct in a Global Context* (2011)

[104] Ibid, Clause 1 Concepts and Principles

framework of corporate regulation. A country like China has an outward investment of 13.8% into sub-Saharan Africa[105] while India's foreign direct investment into Africa has steadily grown.[106] With no explicit regulations on corporate conduct, Chinese multi-national corporations operations in Africa pose a unique challenge to addressing human rights compliance in African states.

The International Labour Organisation's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[107] is another international soft law mechanism that deals with corporate activities.[108] The Declaration sets out principles in the fields of employment, training, conditions of work and life and industrial relations which governments, employers' and workers' organisations and multinational enterprises are recommended to observe on a voluntary basis.[109] Major ILO instruments have been adopted into national legislation through labour laws and adoption of the right to work in constitutions. This makes it easier to monitor and regulate corporate action in areas covered by the Declaration. Unfortunately, not many soft law regimes have found their ways into legislative pronouncements.

United National Global Compact also offers strategic voluntary schemes from which businesses may align themselves with ten universally acceptable principles in the human rights practice, labour rights, the environment and anti-corruption.[110] According to the Global Compact website, the initiative has grown to over 8,700 participants.[111] Participants from multi-national corporations publicly indicate their compliance with the Global Compact principles. Another soft-law mechanism worth mentioning is the ISO 26000 under the auspices of the International Standards

[105] <http://www.economist.com/node/18586448> last accessed 2 August 2011

[106] Harry G. Broadman, *Africa's Silk Road China and India's New Economic Frontier* (2007) The International Bank for Reconstruction and Development / The World Bank, 289-357

[107] Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th Session (Geneva, November 2000) Official Bulletin, Vol. LXXXIII, 2000, Series A, No. 3.

[108] Andrew Clapham (n 22) 211 - 218

[109] (n 107) Article 7

[110] Andrew Clapham (n 22) 218 - 225

[111] <http://www.unglobalcompact.org/AboutTheGC/index.html> accessed 4 July 2011

Organisation that provides a certification process that aims at making organisations socially responsible. Just like other voluntary schemes, ISO 26000 covers human rights, labour practices and environmental protection while including fair operating practices, consumer protection and community involvement and development. The Equator Principles[112] have been earmarked by the financial industry to determine, asses and manage social and environmental risk in project financing. Before financing a project, participating institutions undertake internal social and environmental review and due diligence on the proposed project to asses its environmental and social impacts.[113] While assessing the potential environmental and social risks, assessments are to include proposed mitigation and management measures relevant to the project.[114] The International Finance Corporation has adopted sustainable investment standards dubbed Policy and Performance Standards on Social and Environmental Sustainability[115] that integrate social, environmental and governance issues in investment projects. The IFC standards are the rationale behind the Equator Principles.

One glaring theme is evident across the UN Global Compact, OECD guidelines, EITI, IFC standards, Equator Principles and ILO rules and regulations; they are all voluntary in nature. Without legislative action by African states on these regulations and principles, adherence proves to be a challenge. Additionally, the voluntary schemes do not provide any concrete enforcement mechanisms. Judicial remedies are not available for persons aggrieved by irresponsible corporate actions. Among other reason, this gives impetus on the African Union to come up with definitive corporate regulations binding upon member states as indicated in the next chapter; ECOWAS and European Union regulations are used as points of reference for a possible African Union framework.

---

[112]June 2006, <http://www.equator-principles.com/resources/equator_principles.pdf> accessed 6 July 2011

[113] Ibid, Principle 1: Review and Categorisation

[114] Ibid, Principle 2: Social and Environmental Assessment

[115]

<http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/SustainabilityPolicy.pdf> accessed 15 July 2011

3 Role of the African Union

3.1 Preliminary considerations

Within its powers under the Constitutive Act of the African Union,[116] the African Union (AU) has recently acted to assert its authority in the continent's matters. The AU Assembly has recently issued resolutions on the conflict situations in Libya the Sudan and Kenya vis a vis the Union's membership interaction with the United Nations Security Council and the International Criminal Court.[117] The AU Assembly is the supreme policy making, implementation and monitoring organ of the Union.[118] The Assembly is supported by the Executive Council that takes decisions in areas of common interest to member states including foreign trade.[119] It is these policy-making functions of the African Union's principal organs that this paper attempts to draw into regulation of corporate operations and foreign direct investment into Africa. Some the objectives set out in Article 3 of the Constitutive Act include promotion and defending of common positions on issues of interest to Africans and establishment of the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiation. These objectives indicate that African Union members should take a greater collective role in protection of Africa's interest including action against the encroaching multi-national corporations' imperialism in Africa.

Making a comparison with the European Union (EU), the EU in 2006 set in motion regulation of corporate responsibility through a communication aimed at making

[116] (n 18)

[117] Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc. EX.CL/670(XIX); Doc. EX.CL/639(XVIII); Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/640(XVIII); Decision On The Report Of The Second Meeting Of States Parties To The Rome Statute On The International Criminal Court (ICC) DOC. Assembly/AU/8(XIV)

[118] Constitutive Act of the African Union (n 18), Articles 6 and 9

[119] Constitutive Act of the African Union (n 18), Articles 13

Europe a pole of excellence on corporate responsibility.[120] One of the core intentions of the EU CSR initiative is to make the region's business competitive on the global scene. With a view to promote trust in European business, the European Community in the communication rallied European businesses to explicitly demonstrate their commitment to economic growth, sustainable development and creation of better jobs.[121] The communication further indicated the need to accord CSR greater political visibility and reiterated the Commission's support for the launch of an European Alliance on CSR.[122] While the communication recognised limitations that CSR face and that CSR could not replace public policy, it outlined a number of areas where CSR could make a contribution to society. The areas include employment of marginalised groups, investment in skills development, limiting negative effects of business products on public health, equitable use of natural resources, progression towards achievement of Millennium Development Goals plus respect for human rights, environmental protection and labour standards in developing states where European businesses operate.[123]

Noteworthy in the communication by the European Commission in making Europe a hub for business excellence is that the European Commission expects businesses to operate responsibly in Europe plus other areas where they operate in accordance with internationally recognised standards and European values.[124] The initiative by the European Commission was at the outset meant to be a voluntary scheme through the European Alliance on CSR. Business corporations on their own accord businesses may sign into the initiative. States are also encouraged to engage with businesses in ensuring compliance with international standards such as the ILO Tripartite Declaration of Principles concerning MNEs and Social Policy, the OECD Guidelines for MNEs and the UN Global Compact act as the basic principles for business

[120] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility, Brussels, 22.3.2006 COM (2006) 136 final

[121] Ibid, 2

[122] Ibid, 2-3

[123] Ibid, 4

[124] Ibid, 5

conduct wherever their areas of operation are.[125] The EC's Communication on CSR was advised principally by the Final Results and Recommendations of the European Multi-stakeholder Forum on CSR.[126] Recognising existence of numerous international guidelines and conventions through which states and businesses could find direction on responsible business, the Forum sought to underscore their importance in business undertakings. Some of the guidelines as indicated are international instruments[127] and initiatives while others were European Union specific.[128]

The African Union through its Assembly and Executive Council should initiate a process similar to the European Commission in providing policy direction for business operating in and out of Africa. A common standard in protection of member states against arbitrary corporate practice would ensure respect, promotion and protection of human rights. Unlike the EU's, the African Union's policies on investment and corporate enterprise in Africa should be binding upon states and all businesses operating within Africa while providing for judicial mechanisms to address any disputes or infringements arising. The policies would be a novelty to human rights protection in the region.

---

[125] Ibid, 8

[126] 29 June 2004 Final Report <http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR%20Forum%20final%20report.pdf> accessed 17 July 2011

[127] ILO tripartite declaration of principles concerning Multinational enterprises (MNEs) and social policy (1977, revised 2000); OECD guidelines for MNEs (1976, revised 2000); UN Global Compact (2000); UN Declaration on Human Rights (1948); International Convention on civil and political rights (1966); International Convention on economic, social and cultural rights (1966); ILO Declaration on fundamental principles and rights at work (1998); Rio Declaration on Environment and Development (1992) and its Agenda 21 (1992); Johannesburg Declaration and its Action Plan for Implementation (2002) UN guidelines on consumer protection (1999)

[128] Council of Europe Convention for Protection of Human Rights and Fundamental Principles (1950); EU Charter of Fundamental Rights (2000); Council of Europe Social Charter (1961, revised 1996); The EU Sustainable Development Strategy, as adopted by the European Council at the Gothenburg Summit (2001)

The main human rights instrument within the African Union is the African Charter on Human and Peoples Rights.[129] Although the Charter provides basis for litigation against human rights violations, it has no specific indication with regards to corporate responsibility in human rights protection within the continent. Corporations as legal personalities have no duties and responsibilities as spelt out in the Charter. Litigation that emanating from the Charter has primarily targeted states.

The Economic Community of West African States (ECOWAS) has gone a step ahead in regulating entities involved in the mining industry and their effect on society. ECOWAS in regulating the mining sector in the region validated Directive C/DIR. 3/05/09 on the Harmonisation of Guiding Principles and Policies in the Mining Sector.[130] The guiding principles and policies harmonise mining legislation within the ECOWAS region while providing a framework of sustainable exploitation of minerals. The mining code and policy is a pioneer model for corporate regulation in a sector that has experienced massive corporate complicity in violation of human rights standards. Article 2 provides that the directives are to provide harmony in the mining sector of ECOWAS member states while ensuring accountability for mining companies and governments. Article 6(3) covering protection of the environment obligates mining investors to carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment. The Article also requires investors to operate while giving due regard to relevant international agreements concerning environmental protection with a wider goal of sustainable development. Article 13 requires states to encourage freedom of information regarding mining activities and requires subscription to the Extractive Industries Transparency Initiative. Article 15 requires holders of mining rights and other mining related business to respect and promote human rights arising

[129] Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

[130] The mining code is premised on three pillars

a) Social stability, including the eradication of armed conflict, job security, securing income and food, and respecting good mining conduct norms
b) Macroeconomic stability of ECOWAS member countries' economies
c) Protection of the environment

from mining activities. Coupled with EITI strategies, the ECOWAS mining sector framework ought to provide a model from which key investment areas may be governed.

3.2 African Commission of Human and Peoples Rights

Established under the African Charter on Human and Peoples Rights,[131] the Commission has a mandate to ensure the protection of human and people's rights. Article 45 of the African Charter extends the Commission's mandate to the promotion of human and peoples rights through studies, research, cooperation with states, African and international institutions, interpretation the Charter's provisions to State parties, organs of the African Union and organisations recognised by the African Union also form the core mandate of the Commission. The African Commission on Human and People Rights could therefore be instrumental in enforcing corporate compliance with the African Charter on Human and Peoples Rights.

As indicated earlier, the African Charter on Human and Peoples' Rights does not expressly provide for business organisations' duties and responsibilities in human rights protection. Article 1 of the Charter in point of fact places enforcement of the Charter upon State.[132] Through one of its decisions, the Commission has lent its voice against the negative impact corporate activities have on communities in Africa. In the oft-cited case, *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria*,[133] the Commission ruled that the Nigerian government had failed in its duty to protect, respect and promote human rights by leaving oil resources at the hand of oil irresponsible multi-national and national corporations hence jeopardizing the socio-economic rights of the Ogoni people. The right to a clean and satisfactory environment,[134] the right to health,[135] the right to property,[136]

[131](n 129) Article 30

[132] 'The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.'

[133] Communication No. 155/96(2001)

[134] (n 129) Article 24

the right of all people to their economic, social and cultural development[137] and the right to dispose off ones wealth and natural resources[138] were cited as the violated rights. The primary protection of the rights rested on the state. The Commission's decision had no concrete finding on corporate liability in violation the African Charter on Human and Peoples Rights by the oil corporations. The Commission found that the state had also failed in its duty to monitor and regulate the operations of the oil companies in effect violating fundamental rights and freedoms of the Ogoni community living in the Niger delta.

The decision by the Commission was premised one, on the fact that the Nigerian government through the Nigerian National Petroleum Company (NPC) a majority shareholder in a consortium with Shell Petroleum Development Corporation (SPDC) had through their operations caused degradation of the environment in effect causing health problems to the Ogoni people who lived around the oil drilling areas. Claims were also made against the consortium for dumping toxic waste on waterways and causing oil spills without undertaking a clean up. Secondly, the then Nigerian military government had failed to offer protection of the Ogoni people from the oil companies' continuous human rights violations and degradation of the environment. Adverse effects of the oil drilling were never investigated, mitigated or addressed; the Ogoni's socio-economic rights had been violated by the oil companies and in effect the national government.

The African Commission has not handled communications of similar corporate malpractice as the Social and Economic Rights Action Centre & the Centre for Economic and Social Rights case. Withal, decisions of the Commission put pressure upon governments to act in elimination of human rights violations. The negative publicity multi-national corporations attract due to such communications similarly acts as a deterrent against future human rights violations. The challenge that faces redress by the African Commission is the lengthy process of access to it. Exhaustion

[135] (n 129) Article 16

[136] (n 129) Article 14

[137] (n 129) Article 22

[138] (n 129) Article 21

of local remedies as provided for by Article 56(5) of the African Charter does not bear in mind the fact that violations may be continuing while tedious litigation processes are in operation.

3.3 African Court of Human And Peoples Rights

Established under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,[139] the Court's jurisdiction extends to disputes submitted to it in interpretation and application of the African Charter on Human and Peoples Rights.[140] With a complementary relationship with the African Commission on Human Rights,[141] the Court may entertain matters submitted to it by the African Commission, State Parties to the African Charter, African Intergovernmental Organizations and Non-Governmental Organisations with observer status.[142] Since its establishment and operationalisation, the court has had no matters before it. With substantial coercive powers in execution of its judgement,[143] the African Court may provide the apt forum for litigating against corporate malpractice.

3.4 Litigation in Individual African States

African states have had litigation in their national courts relating to negative effects of corporate operations within their territories. National court decisions on corporate activity have been varied. One of these decisions is the *Zango v. Pfizer International* (Zango Case) in the Federal High Court in Kano, Nigeria.[144] The Zango Case involved minors from Kano, Nigeria suing Pfizer International on allegations that

[139] June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III)

[140] Ibid, Article 3

[141] Ibid, Article 2

[142] Ibid, Article 5

[143] Ibid, Article 30

[144] (FHC/K/CS/204/2001).

they had suffered grave irreversible injuries after an experimental anti-biotic[145] had been administered to them without consent after suffering from meningitis. Experimental anti-biotic care had however been administered with consent of the state. Most children suffered from brain damage, paralysis, blindness and deafness due to the adverse effects of the anti-biotic; Pfizer International undertook no clinical follow-ups. Conduct by Pfizer had violated the rights of the victims to enjoy the highest attainable sate of health. Although proceedings in the Nigerian courts were dismissed, parallel trials were held in the United States as discussed in latter sections of this paper.

In South African, the case of *Hoffman v South African Airways (SAA)*[146] concerned South African Airways' refusal to employ as cabin attendants persons living with the Immunodeficiency Virus (HIV). The plaintiff contended that this was a violation of his right to equality as provided by Section 9 of the South African Constitution.[147] His constitutional challenge of SAA's action was dismissed by the Witwatersrand High Court hence the appeal to the Constitutional Court that ruled in his favour. The Court found that SAA had violated Hoffman's right to equality under Section 9 of the Constitution by refusing to employ him due to the sole fact that he was HIV positive. The case is a clear indication of how corporate actions that violate fundamental rights and freedoms may be successfully challenged through court action.

Perhaps one of the few corporate complicity in war crimes cases, the *Anvil Mining Suit* in the Democratic Republic of Congo before a military tribunal was a milestone in international criminal law.[148] Contention before the court was that Anvil Mining Company Limited registered in Canada has offered material and logistical support to the Congolese army in their military operation that resulted in gross human rights violations against the civilian population. Acquittals of three Anvil Mining Company

---

[145] trovafloxacin (a quinolone antibiotic)

[146] 2000 (2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146

[147] ACT NO. 108 OF 1996

[148] Information available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/AnvilMininglawsuitreDRC> accessed 16 July 2011

employees and nine Congolese soldiers were however handed down by the Military tribunal. In Kenya, *Hiribo Mohammed Fukisha v Redland Roses Limited*[149] was a case before the High Court concerning the duty of employers towards its employees in providing a safe work environment and whether an employee can seek damages in case of employers failure in his duty of care. The case does not involve a multi-nation corporation but illustrates the extent to which national courts may be used by aggrieved parties and communities to address human rights violations. The High Court ruled in favour of the plaintiff and awarded damages and special damages for the loss occasioned upon the employee. The employer had a duty to provide protective clothing to his employee and medical care in case of work related injuries.

4 Extra-territorial jurisdiction

Soft law regimes cannot be fashioned within short periods of time into hard law. The negotiation processes for binding international law are lengthy, tedious and shrouded in political bargaining. This is not different to laws that may regulate corporate activity in Africa. History has it that states and multi-national corporations have been resistant to a structured framework that may govern business and human rights. Customary international practice and international law still holds states as the primary duty bearers in the protection and promotion of human rights. Further, it may take a long while before the African Union decides to presents its business and human rights agenda. Individual states on the other hand may through legislative pronouncements formulate regulations relevant to their territories. As for weak states, corporate impunity continues to thrive.

To address corporate impunity in Africa, home states of multi-national corporations may allow for the exercise extra-territorial jurisdiction.[150] A controversial concept in international legal practice, extra-territorial jurisdiction may provide legal redress for

[149] [2006] eKLR

[150] Austen Parrish 'The Effects Test: Extraterritoriality's Fifth Business'(2008) 61 Vand. L. Rev. 1455 - 1505

persons and communities aggrieved by corporate conduct.[151] *Forum non conviniens* should not be used by home state courts to prevent litigation of overt corporate malpractice. Political and administrative action may also be taken against multi-national corporations that exploit weak states to the detriment of the protection of fundamental rights and freedoms. This chapter reflects on the various mechanisms through which extraterritorial jurisdiction has been exercised against multi-national corporations operating within the African continent.

Article 2(4) of the United Nations Charter[152] provides for territorial integrity of states and in effect affirms their sovereignty.[153] Chapter VII of the UN Charter gives conditions from which the territorial integrity of a state may be breached. Such exceptions include threats to the peace, breach of the peace, or act of aggression against any state. *The Island of Palmas Case (Netherlands v USA)* defined sovereignty: -

> 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.'[154]

---

[151] Zerk, Jennifer A. 'Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas.' Corporate Social Responsibility Initiative Working Paper No. 59 (Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010) 114 - 175

[152] June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

[153] Ibid, 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

[154] Island of Palmas Case (*Netherlands v. United States of America*), Award of 4 April 1928, United Nations, Reports of International Arbitral Awards, vol. II, 1928, pp. 829-871, at p. 838 quoted in Olivier De Schutter, *Extraterritorial Jurisdiction as a tool for improving the Human*

In Africa, state sovereignty has often been used as a defence by despotic regimes to cling onto power and justify gross human rights violations. It is undisputed that territorial integrity is paramount for the continued existence of peaceful international relations. However, the issue that international law has to deal with is the role of the international community in addressing human rights violations in different states. International criminal and transnational law have provisions for exercise of extra-territorial and universal jurisdictions. Crimes against humanity, genocide, torture, forced disappearances and war crimes all attract universal and extraterritorial jurisdiction. The principle of *aut dedere aut judicaire* that requires states to either prosecute or extradite a suspect of criminal misdoings easily comes into operation for international crimes.[155]

Extra-territoriality in relation to multinational corporations is crucially relevant to Africa's human rights concerns. As highlighted in the previous chapters of this paper, while soft law and weak political and institutional structures are being strengthened, Africa requires stopgap measures for corporate accountability. Exercise of extraterritorial jurisdiction may nonetheless be perceived as home states interference with the sovereignty of host states when they directly seek to regulate operations of multi-national corporations. While the perception of interference may be true for host states with strong institutional structures, weak African nations have much more to suffer from continuous non-regulation of multi-national corporations. The argument

---

Rights Accountability of Transnational Corporations (2006) <http://www.reports-and-materials.org/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf> accessed 20 July 2011

[155] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)]; Article 9 International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006)

Article 7 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277

of internal interference may be conceptual but dealing with corporate violation of fundamental rights and freedoms requires an internationally coordinated approach.[156]

4.1 Home States

Jurisdictions where multi-national corporations are registered provide normative legislative and policy regulation in business operations. Home states have *de jure* powers of control and political interests in the global economy that this chapter invokes.[157] While multi-national corporations may evade host state laws they are under the scrutiny of home states' legal systems.[158] The United States of America and the United Kingdom provide reflective illustration of extraterritoriality for multi-nationals operating in Africa.

4.1.1 United States

United States of America's has the Aliens Torts Claims Act of 1789(ATCA)[159] that confers jurisdiction over district courts to try any civil action by an alien for a tort committed in violation of the law of nations or treaty of the United States.[160] The ATCA has often been employed to challenge negative corporate action occasioned by multinational corporations operating in Africa.[161] Despite the fact that courts in the United States have literally excluded corporate liability from the ambit of the ATCA as was the case in *Kiobel v Royal Dutch Petroleum,*[162] claimants aggrieved by corporate torts regularly seek redress. An amicus brief is currently before the US

[156] Damira Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations' (2007) 3 Buff. Hum. Rts. L. Rev. 87 - 149

[157] Jeniffer A. Zerk (n 19) 145 - 160

[158] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) MLR 598 - 625

[159] 28 U.S.C. § 1350

[160] Ibid

[161] see Andrew Clapham (n 22) 252 – 265; Jennifer A. Zerk (n 19) 198 - 239

[162] (06-4800-cv, 06-4876-cv)

Supreme Court challenging the prevailing judicial apathy against suits brought by foreign claimants against American companies.[163]

The Case of *Ken Wiwa v Royal Dutch Petroleum Company*[164] involved suits filed under the ATCA, Torture Victim Protection Act of 1991 (TVPA)[165] and the Racketeer Influenced and Corrupt Organizations Act (RICO)[166] by the family of Ken Saro-Wiwa.[167] The case against Royal Dutch Shell, Shell Nigeria (its subsidiary) and Brian Anderson the subsidiaries CEO related to alleged complicity by the Shell Corporation in human rights abuses against the Ogoni people who inhabited the Niger Delta. Specific human rights violations included torture, inhumane treatment, arbitrary executions and wrongful detentions. Ken Saro-Wiwa had been one of the leaders of the Movement for the Survival of the Ogoni People (MOSOP) that had been executed by the Nigerian government. Similar to the *Economic Rights Action Centre & the Centre for Economic and Social Rights* case mentioned above, the *Ken Wiwa* case provided an opportunity for US courts to reign over human rights violations by multi-national corporations. The Royal Dutch Company opted for an out of court settlement on the matter hence it is a challenge to speculate what the courts' verdict would have been.[168]

The Presbyterian Church of Sudan et al v Talisman Energy Inc[169] case also exemplifies the use of the ATCA to address alleged human rights violations by multi-national corporations operating in Africa. In this case, the Talisman Energy Company

---

[163] <http://www.ccrjustice.org/files/FINAL%20Kiobel%20Amicus.pdf> accessed 25 July 2011

[164] 1:96-cv-08386-KMW-HBP

[165] Pub.L. 102-256

[166] Title 18, United States Code, Sections 1961-1968

[167] United States Court of Appeals for the Second Circuit - 226 F.3d 88; also Case 1:96-cv-08386-KMW-HBP Wiwa, et al v. Royal Dutch, et al

[168] A similar case on facts and violations by the Nigeria government and complicity by the Royal Duct Petroleum Company was *Kiobel v Royal Dutch Petroleum (06-4800-cv, 06-4876-cv)* that was dismissed by the United States Courts of Appeal for the Second Circuit

[169] 244 F. Supp. 2d 289 (S.D.N.Y. 2003)

had entered into oil concessions with the Government of Sudan. The area that the oil concessions were to apply in South Sudan had been plagued by an armed campaign against non-Muslim civilians resulting in arbitrary deaths, human rights violations and international crimes. The plaintiffs claimed that Talisman Energy Company had been complicit in the massive human rights violations and had to be held accountable for them. The US Court of Appeals for the 2nd Circuit dismissed the matter due to what indicated was insufficient evidence to permit a full trial. The Supreme Court of the United States declined to entertain a further appeal.

Three lawsuits similar to the above cited Zango Case before the Nigerian High Curt were filled against Pfizer in the United States under the ATCA. [170] The suits, *Abdullahi v Pfizer Inc*[171] related to the failure of Pfizer Inc. to acquire consent from parents of children who were placed under trial anti-biotic treatment that resulted in chronic health complications. *Abdullahi v Pfizer Inc I & II*, were dismissed on *forum non conveniens* grounds[172] while *Abdullahi v Pfizer Inc III* was dismissed because non of the international law provisions relied upon by the plaintiff were applicable under the ATCA.[173]

John Doe I, et al v. Nestle, USA, et al,[174] brought under the ATCA, the plaintiffs had claimed to trafficked children from Mali who had been forced to work in cocoa bean farms in Ivory Coast. They claimed that the defendants, a multi-national corporation had failed in its duty to prevent forced labour, use of children as slaved and arbitrary detention of children in violation of international laws and norms. Hence, they argued

[170] Abdullahi v Pfizer I (2002 U.S. Dist. LEXIS 17436 at *1 (S.D.N.Y. September 17, 2002)); Abdullahi v Pfizer II (7 Fed. Appx. 48, 2003 U.S. App. LEXIS 20704 (2d Cir. N.Y., October 8, 2003)); Abdullahi v Pfizer III (2005 U.S. Dist. LEXIS 16126 (S.D.N.Y., August 9, 2005); see also Adamu v. Pfizer, Inc., 399 F. Supp. 2d 495 - Dist. Court, SD New York 2005

[171] ibid

[172] Abdullahi v Pfizer II, 77 Fed.Appx. at 53 and Abdullahi v Pfizer I, 2002 WL 31082956, at *6-12

[173] Abdullahi v Pfizer III, 2005 WL 1870811, at *14

[174] 10-56739 U.S. Court of Appeals Ninth Circuit, previous case John Doe I v. Nestle S A (2:2005cv05133)

that Nestle was liable for the violations but the matter was dismissed, as the court did not find corporate liability was not well established under the ATCA.

Boimah Flomo, Et Al., V. Firestone Natural Rubber Co., Llc [175] was a case brought to the United States courts under the ATCA by Liberian workers for Firestone Natural Rubber Company. The claimants had argued that the defendants had subjected them to deplorable working conditions akin to use of slave labour and profiting from illegal child labour in the production of rubber. The suit was dismissed for lack of an indication of the specific international violations by the defendants as required under the ATCA and that no corporate liability could be imputed from the Act.

The amicus brief before the United States Supreme Court in the *Kiobel v Royal Dutch Petroleum case* highlights the inefficiencies in application of the ATCA.[176] The Kiobel Case had been dismissed by the Second Circuit's majority on the premise that corporate liability was not a principle of international law and thus corporations could not be charged before the United State's court under the ATCA. Fundamentally, the amicus brief points to the already evolved international custom of corporate liability.[177] Corporate action is regulated by national and international, laws, regulation and norms drawing upon general principles of law and hence should fall within the ambit of the ATCA.

Numerous court decisions in judicial systems around the world have held corporate liability to be a general principle of law. Some of the cases cited in the amicus brief[178] that prove this include, *Lubbe v. Cape Plc, Guerrero & Ors v. Monterrico Metals Plc & Rio Blanco Copper SA*[179] discussed in the next subsection and *Union Carbide Corporation v. Union of India*[180] which involved the finding of liability against a company for releasing toxic gases that caused death and injury to thousands of

[175] In the United States Court of Appeals for the Seventh Circuit No. 10-367

[176] (n 168)

[177] (n 163) 4

[178] (n 163) 14- 22

[179] [2009] EWHC 2475, [2010] EWHC 3228 (QB)

[180] (1991) 4 S.C.C. 584; A.I.R. 1992 S.C. 248 (India)

persons. Using the four principles framework to determine liability under ATCA espoused in *Jose Francisco Sosa v. Humberto Alvarez-Machain, et al.*[181] corporate liability should be addressed before the United States Courts. One is if it forms a cause of action that is recognised within the law of nations. Secondly, prohibition against illegal corporate action can be found in municipal, regional and international legal instruments. Thirdly, specific corporate actions can impute liability and finally factors surrounding the cause of action should be used to balance between justiciability and non-justiciability.

Two other legislative Acts of the United States may form basis to litigate against corporate action. One of these is the 1977 U.S. Foreign Corrupt Practices Act (FCPA)[182] that prohibits extraterritorial bribery. Specifically, it outlaws payment or promise for payment to any foreign official to influence any decision-making.[183] Second is the Sarbanes-Oxley Act of 2002[184] that requires public companies to disclose all codes or ethics they have adapted to investors and their effects in operations. No express political or administrative action has been undertaken against multi-national corporations' human rights violations in Africa in the US courts. Thus, court action remains the key redress mechanism that may be pursued by aggrieved parties.

4.1.2 United Kingdom

Just as in the United States, the United Kingdom has had a considerable share in litigation against multi-national corporations. The *Schalk Willem Burger Lubbe (Suing As Administrator Of The Estate Of Rachel Jacoba Lubbe) And 4 Others v Cape Plc case*[185] is one case dealing with multi-national corporations

[181] 124 S. Ct. 2739; 159 L. Ed. 2d 718; 2004 U.S. LEXIS 4763; 72 U.S.L.W. 4660; 158 Oil & Gas Rep. 601; 2004 Fla. L. Weekly Fed. S 515

[182] 15 USC § 78 (2000)

[183] ibid § 78dd

[184] 15 U.S.C.A. §§ 7201-7266 (2004) also know as the Public Company Accounting Reform and Investor Protection Act and Corporate and Auditing Accountability and Responsibility Act

[185] (2000) 4 All ER 268

operating in South Africa. The suit was by persons seeking compensation for injuries from their employment in asbestos mining carried out by the defendants. After being dismissed in the lower courts, the House of Lords addressed the issues in contention. The House of Lords ruled that London was the proper forum for the case as there was no legal aid available in South Africa. The defendants however reached a settlement to compensate the plaintiffs while establishing a trust fund for all persons with asbestos related injuries. An express decision on multi-national corporations liability was never rendered.

The *Trafigura Beheer BV Case*[186] involved dumping of toxic waste in Abidjan in the Ivory Coast. Toxic chemicals in the waste caused more that six deaths and thousands of persons suffered from various ailments. Due to Trafigura's corporate negligence, group proceedings were commenced against it in the High Court in London. One of the claims against Trafigura was that it violated the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.[187] The Basel Convention as it is commonly known seeks to minimise the movement of toxic wastes while reducing dumping of the same in least developed states that do not have the capacity and technological know-how to deal with it. Member states of the African Union have equally adopted the Bamako Convention on the Ban of the Import Into Africa and the Control Of Transboundary Movement and Management of Hazardous Wastes within Africa.[188] Trafigura was in clear violation of the Bamako and Basel Conventions. Though claims were settled out of court this suit illustrates the level of impunity multi-nationals from the developed world operate in vulnerable African states. Out of court settlement stifles probability of having express court decisions against multi-national corporations.

4.1.3 France

[186] Cases No. HQ06XO3370 and HQ06XO3342

[187] <http://www.basel.int/text/con-e-rev.pdf> accessed 26 July 2011

[188] Volume 2101, I-36508 <http://www.africa-union.org/root/au/documents/treaties/Text/hazardouswastes.pdf> accessed 26 July 2011

France adopted the '*Nouvelles Regulations Economiques (NRE)* in 2001.[189] Regulating corporate action for companies listed in the French Stock Exchange. The NRE provides for reporting by companies in relation to their human resources, community and the environmental impact emanating from their course of business. Even though it is not clear whether businesses can indict themselves through negative reports of their operations, the NRE provides a concrete step towards enhanced corporate responsibility. Companies may, in aiming to gain advantage over business rivals adopt global corporate citizenship frameworks.

4.2 Host state

In as much as extraterritorial jurisdiction may be exercised, host states of multi-national corporations have the greatest role to play in reigning over errant corporate operations. The fact that African states are signatories and party to international human treaties they primary responsibility in protecting fundamental rights and freedoms. The 1969 Vienna Convention on the Law of Treaties[190] provides guidance in this regard. The Convention requires sates to perform treaties that have come into force in good faith[191] while Article 18 obliges states to refrain from acts that might defeat the purpose and object of the treaty when they have signed or indicated their intention to be bound by the relevant treaty. The greatest onus is on host states

Municipal law governing labour practices, environmental protection and child labour are in operation in several African states. But these are not adequate to address the challenges occasioned by multi-national corporations actions. Environmental laws and regulations have not stopped pollution in the Niger Delta while toxic waste continues to have effects in the Ivory Coast. Additionally, Lakes in Kenya and illegal mining thrives in the Democratic Republic of Congo. International human rights instruments require states to take steps to ensure the enforcement of human rights.

[189] Law number 2001-420, dated May 15, 2001.

[190] Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331

[191] Article 26, '*pacta sunt servanda'*

These steps may take the form of legislative, administrative or international cooperation measures.[192]

In conformity with their obligations to take legislative measures, African states should develop laws that regulate multi-national corporations activities within their jurisdictions. State sovereignty cannot be questioned in this regard. Many African states may fear the backlash of greater corporate power but what is proposed is not punitive regulation but regulation that in the long run ensures a win-win scenario for the state, communities, human rights protection and corporations.

5 Conclusion

[192] *Article 2(1)* International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3:

' Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.' Article 2(2) International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171: 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.' *Article 1,* African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982): 'The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them. '

Corporate impunity in Africa has resulted in epic human rights violations in many states. Trade in blood diamonds, illegal mining, environmental degradation and corruption have been fuelled by errant action by multi-national corporations. The multi-national corporations have been either foreign or African owned. Corporate regulation in human rights protection has been inept in a majority of African states. Weak political and institutional systems exacerbate the situation. This is notwithstanding African countries being state party to numerous international human rights instruments and having institutions that that can implement and monitor such obligations.

Africa badly needs foreign direct investment injected into its economy and multi-national corporations have provided this. In reaction to their adverse effect on communities around them, multi-national corporations have resorted to corporate social responsibility. This does not definitively deal with the negative impact of corporate action as it is based on either philanthropy or public relations. Hence, the CSR initiatives are inadequate in addressing corporate violation of human rights. While multi-national corporations could have engaged in global corporate citizenship, few have done so. To address gaps occasioned by political and administrative failures, businesses, civil societies and international organisations have adopted soft law strategies. As pointed out above, despite the fact that these strategies emanate from highly consultative initiatives, they are escapist routes from express corporate regulation. Soft law in corporate regulation is inappropriate for the Africa situation. Political, social and economic circumstances leave Africa at a vulnerable position that requires binding and enforceable laws.

The African Union is best placed to negotiate a common corporate regulation standard. Empowered by the Constitutive Act of the African Union, the Assembly and Executive Council should initiate a process to realise greater corporate scrutiny and regulate foreign direct investments into the continent. As a regional block, the African Union has greater bargaining leverage as opposed to singular vulnerable member states. With a common standard, protection and enhancement of human rights in business operations would be easily facilitated. Further provision for effective remedies would be put in place.

Primarily, states bear the greatest responsibility in ensuring respect and protection of international human rights standards. Legislative and administrative actions should be initiated at state level to reign over corporate impunity. As this is a challenge to many African states, exercise of extraterritorial jurisdiction by multi-national corporations home states is proposed. Home states ought to allow for individuals and communities aggrieved by corporate operations to access judicial, political and administrative remedies. No magic bullet is at hand to deal with and regulate multi-national corporations' operation in Africa. As a result, concreted efforts between host states, home states and the African Union might in the long run offer plausible responses to the challenges faced.

Bibliography